

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
April 26, 2012

v

ERIC JON SCOTT, II,

Defendant-Appellant.

No. 303984  
Kent Circuit Court  
LC No. 10-005438-FH  
10-005439-FH  
10-009653-FC

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Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this criminal sexual conduct case, in circuit court docket no. 10-005438-FH, defendant was convicted by jury of two counts of third-degree criminal sexual conduct (CSC III) under MCL 750.520d(1)(d). In circuit court docket no. 10-005439-FH, the jury found defendant guilty of two counts of second-degree criminal sexual conduct (CSC II) under MCL 750.520c(1)(b)(iii). In circuit court docket no. 10-009653-FC the jury found defendant guilty of two counts of CSC II under MCL 750.520c(1)(a) and two counts of first-degree criminal sexual conduct (CSC I) under MCL 750.520b(1)(a). We affirm.

Defendant's convictions are based on his sexual conduct with two of his children. J.S., his 14-year-old daughter, stated that she was nine years old when defendant began committing CSC against her in 2005. She testified that he engaged in sexual contact with her over 100 times. N.O., defendant's 21-year-old step-daughter, testified that she was 16 years old when defendant committed CSC against her in 2005. She also testified that defendant sexually assaulted her when she was ten years old, but that nobody believed her at the time.

First, defendant argues that defense counsel was ineffective for failing to pursue an interlocutory appeal after the trial court denied his motion to quash. We disagree.

Because defendant did not raise an ineffective assistance of counsel claim in the trial court, appellate review of any such claim is limited to errors apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

At the preliminary examination, J.S. stated that defendant assaulted her over 100 times. J.S. described defendant lying on her and humping her. J.S. stated that humping is "going up and down on your body." When J.S. was asked if defendant had penetrated her, she answered "I

don't remember." On cross-examination she indicated she did not know if defendant's penis penetrated her vagina and that she was not sure. When the trial court questioned her, J.S. stated that she "didn't know" if penetration had happened. The district court bound defendant over for trial on two counts of CSC I as to J.S. Defense counsel filed a motion to quash in the trial court, arguing that there was no evidence of sexual penetration. The motion was denied and defense counsel declined to file an interlocutory appeal. Defendant argues that this constituted ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resulting proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714, 645 NW2d 294 (2001). Defendant must overcome a strong presumption that his attorney's actions were sound trial strategy. *People v Carbin*, 463 Mich 590, 600, 623 NW2d 884 (2001).

With regard to counsel's failure to pursue an interlocutory appeal, this failure did not affect the outcome of the case. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Indeed, had such an appeal been pursued, review of the circuit court's decision would have been de novo to determine whether the district court abused its discretion in binding defendant over for trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). The abuse of discretion standard is narrow; for an abuse of discretion to be present, the result of the proceedings must have been so violative of fact and logic that it evidences a defiance of judgment or an exercise of passion or bias. *Id.*

Here, the district court was required to bind defendant over for trial if the prosecutor presented competent evidence constituting probable cause to believe that defendant committed CSC I. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). The court's "determination that sufficient probable cause exists will not be disturbed unless the determination is wholly unjustified by the record." *Id.* "Probable cause requires a reasonable belief that the evidence presented during the preliminary examination is consistent with defendant's guilt." *Id.* at 575. "Circumstantial evidence, coupled with those inferences arising therefrom, is sufficient to establish probable cause...." *Id.*

To sustain a conviction under MCL 750.520b(1), the prosecution must prove sexual penetration with another person and the existence of an additional circumstance. In this case, the additional circumstance alleged was "[t]hat other person is under 13 years of age." MCL 750.520b(1)(a). Defendant does not dispute that the victim was under 13 years of age when the alleged acts occurred, but argues that at the preliminary examination, there was insufficient evidence of the sexual penetration element.

"Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). Here, the victim testified that she and defendant were both unclothed and that defendant was on top of her "humping" her. She defined "humping" as "going up and down on your body." J.S. also testified that at one point defendant used his hand

to “check” her for sexual abuse. This indicates that defendant had likely placed his fingers into J.S.’s labia majora. Based on the type of sexual contact that J.S. described, it would have reasonably been inferred that defendant’s penis or finger intruded, however slightly, into J.S.’s vagina or labia majora. Because a rational trier of fact could have found that defendant engaged in sexual penetration with J.S., any interlocutory appeal would have been futile. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Next, defendant argues that defense counsel was ineffective for failing to object to the joinder of all the charges against him. We disagree.

A trial court’s determination whether offenses are related and whether joinder of the offenses for trial is permissible under MCR 6.120(B) is reviewed de novo. *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003). The trial court’s ultimate decision is reviewed for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

MCR 6.120(A) states that:

The prosecuting attorney may file an information or indictment that charges a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.

MCR 6.120(B)(1), sets forth the following:

Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

- (a) the same conduct or transaction, or
- (b) a series of connected acts, or
- (c) a series of acts constituting parts of a single scheme or plan.

The record demonstrates that the charges against defendant arose from “a series of acts constituting parts of a single scheme or plan.” MCR 6.120(B)(1)(c). Defendant’s conduct in all of the charged offenses was part of a scheme or plan to obtain sexual gratification from pre-adolescent/adolescent girls over whom he had authority as a parent. Therefore, even if defense counsel had objected to the joinder, it is unlikely that such a motion would have been granted because the cases were properly joined. Defendant would have had to make “a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.” MCR 6.121(C). “There is a strong policy favoring joint trials in the interest of justice, judicial economy, and administration, and a defendant does not have an absolute right to a separate trial.” *People v Etheridge*, 196 Mich App 43, 52–53; 492 NW2d 490 (1992). Thus any objection to the joinder would likely have been futile and defense counsel “is not ineffective for failing to make a futile objection.” *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007).

Next, defendant argues that defense counsel was ineffective for eliciting testimony from an expert witness about defendant's guilt and failing to move for a mistrial. We disagree.

Becky Yuncker is a forensic interviewer at the Children's Assessment Center and was qualified as an expert in forensic interviewing and sexual abuse dynamics. During cross-examination, she gave the following testimony:

Q [defense counsel]: Part of the protocol - a large part of the protocol is alternative hypothesis testing, correct?

A [Yuncker]: Yes.

Q: It's where you - that's where you have to kind of rule out various reasons as to why the child would lie.

A: Right.

Q: Did you have any alternative hypothesis in this case? Did you look into that?

A: Yes.

Q: What was your hypothesis? Why - why do you think she could have been lying?

A: I'm - I didn't believe that she was lying.

Q: Did you think - is it possible that kids lie at this age?

A: What we look at alternative - alternative hypotheses, as one of the hypotheses that we look at is did the kid truly make these statements or are they lying.

Q Um - hum.

THE COURT: May I see counsel, please? Stop.

(At 9:22 a.m. off-record bench conference held).

THE COURT: Ladies and gentlemen, this witness has just given you an opinion as to whether someone was telling the truth or not. You are not to consider that statement in way, shape or form. That is for you to decide in this matter. But this - opinions - this witness's opinion with regards to truth or veracity of statement made by someone is not to be considered by you in any way, shape or form. Alright, so let's proceed on that basis."

We find that defendant's contention that this incident constituted an error requiring reversal is incorrect. In CSC cases, "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended on other grounds 450 Mich 1212, 548 NW2d 625 (1995). We find that Yuncker's

testimony was an improper opinion regarding the ultimate issue in this case. Nevertheless, defense counsel's failure to object did not affect the outcome of the trial. The trial court specifically told the jury that they could not rely on Yuncker's statement in any way, shape, or form. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, the error was cured by the judge's sua sponte curative instruction and was harmless. Although defense counsel should have moved for a mistrial, relief is not required because defendant cannot show that, but for defense counsel's error, the result of the trial would have been different. *Carbin* 463 Mich at 599-600.

Affirmed.

/s/ Jane M. Beckering

/s/ Donald S. Owens

/s/ Amy Ronayne Krause