

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 26, 2012

v

WILLIAM LEVEREST PLATZ, JR.,

Defendant-Appellant.

No. 302885
Kent Circuit Court
LC No. 09-011807-FC

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b), and one count of third-degree criminal sexual conduct, MCL 750.520d(1)(d). The trial court sentenced defendant to 210 to 450 months' imprisonment for his first-degree criminal sexual conduct convictions and to 120 to 180 months' imprisonment for his third-degree criminal sexual conduct conviction. We affirm.

FACTUAL BACKGROUND

Defendant's convictions arose from the repeated molestation of his step-daughter, beginning when the victim was 14 years old. Defendant met the victim in 1991, when she was only six years old. He later married the victim's mother and had two more daughters. Defendant and the victim's mother separated in 2005 and divorced in 2007. At the time of trial, the victim was 25 years old.

Defendant's abuse of the victim began in 1999 while the victim's mother was out of town. One evening, defendant called the victim into his bedroom. The victim went into defendant's room and found him lying on the bed wearing black boxer briefs. Defendant told the victim he had something to show her and he retrieved a small vibrator from the top drawer of a dresser. He returned to the bed and placed the vibrator in his boxer shorts. The victim asked what defendant was doing and she tried to leave the room. Defendant told her, "you're not going anywhere." He then grabbed her arm and pushed her against the bed. Defendant then went to the closet and retrieved a second vibrator from a white chest with a padlock. Defendant approached the victim and pulled her legs out from under her, knocking her to the floor. He attempted to remove her pajama pants, but she resisted him. He told her to "stop crying or you'll wake up your sister." He said he would "go upstairs and get her, too." The victim stopped crying and defendant proceeded to remove her pajama pants. He then penetrated her vaginally

with a vibrator, performed oral sex on her, and penetrated her vaginally with his penis. When defendant stopped, the victim ran crying upstairs to her room. After about ten minutes, defendant came to her room. He told her, "I know you liked it" and that "no one would ever believe [her] if she told." He also promised her that if she told, "someone would get hurt," her sister and her family. After defendant left her room, the victim waited three hours and then tried to leave her room. When she tried to leave, she found that she could not open the door.

Following the first instance of abuse, the victim testified that defendant continued to sexually assault her every two to three days for years. Defendant paid the victim for the abuse at a rate of \$10 per minute. However, she was not paid every time and sometimes she was paid in marijuana. Because of the vast number of incidents, they had begun to blur in the victim's mind. However, she testified to two other specific instances of abuse. When the victim was 15, defendant forced her to perform oral sex on him while they were in a car together. Later, when the victim was 16, defendant came into the bathroom while the victim was showering. He pulled her from the shower and performed oral sex on her before penetrating her vagina with his penis.

When the victim was 16, she confided the abuse to her best friend. However, neither the victim nor her friend disclosed the abuse to anyone else. The victim moved out of the family home when she turned 18. However, she continued to comply with defendant's sexual demands in order to protect her younger sisters from abuse. She testified that sexual contact with defendant stopped following defendant's divorce from her mother when she was 22 years old.

In 2009, the victim came forward about the abuse after finding her own daughter and her younger sister engaged in sexually inappropriate activity. The victim also became suspicious of the expensive gifts defendant had begun to buy her 14 year old sister. Out of concern for her sisters, the victim told her mother about the abuse and reported it to the police.

At trial, defendant testified in his own defense and denied the victim's claims of abuse. He admitted to a consensual sexual relationship that he claimed occurred when the victim was an adult, after he had divorced the victim's mother. As a result of the divorce settlement, defendant and the victim's mother were involved in a dispute over equity in the family home. Defendant believed the victim fabricated the abuse because he denied her demands to pay her \$2,500 in exchange for her testimony in the dispute with her mother. As part of his defense, defendant argued the victim's claims were improbable in light of the fact that she had a seemingly healthy relationship with defendant. Extensive evidence was put forth chronicling the amicable nature of defendant's relationship with the victim. For example, there was evidence the victim frequently socialized with defendant, visited his apartment after he separated from her mother, visited the junkyard where he worked, let him babysit her daughter, celebrated holidays with him, invited him to her daughter's birthday party, borrowed money from him, worked for him selling parts on Ebay, and sent him Father's day cards. The victim's mother and grandfather both confirmed that they never suspected any abuse. The victim's best friend also confirmed that the victim continued to socialize with defendant as a teenager and adult despite the ongoing abuse. Moreover, defendant called numerous witnesses including his mother, his girlfriend, his girlfriend's son, and the victim's former boyfriend. All of these witnesses testified to the apparently normal state of defendant's relationship with the victim and opined that she never seemed uncomfortable around defendant. The victim in fact admitted to an apparently normal relationship and maintained that she presented a façade of normalcy out of fear. To explain the victim's seemingly normal relationship with defendant, the prosecution called an expert in child

sexual abuse who explained in detail that victims are often groomed to preserve the appearances of normalcy and avoid discovery of the abuse.

GREAT WEIGHT OF THE EVIDENCE

Defendant argues that the jury's verdict was against the great weight of the evidence. He preserved his claim by making a timely motion for a new trial. *People v Cameron*, 291 Mich App 599, 618; 806 NW2d 371 (2011). We review the trial court's decision to deny defendant's motion for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). Issues of credibility remain matters for the jury to decide and a judge may not sit as a "thirteenth juror" when assessing motions for a new trial. *People v Lemmon*, 456 Mich 625, 642-645; 576 NW2d 129 (1998). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id.* at 647. "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003), quoting *Lemmon*, 456 Mich at 645-646.

Defendant argues that the victim's testimony was patently incredible in light of her seemingly normal relationship with defendant. His argument is inherently an attack on the victim's credibility, an issue within the province of the jury that cannot typically justify a new trial. *Lemmon*, 456 Mich at 642-647. Moreover, defendant's argument ignores expert testimony which suggested that the victim's behavior was not abnormal for a victim of child sexual abuse. Most notably, expert testimony revealed that victims are groomed to maintain an outward appearance of normalcy. In keeping with the expert's testimony, the victim testified that she maintained an apparently normal relationship with defendant because she was afraid and desired to protect her younger sisters. From the expert testimony and the victim's explanation of her behavior, it is clear her seemingly normal relationship with defendant does not render her claims of abuse inherently unbelievable.

Defendant also argues that the victim's claim that defendant paid her at a rate of \$10 per minute of abuse was patently incredible and contradicted by testimony from numerous witnesses who testified the victim did not have vast sums of money as a teenager. Defendant has again only raised a challenge to the victim's credibility. The entirety of the victim's testimony is not robbed of all probative value merely because she claimed to receive a vast sum of money. Defendant ignores that "a jury is free to believe or disbelieve, in whole or in part, any of the evidence presented." *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). A jury could have found the victim overestimated how much or how often she was paid. Indeed, the victim admitted that she was not paid for every instance of abuse and defendant often gave her marijuana instead of cash. Moreover, merely because no one else saw the victim with lots of money does not mean she could not possibly have received it. There was testimony to confirm that defendant did in fact carry large sums of cash, gave the victim numerous gifts including cars, and repeatedly lent money to the victim which no one testified to seeing her repay. Essentially,

it was for the jury to decide whether the amount of money the victim claimed to receive was detrimental to her credibility. *Lemmon*, 456 Mich at 642-645. The trial court properly deferred to the jury's assessment of the victim's credibility and denied defendant's motion for a new trial. *Id.*

INEFFECTIVE ASSISTANCE OF COUNSEL

A claim alleging the denial of effective assistance of counsel presents a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of law are reviewed de novo, and a trial court's findings of fact, if any, are reviewed for clear error. *Id.* Because an evidentiary hearing was not held, review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish the ineffective assistance of counsel, defendant bears the burden of demonstrating: (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant has the burden of establishing the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The effective assistance of counsel is presumed, and "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Defendant bears a heavy burden of proving the challenged action was not sound trial strategy. *LeBlanc*, 465 Mich at 578.

Defendant argues defense counsel was ineffective for failing to investigate five additional witnesses who would have testified to the apparently amicable nature of defendant's relationship with the victim. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004) (citation omitted). Where defendant's ineffective assistance claim is based on counsel's failure to interview witnesses, defendant must show the failure to interview witnesses resulted "in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). In this case, because counsel in fact spoke with one of the proffered witnesses and two of the witnesses did not indicate whether they spoke with defense counsel, defendant has failed to establish the factual predicate of his claim. *Hoag*, 460 Mich at 6. The two additional witnesses specify that they were not contacted by defense counsel. However, defense counsel did not have an "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). From the record it is clear that defense counsel investigated numerous witnesses with information about defendant's apparently normal relationship with the victim. The additional witnesses now proposed by defendant had no new information to offer that could have benefited defendant's position. *Caballero*, 184 Mich App at 642. Given that the prosecution did not contest the outward nature of defendant's relationship with victim and the fact that defense counsel had numerous witnesses to testify about the victim's relationship with defendant, there was nothing objectively unreasonable in not interviewing additional witnesses who would have merely provided cumulative, uncontested information.

Similarly, there was nothing objectively unreasonable in counsel's decision not to call any of the proposed witnesses. Whether to call or question witnesses are presumed to be matters of trial strategy which should not be assessed with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *Id.* The additional witnesses now proposed by defendant had no new information to offer and could only provide what defense counsel characterized as "redundant" testimony. There was nothing objectively unreasonable in not providing redundant testimony on issues uncontested by the prosecution. Moreover, because defense counsel did in fact call numerous witnesses, including defendant, to testify about his relationship with the victim, counsel's decision not to call the proposed witnesses did not deprive defendant of a substantial defense. *Id.*

Defendant also claims that defense counsel was ineffective for failing to impeach the victim with her prior inconsistent statements. As a general rule, how to question witnesses and whether to impeach a witness' testimony are matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). Here, a review of the record establishes that defense counsel's examination of the victim was not objectively unreasonable and was in fact quite thorough. In addition to numerous other avenues of cross examination, many of the issues now raised by defendant were explored during trial. For example, defense counsel questioned the victim about her changing statements as to what defendant was wearing during the shower incident, i.e. whether she previously testified that he was wearing work boots and work clothes. Defense counsel also sought to impeach the victim on whether her mother was home when the shower incident occurred and whether she was paid \$300 for the instance in the bathroom. Defense counsel specifically confronted her with her previous statement that defendant gave her \$200 and an extra \$100 "to keep [her] mouth shut." Because these issues were explored, defendant has failed to establish the factual predicate of his claim. *Hoag*, 460 Mich at 6. Additionally, the victim's confusion over her age during the shower incident was discussed on direct examination, making it unnecessary for defense counsel to question her about her age. Despite this thorough cross examination, on appeal defendant offers several additional inconsistencies he believes warranted exploration by defense counsel. However, in light of defense counsel's detailed cross examination and his repeated efforts to impeach the victim, his decision not to explore every minute difference between the victim's trial testimony and her previous statements was a matter of trial strategy which this Court will not second guess on appeal. *McFadden*, 159 Mich App at 800. Moreover, we cannot conclude that the minor inconsistencies not explored could have created a reasonable likelihood of acquittal. *Id.*

Related to his ineffective assistance of counsel claim, defendant also argues the trial court erred by not holding a *Ginther*¹ hearing. We review a trial court's decision on whether to hold an evidentiary hearing for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). A *Ginther* hearing is appropriate where there is a "factual dispute" warranting development. *People v McMillan*, 213 Mich App 134, 142; 539 NW2d 553 (1995).

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

As discussed above, from the record it is readily apparent defendant was not denied the effective assistance of counsel. Further factual development was unnecessary and the trial court did not abuse its discretion by denying defendant's motion for a *Ginther* hearing. *Id.*

SCORING OF OV 11 AND OV 13

Lastly, defendant argues the trial court erred in scoring both offense variable (OV) 11 and OV 13. Defendant relies on language in the instructions for OV 13 which provides that “[e]xcept for offenses related to membership in an organized criminal group or that are gang-related, do not score conduct scored in offense variable 11 or 12.” MCL 777.43(2)(c). Defendant correctly recognizes that conduct scored under OV 11 cannot be scored under OV 13. *People v McCraine*, 471 Mich 879; 686 NW2d 488 (2004). What defendant ignores is that, in his case, OV 13 was not scored for conduct scored under OV 11.

OV 11 is scored 50 points where two or more criminal sexual penetrations occurred. MCL 777.41(1)(a). However, to score a sexual penetration under OV 11, the penetration must arise out of the sentencing offense. MCL 777.41(2)(a). In contrast, criminal sexual penetrations “extending beyond the sentencing offense” cannot be scored under OV 11. MCL 777.41(2)(b). In comparison, criminal sexual penetrations “extending beyond the sentencing offense” may be scored under OV 13. MCL 777.41(2)(b); *People v Johnson*, 474 Mich 96, 102 n 2; 712 NW2d 703, (2006). Under OV 13, 25 points are scored when “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). In determining whether a pattern of activity exists, “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). Criminal sexual conduct is a crime against a person, MCL 777.16y.

In defendant's case, the scoring of OV 11, which defendant does not challenge, was based on the first instance of abuse in defendant's bedroom during which three sexual penetrations occurred. One of the penetrations formed the basis of the scoring offense and the two additional penetrations warranted a score of 25 points under OV 11. MCL 777.41(2)(a); MCL 777.41(2)(c); *People v Cox*, 268 Mich App 440, 455-456; 709 NW2d 152 (2005). The trial court then properly scored OV 13 for the numerous instances of sexual assault that extended beyond the sentencing offense. Particularly, the victim indicated that she was sexually assaulted multiple times a week for years. In her trial testimony, she described additional specific instances of sexual assault which took place in the bathroom and in the car. Based on these numerous additional instances of sexual assault which extended beyond the sentencing offense, the trial court did not abuse its discretion in scoring OV 13 at 25 points.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck