STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAY BRIAN RENUSCH,

Defendant-Appellant.

UNPUBLISHED
February 19, 1999

No. 201753
Macomb Circuit Court
LC No. 93-001441 FH

Before: Markman, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2).[1] The trial court sentenced defendant to eight to twenty years' imprisonment. We affirm.

Defendant was convicted of CSC I involving his niece, who was six years old at the time of the sexual assault. Defendant often took care of the victim and her brother for overnight periods. According to the victim, on the day of the assault, defendant gave her a bath and "scrubbed my vagina longer than the other parts." Afterward, defendant asked her to come into his bedroom. While both defendant and victim were naked, defendant lifted the victim by the armpits and put her on top of him. The victim testified that defendant's penis was hard when it touched her vagina, that his penis was pushing and it hurt her. The victim's mother testified that, on the day of the assault, the victim was very upset and angry when she picked her up. The victim told her mother that defendant had given her a bath and washed her private parts too long. Afterward, the victim became very quiet and did not want to return to defendant's home. She first made the detailed allegations of sexual abuse about five or six months later.

Defendant testified that that nothing unusual occurred on the date in question. He said that he was awakened by the victim standing by the side of his bed after his wife left for work, and he told her to go back to sleep. Later, he said, he helped the victim adjust the water in the shower and wash her hair, but did not wash any other part of her body. However, the victim's mother said that when she

asked him later what had happened, he told her that the victim climbed into bed with him, got on top of him and "started wiggling."

At the time of the incident, the victim's mother and father had divorced and the father had remarried and retained custody of the victim. The mother had a continuing relationship with another woman. Defendant's wife testified that the victim had been in bed with her mother and her mother's lover, and that she had found the victim watching a pornographic movie when she was about four years old. The victim admitted that about one year before trial, at age nine, she had watched "dirty movies" at her mother's house.

Over defense objections at trial, Jessica and Mandy Micheau testified about prior acts of sexual abuse allegedly committed by defendant when he lived with them and their mother in the early 1980's. Jessica testified that she was sexually assaulted by defendant when she was between eight and eleven years old. According to Jessica, one night "[defendant] took his penis and put, inserted it not all the way but just to the outer layer of my vagina, was pushing it in and out. Mandy testified that, on a "regular basis," defendant would sit between her legs and rub his penis up and down between the outer lips of her vagina. When Mandy reported this abuse to the police several years later, the police dismissed the investigation when they could not locate defendant. Subsequently, in late 1992, the Michigan State Police contacted Mandy about the alleged abuse. Although Mandy initially did not want to be involved, she agreed to cooperate when she learned that another girl had been abused. In 1993, Jessica was contacted by the police regarding defendant, but initially told the investigating officer that no sexual abuse had occurred. She said that she was embarrassed and wanted to forget about it, but agreed to cooperate also when she found out that another child had been abused.

After the jury convicted defendant of CSC I, defendant moved for a new trial. A Ginther hearing[2] was held regarding defense counsel's decision not to call an expert witness to testify about how a young child might raise false accusations of sexual abuse. Dr. Guyer, a faculty member in the Department of Psychiatry at University of Michigan since 1967 specializing in child and adolescent psychiatry, had been engaged by the defense as an expert witness. He was prepared to testify that there were reasons to doubt the reliability of the three child witnesses in this case; he said that he had testified in several cases involving multiple complainants in which "not guilty" verdicts were returned. Defense counsel explained that he ultimately decided not to call Dr. Guyer because "it would be kind of ridiculous to call [him]" since there were three witnesses, instead of one, who alleged that defendant sexually abused them, and that this would "insult the jury's intelligence." Further, the defense attorney acknowledged that defendant had admitted "information . . . that would substantiate a conviction . . . on at least second degree CSC," and that "if I were to call Dr. Guyer at that point, I felt I would be walking in a minefield to try and demonstrate to the trier of fact that the child was fabricating the incident when my client had related elements that constituted a crime, not the crime of which he was necessarily being charged but a crime . . . knowing all of those things, I felt that it would be ill-advised to call an expert to testify that these allegations were being fabricated." In addition, the defense attorney added that, if he were to call Dr. Guyer, "I would be infringing on my ethical responsibility as an officer of the Court . . . I wasn't completely certain that it would be unethical, but I certainly think it would be invading the processes about coming up with the truth and obviously forcing the prosecution to prove

this case beyond a reasonable doubt to a jury, but I certainly didn't want to be deceptive." The trial court denied defendant's motion for a new trial, finding that defense counsel's failure to call Dr. Guyer "constituted a trial tactic which did not amount to ineffective assistance of counsel."

Defendant first argues that his trial attorney's failure to call an expert witness to testify regarding children's false accusations of child abuse amounted to ineffective assistance of counsel. To justify a reversal based on ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, so a defendant "bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Under the objective standard of reasonableness, there is also a presumption of sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). This is true even if the trial strategy did not work. *People v Murph*, 185 Mich App 476, 479; 463 NW2d 156 (1990). The decision whether to call witnesses is a matter of trial strategy that can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense. *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). A substantial defense is one which might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

In this case, defendant must show that his attorney's failure to call an expert witness to discuss children's false accusations "deprived him of a substantial defense that would have affected the outcome of the proceeding." *Daniel*, *supra* at 58. Defendant's trial attorney claimed, at least in part, that he did not present the testimony of the expert witness because "it would be kind of ridiculous to call [him]" since there were three child witnesses (two of whom had never met or heard of the third) who alleged that defendant sexually abused them and who offered a variety of similar details, and that this would "insult the jury's intelligence." In our judgment, this decision can reasonably be viewed as a justifiable trial strategy in this case, where defendant was confronted with several witnesses claiming sexual abuse by defendant, rather than just one. Although Dr. Guyer testified that he had previously testified in several cases with multiple victims which resulted in acquittals, he also admitted that he had never successfully testified in a multiple victim case in which the victims were not all known to one another. Nor does Dr. Guyer's testimony concerning multiple witnesses automatically transform this potential defense into a "substantial defense" or otherwise compel us to second-guess defense counsel's judgment and his assessment of the anticipated reaction of the jury to Dr. Guyer's argument.[3] Despite not offering the testimony of Dr. Guyer, defense counsel presented character witnesses who testified that defendant was both a good father and honest; defendant's wife who questioned complainant's credibility and who raised the circumstances of complainant's mother's lesbian relationship and how that might have affected complainant's testimony; and defendant himself who set forth his own version of what had occurred. Thus, in our judgment, defendant failed to overcome the presumption of sound trial strategy, and on this basis we find that defendant was not denied the effective assistance of counsel.

Defendant also contends that his attorney improperly failed to call Dr. Guyer because he mistakenly assumed that the testimony would infringe on his ethical responsibilities, and that this resulted in a conflict of interest. We acknowledge that, as officers of the court, criminal defense attorneys have

obligations both to their client and to the integrity of the justice process which conceivably may be in tension with each other. Here, the trial attorney was concerned about soliciting testimony from Dr. Guyer regarding the possible fabrication of the allegations by the victims, after defendant apparently admitted acts that his attorney believed would constitute a crime.[4] While an attorney "shall not knowingly . . . offer evidence that the lawyer knows to be false," MRPC 3.3(a)(4), it does not appear that Dr. Guyer's purported testimony itself would have been false, although it may have raised wholly baseless doubts in the minds of the jury. Defense counsel's concern seemed to arise more from his concern about defendant's deception than about the possibility of false testimony from Dr. Guyer. Although it can be reasonably argued that defense counsel may have incorrectly understood or balanced his ethical obligations, we decline here to decide this issue. Since we have determined that defense counsel was able to decline the services of an expert to testify regarding possible false allegations of abuse on the basis of sound trial strategy, we need not address the possible ethical quandary of defense counsel in this case.

Defendant next argues that the trial court abused its discretion by admitting evidence of prior acts of sexual abuse allegedly committed by defendant. The decision to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995); *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). MRE 404(b)(1) determines the admissibility of other acts, as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 74-5; 508 NW2d 114 (1993), the Court held that evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime; (2) relevant to an issue or fact of consequence at trial; and (3) sufficiently probative to prevail under the balancing test of MRE 403. Only one type of logically relevant evidence is forbidden by MRE 404-- that which is "offered solely to show the criminal propensity of an individual." *Id.* at 65.

Accordingly, to determine the admissibility of the evidence at issue here, we must first determine the purpose for which the evidence was offered and admitted. The trial court here admitted the evidence of prior sexual abuse by defendant because the abuse of the three victims showed a common scheme or plan used by defendant. This is a proper purpose for admission under MRE 404(b). *Id.* at 74-5. Second, the evidence was relevant under MRE 401 and 402 because it tended to show a common scheme for defendant's abuse, into which the victim's abuse in this case fit squarely. The evidence tended to show that defendant took the opportunity to engage in similar sexual activity with young girls when the children were in locations convenient to him and largely under his control. It is more probable that the victim's account of the abuse here was truthful because of its similarity to the accounts of defendant's previous conduct. Third, although the lack of physical evidence in this case

increased the risk that this evidence would be prejudicial, overall the probative value of the evidence was not outweighed by unfair prejudice, in our judgment. MRE 403. Thus, the evidence regarding defendant's prior sexual abuse of Jessica and Mandy Micheau was properly admitted as relevant to defendant's scheme or plan.

Defendant next contends that the prosecutor improperly introduced hearsay evidence to bolster the credibility of a prosecution witness. Again, a trial court's decision to admit evidence is reviewed for an abuse of discretion. *Bahoda*, *supra* at 289. Generally, hearsay, or "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," MRE 801(c), "is not admissible except as provided by" the rules of evidence. MRE 802. However, in this case, defendant himself requested the evidence that he now argues was prejudicial error. At trial, defendant requested the testimony of the police officer that interviewed Mandy and Jessica Micheau, and the prosecutor agreed with this late request. When production of the officer at trial proved impossible, the prosecutor agreed to allow his police reports into evidence. Defendant and the prosecutor then agreed to allow defendant to question another police officer, Officer Bartholomew, about the reporting officer's reports at trial, with the stipulation that the prosecutor would be able to cross-examine the officer. Not only did defendant stipulate to the admission of the hearsay at issue, but he also questioned the officer himself about Jessica Micheau's statements. Accordingly, defendant cannot now object on appeal for that in which he actively solicited and participated at trial. *People v Murry*, 106 Mich App 257, 262; 307 NW2d 464 (1981).

Next, defendant argues that the trial court improperly failed to allow an in camera inspection of the victim's counseling records. A trial court's denial of a discovery request in a criminal case is reviewed for an abuse of discretion. *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994). In *Stanaway*, *supra* at 650, the Supreme Court attempted to "balance the Legislature's interest in protecting the confidentiality of the therapeutic setting with the possibility that there may be exculpatory evidence in such records necessary to prevent the conviction of an innocent person." The Court held that:

> [W]here a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense. [*Id.*]

Accordingly, we must determine whether defendant "demonstrated a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense." MCR 6.201(C)(2);[5] *Stanaway*, *supra* at 677. Our determination is somewhat complicated because the trial court in this case did not apply the proper standard found in *Stanaway*, ruling instead that an in camera inspection was not "in the interest of justice." Nevertheless, in our judgment, the trial court did not abuse its discretion overall because defendant failed to make the required showing that there was a "reasonable probability" that the records contained necessary information. Defendant argued that the victim was the product of a dysfunctional family, the target of a bitter custody dispute, that she had been exposed to her mother's romantic relationship with another woman and that she had experimented sexually with her brother; and

that these "recent experiences could have easily generated false accusations." However, defendant did not set forth any good faith basis for believing that false accusations were ever actually made, nor how these events of the victim's life would have resulted in false accusations. A more specific justification than simply reciting difficult or troublesome aspects of a victim's life is necessary to mandate an in camera inspection of privileged records. Thus, in this case, we do not believe that the court abused its discretion in denying defendant an in camera inspection of the victim's psychological records.

Defendant next contends that he was denied a fair trial by the prosecutor's improper arguments to the jury on rebuttal. Since a timely objection was not made to the alleged misconduct at trial, "appellate review is foreclosed unless our failure to consider the issue would result in a miscarriage of justice," *People v Duncan*, 402 Mich 1, 15-6; 260 NW2d 58 (1977), or "if a curative instruction could not have eliminated the prejudicial effect." *Stanaway, supra* at 694.

First, defendant claims that the prosecutor improperly argued facts not in evidence when she stated that Mandy Micheau told police about defendant's sexual abuse of her before the case at hand had come to light. It is improper for a prosecutor to "make a statement to the jury of a fact, as of his own knowledge, which has not been introduced in evidence, . . . relating to the material issues in the case." *Duncan, supra* at 17 n 5, quoting *People v Dane*, 59 Mich 550, 552; 26 NW 781 (1886). In this case, the record shows that Mandy Micheau was interviewed by police officers regarding the alleged sexual abuse by defendant on September 20, 1992. This was two months before the victim here contacted the police on November 18, 1992. Therefore, the prosecutor's argument was supported by evidence.

Second, defendant claims that the prosecutor employed an improper civic duty argument and appealed to the sympathy of the jury by stating: "Tell Ray Renusch that in our society we will not allow our children to be abused, that we will protect them." Prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Accordingly, in this case, the prosecutor asked the jury to convict defendant on the basis of the *abuse* that he committed. This kind of argument is proper and does not ask the jury to disregard the evidence in favor of fear or to send a message to the community at large.

Next, defendant claims that the trial court improperly rejected his jury challenges for cause. This Court reviews the trial court's determination of bias or prejudice of jurors for abuse of discretion. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). Jurors are presumed competent and impartial. *McNabb v Green Real Estate Co*, 62 Mich App 500, 505; 233 NW2d 811 (1975). Their dismissal is determined according to MCR 2.511(D).[6] *People v Legrone*, 205 Mich App 77, 81-2; 517 NW2d 270 (1994). In *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228; 445 NW2d 115 (1989), the Supreme Court enunciated a four-pronged test to determine reversal based on a denial of a challenge for cause, as follows:

> [T]here must be some clear and independent showing on the record that: (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse

was objectionable. [See *Legrone, supra* at 82 (applying the four-factor test to criminal cases).]

Applying the four-factor test to the case at hand, we must first determine if the court improperly denied a challenge for cause. Defendant challenged three prospective jurors for cause that were denied by the trial court, forcing him to use peremptory challenges to dismiss all three jurors. Two of the jurors communicated that they felt that they could listen to the evidence and make a decision based on that evidence, and we find that the court properly denied their dismissal for cause. However, the third juror stated that, because her son-in-law had been molested by his father, she "might have predisposed one-way or another . . . might predispose my not being open with the way I feel about this case." Even after prompting by the court as to whether she could be fair and impartial, she could only say, "I would hope so, but I can't say for sure" and "that's in the back of my mind." Since the juror could not swear that she could render an impartial verdict, and plainly recognized her own bias, see *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986), in our opinion the trial court improperly denied defendant's request to excuse her for cause. However, we must continue to apply the facts of this case to the four-part test to determine prejudice. In response to the second inquiry, we find that defendant did exhaust all of his peremptory challenges. Under the third inquiry, defendant claims on appeal that his trial attorney was ineffective because he failed to state his desire to remove another juror who should have been dismissed for cause since she had been a victim of child sexual abuse. Thus, defendant admits that he did not demonstrate that he wanted to challenge another juror for cause at trial. In answer to the fourth inquiry, even if defendant had challenged this additional juror for cause, we find that she was not objectionable. According to the record, this juror was one of the original prospective jurors, and after she stated that she would hope that her own abuse would not affect her ability to be impartial and that she still believed in "innocent until proven guilty," defense counsel did not question her further or ask for her dismissal. Thus, she did not believe that she would be biased and no bias was otherwise demonstrated. See *Poet, supra* at 241 n 15. Therefore, although one juror should have been excused for cause, reversal here is not required. Since defendant was able to dismiss all of the prospective jurors that he demonstrated a desire to excuse, we can find no actionable prejudice to defendant that mandates reversal.

Next, defendant claims that his conviction should be reversed because the prosecution did not prove the required element of penetration beyond a reasonable doubt. A claim of insufficient evidence is reviewed de novo. *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

> [W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. [*People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992).]

An insufficient evidence claim "focuses on whether the evidence, taken as a whole, justifies submitting the case to the trier of fact or requires judgment as a matter of law." *People v Clark*, 172 Mich App 1, 6; 432 NW2d 173 (1988), lv den 432 Mich 897 (1989). The evidence is sufficient if, viewed in a light

most favorable to the prosecution, a rational jury could find that the essential elements were proven beyond a reasonable doubt. *Hampton, supra,* at 368.

One of the elements of CSC I, distinguishing it from CSC II, is sexual penetration, or "intrusion, however slight, of any part of a person's body or of any object into the genital . . . openings of another person's body." MCL 750.520a(l); MSA 28.788(1)(l). This Court has held that penetration of the female "genital opening" includes the penetration of the labia majora. *People v Whitfield,* 425 Mich 116, 135 n 20; 388 NW2d 206 (1986); *People v Legg,* 197 Mich App 131, 133; 494 NW2d 797 (1992). In this case, the victim testified that defendant's penis was hard when it touched her vagina, that it was pushing and it hurt her. Given these facts, a rational jury could reasonably conclude that, at the least, defendant penetrated the victim's labia majora. Thus, the charge of CSC I was properly submitted to the jury for deliberation.

Finally, defendant argues that the trial court improperly instructed the jury regarding the elements of CSC I. Failure to object to jury instructions, as here, waives appellate review unless manifest injustice will result. *People v Curry,* 175 Mich App 33, 39; 437 NW2d 310 (1989). "Manifest injustice occurs where the erroneous or omitted instructions pertain to a basic and controlling issue in the case." *People v Johnson,* 187 Mich App 621, 628; 468 NW2d 307 (1991), lv den 439 Mich 978 (1992). Although the instruction at issue here pertains to a key element of the offense, there is no manifest injustice because the trial court's instruction was proper. The trial court relied on CJI2d 20.1, which requires "entry into [the victim's] vagina," and added to this instruction as follows: "Penetration of the labia majora by law constitutes penetration." Contrary to defendant's assertion that this addition was improper, we observe that this addition correctly stated the law. *Legg, supra* at 133. Thus, this argument is without merit.

For these reasons, we affirm the defendant's conviction.

/s/ Stephen J. Markman
/s/ Henry William Saad
/s/ Joel P. Hoekstra

[1] The victim was less than thirteen years old at the time of the act, which included sexual penetration.

[2] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

[3] Further, the testimony of three victims of defendant's alleged sexual abuse made it reasonably unlikely that Dr. Guyer's testimony might have made a difference in the outcome of the trial, especially since he would not have been permitted to testify directly as to the veracity of the witnesses. See *People v Peterson,* 450 Mich 349, 352, 376; 537 NW2d 857 (1995). Indeed, the fact that Dr. Guyer was an expert witness, rather than a witness of the incidents, MRE 702, makes it even less likely that defendant was denied a substantial defense.

[4] Apparently, defendant admitted to his attorney that some incident occurred with the victim here but denied any penetration. Defendant's trial attorney also testified that he had been told that defendant had previously pleaded guilty to second-degree CSC, but then withdrew the plea.

[5] After the Court decided *Stanaway, supra,* MCR 6.201(C) was amended to conform to this holding.

[6] MCR 2.511(D) provides, in relevant part:

> The parties may challenge jurors for cause, and the court shall rule on each challenge . . . It is grounds for a challenge for cause that the person:
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> * * *
>
> (3) is biased for or against a party or attorney;
>
> (4) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be.