

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANA RAY SCOTT,

Defendant-Appellant.

UNPUBLISHED

March 13, 2001

No. 218733

Oakland Circuit Court

LC No. 98-158671-FC

Before: Markey, P.J., and McDonald and K. F. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and sentenced to eight to twenty-five-years imprisonment for each count. He appeals as of right. We affirm.

I. Basic Facts and Procedural History

Defendant's convictions arose from allegations of sexual abuse perpetrated on the complainant who was 5 years old at the time of the incident and 9 years old at the time of trial. The incident occurred between January 1, 1996 and May 16, 1996 when the complainant was a foster child residing in the defendant's mother's home. Although the incident giving rise to the instant litigation occurred in 1996, testimony adduced at trial established that the complainant did not tell anyone until November of 1997 when she confided in her new adoptive mother. At this time, the complainant described the incident and further advised that Defendant warned her not to tell anyone or he would kill her. At the same time that complainant told her new adoptive mother about defendant's acts of sexual abuse, she also confided that after she moved out of the defendant's mother's house and into another foster home, an individual in that foster home also sexually assaulted her.¹

Before trial, counsel for the defendant notified the prosecutor that he intended to introduce evidence relating to the "Tillman assault." In his proffer², defense counsel submitted

¹ The second alleged incident of sexual abuse will hereinafter be referred to as the "Tillman assault."

² Defendant filed a "Motion to Introduce Other Acts Evidence Pursuant to MRE 404(b)" and a
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that testimony regarding the “Tillman assault” would establish that the complainant levied “identical accusations” against both defendant and Tillman and that the accusations were fabrications created as part of a “scheme” so that complainant could be removed from “[f]oster care environments that she didn’t like” and that complainant learned to fabricate allegations of sexual abuse to “get rid” of defendant and [Tillman].” Defendant argued that such evidence was particularly relevant in light of the complainant’s statements to the adoption specialist that she no longer wished to live in foster homes. Defendant argued that, other evidence concerning allegations of sexual abuse levied by the complainant against individuals other than the defendant in conjunction with testimony concerning allegations of sexual abuse made by the complainant’s brother in light of the complainant’s statement to the adoption specialist would have a tendency to make it more probable that the complainant fabricated allegations of sexual abuse and hurled them at defendant to ensure her removal from these foster care environments all together.

Additionally, defendant argued that evidence concerning allegations of sexual abuse made by one of the complainant’s brothers along with evidence concerning the sexual conduct engaged in between the complainant’s two younger brothers were relevant in that testimony to this effect would make it more probable that the complainant obtained “[a]ge-inappropriate information about sexual activity,” from a source other than defendant, than it would be without that testimony.

The trial court ruled that the rape shield statute applied and any evidence proffered regarding the “Tillman assault” interposed by the complainant was “[n]ot so compelling as to require its admission in order to preserve Defendant’s constitutional right to confront his accuser and present a defense.” Since the proffered testimony did not otherwise qualify as one of the exceptions included in the rape shield statute, the trial court held that such testimony would not be admitted. After a jury trial, defendant was convicted.

II. The Rape Shield Statute

The rape shield statute, MCL 750.520j(1); MSA 28.788(10)(1) provides in pertinent part that:

Evidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct shall not be admitted . . . unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

In *People v Arenda*, 416 Mich 1, 10-11; 330 NW2d 814 (1982) our Supreme Court discussed the legislative purpose underlying the rape shield statute as a mechanism

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“Memorandum of Law to Assist the Court in it’s Ruling” identifying the testimony that he wished to introduce regarding the complainant’s allegations of other acts of alleged sexual abuse along with an explanation as to the purpose for such testimony.

[d]esigned to exclude evidence of the victim's sexual conduct with persons other than defendant. [T]he prohibitions contained in the rape-shield law represent a legislative determination that, in most cases, such evidence is irrelevant. [T]he prohibitions in the law are also a reflection of the legislative determination that inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury. [T]he prohibition . . . remov[es] unnecessary deterrents to the reporting and prosecution of crimes.

Fourteen years later, in *People v Adair*, 452 Mich 473, 480-481; 550 NW2d 505 (1996), our Supreme Court revisited the issues raised by the rape-shield statute and referencing its prior decision in *Arenda*, *supra*, established further that:

The rape-shield statute was aimed at thwarting the then-existing practice of impeaching the complainant's testimony with evidence of the complainant's prior consensual sexual activity, which discouraged victims from testifying 'because they kn[e]w their private lives [would] be cross-examined.' [A] complainant's sexual history with others is generally irrelevant with respect to the alleged sexual assault by the defendant. More importantly, a witness' sexual history is usually irrelevant as impeachment evidence because it has no bearing on character for truthfulness. MRE 608. (quoting House Legislative Analysis, SB 1207, July 18, 1974).

Essentially, the rape shield statute deprives the defendant of the ability to present evidence of the victim's prior sexual history to assail the victim's character and thereby divert the fact finder's attention from the defendant's conduct on one specific occasion to the victim's entire past sexual history. In *People v Hackett*, 421 Mich 338, 347-348; 365 NW2d 120 (1984) our Supreme Court acknowledged that , "[b]y enacting a general exclusionary rule, the Legislature recognized that in the vast majority of cases, evidence of a rape victim's prior sexual conduct with others . . . for general impeachment is inadmissible."

A. Application of Statute to Child Victims of Sexual Assault

A review of the legislative intent underlying the rape shield statute along with a review of the caselaw discussing the applicability of the statute, suggests that the statute itself was designed to apply to adult victims and to provide for the exclusion of evidence pertaining to prior sexual conduct or sexual history as indicative of a specific type of conduct on one particular instance with one particular defendant. Indeed, it is repugnant to refer to past incidents of child abuse as a child's "prior sexual conduct" for purposes of the statute. Nevertheless, in *People v Morse*, 231 Mich App 424; 586 NW2d 555 (1998), this court did recognize that although the rape shield statute is typically erected where the victim is an adult, it will apply in cases involving issues pertaining to child sexual assault. The *Morse* court went on to discuss our Supreme Court's decision in *Arenda*, wherein the court applied the provisions of the rape-shield statute to exclude any evidence concerning the 8 year old victim's "possible sexual conduct" with any person other than defendant to account for the victim's ability to describe the sexual act at issue and to further attribute that knowledge to a source other than defendant. *Id.* at 11.

In *Arenda*, the court specifically stated that young victims “[a]re the ones most likely to be adversely affected by unwarranted and unreasonable cross-examination into [matters pertaining to sexual conduct with others].” The court thus concluded that “[t]hey [children] are among the persons whom the statute was designed to protect.” *Id.* at 13. [Emphasis added].

Although the decision in *Arenda* makes it clear that the provisions of the rape-shield statute apply to cases involving child sexual abuse, it is equally clear that the rape shield statute will not “[p]reclude introduction of evidence to show that a victim has made prior false accusations of rape.” *People v Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991) (citations omitted). Thus, the relevant inquiry becomes whether erecting the shield will unfairly abridge the defendant’s Sixth Amendment right to confront and cross examine the witnesses brought to bear against him.

As the court in *Morse*, noted, “[a]pplication of the rape-shield statute must be done case by case and that the balancing between the rights of the victim and the defendant must be weighted anew in each case.” *Id.* at 433. To that end, and to adequately balance the competing interests, the court in *Morse*, delineated a specific procedure to follow to determine the admissibility of evidence pertaining to prior claims of sexual abuse involving the victim. First, it is incumbent on the defendant to make an offer of proof to demonstrate relevance. If the defendant initially fails to demonstrate relevance, then admission is denied. But if defendant establishes relevancy, the next step is for the trial court to conduct an evidentiary hearing, in camera, to determine issues of admissibility in light of the competing constitutional interests. *Morse*, at 437.

III. Complainant’s Allegedly False Allegations of Prior Sexual Abuse

Defendant contends that the trial court erred by refusing to admit certain testimony regarding complainant’s prior accusations of sexual abuse by others. Decisions concerning whether to admit evidence rests within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. However, whether a statute or rule requires exclusion, is a question of law that this court reviews de novo ever mindful that it is per se an abuse of discretion, “[t]o admit evidence that is inadmissible as a matter of law.” *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). In the case at bar, we find no error requiring reversal in this regard.

One of the theories that defendant advanced at trial was that complainant’s desire to extricate herself from foster care environments that “she did not like” gave rise to an ulterior motive to fabricate the false allegations of sexual abuse against him.³ Defendant argued that cross examination of the victim on her allegations concerning the “Tillman assault” is directly relevant to her motive to conjure false allegations of sexual abuse to ensure removal from the

³ Defendant also wanted to introduce evidence pertaining to the “Tillman assault” for purposes of establishing the source of the complainant’s age-inappropriate knowledge of sexual activity. We note however, that the trial court did permit testimony concerning the sexual activity occurring between the complainant’s two brothers which gave rise to the sexual assault reports on the first day of trial.

foster home in which defendant resided. The trial court concluded that cross-examination into the alleged “Tillman assault” “[w]ould not make this theory significantly more probable.” We agree.

MRE 401 defines legal relevance as “[e]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evidence regarding the “Tillman assault” on the record here before us would not tend to make it more probable that the complainant fabricated the allegations of sexual misconduct as to this particular defendant.

The record establishes that the complainant reported both the “Tillman assault” and the sexual assault perpetrated by defendant at the same time approximately one year **after** she was removed from the home in which defendant resided and more specifically, removed from foster care all together.⁴ Additionally, the record reveals that the complainant came into contact with the defendant **before** she came into contact with Mr. Tillman. Thus, evidence regarding the complainant’s allegations against Mr. Tillman is neither probative of nor relevant to the complainant’s alleged desire to be removed from foster care environments that she did not like. First, when the complainant disclosed the information, she was in neither Mr. Tillman’s nor defendant’s homes for foster care. Moreover, evidence adduced at trial established that at the time that the complainant disclosed the incident, the adoption proceedings were completed. Thus, when the complainant told her adoptive mother what defendant did, she was not confronted with the possibility of returning to foster care. Defendant’s argument that the complainant fabricated allegations of sexual abuse against him for the purpose of removing herself from foster care and to further ensure that she would never return to defendant’s home, flies in the face of the evidence adduced at trial. Accordingly, evidence concerning allegations of sexual abuse that the complainant made against individuals other than defendant is thus, not legally relevant for the purpose delineated in defendant’s proffer.

Moreover, defendant failed to offer any concrete evidence establishing that the complainant ever made **any** false allegation of sexual misconduct against anyone. At best, defendant merely suggested that the complainant’s allegations of sexual abuse as to Mr. Tillman were “[n]early identical claims of sexual abuse against men in two other foster homes.” “Nearly identical claims” are a far cry from “false claims.” In other words, mere “allegations” are not “false accusations;” the former lacking any indicia of falsity whatsoever. Accordingly, not only was defendant’s proffered evidence not relevant, it was also insufficient to establish a prior false accusation of sexual abuse.⁵

⁴ Ms. Johnson (complainant’s adoptive mother) testified at trial that at the time that the complainant reported the sexual abuse, the adoption proceedings were already complete. Ms. Johnson further testified however, that the adoption was subsequently interrupted because she was under the impression that the children were going to a residential hospital.

⁵ See *People v Adamski*, 198 Mich App 133; 497 NW2d 546 (1993)(holding that the defendant’s offer of proof of two allegedly false accusations of rape made by complainant was not sufficient because defendant did not establish falsity. See also *People v Williams*, 191 Mich App 269; 477 NW2d 877(1991)(holding that defendant failed to provide concrete evidence establishing falsity

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Defendant's final argument is that the trial court's failure to permit cross-examination into the complainant's prior allegations of sexual abuse foreclosed an avenue for defendant to challenge the complainant's veracity. To this end, defendant argues that "[t]his entire case was predicated on credibility. . . . [I]n this case, the children's [including complainant's] own incredible tales of sexual abuse was proffered to show that [the complainant] lacked credibility."

Cross-examination on matters "[b]earing only on general credibility" may be denied. See *Hackett*, 421 Mich at 348. Defendant sought to introduce evidence concerning other allegations of sexual abuse made by complainant against individuals other than defendant for the purposes of assailing the complainant's general credibility. In this case, denying cross-examination into this particular area would not "[u]nconstitutionally abridge the defendant's right to confrontation" as defendant suggests particularly since the defendant had other testimony to establish that the witness was not credible, or otherwise telling the truth.⁶ The trial court did not abuse its discretion by refusing to permit cross examination into allegations of sexual abuse made by the complainant against individuals other than defendant.

IV. Ineffective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel because trial counsel did not call an adoption specialist as a witness, and failed to question another witness about the victim's alleged propensity to lie. Pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), claims for ineffective assistance of counsel should be raised by a motion for a new trial or evidentiary hearing. Since defendant did not procure a ruling by the trial court on this issue, defendant's claim for the ineffective assistance of counsel is forfeited save for a review of the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To set forth a viable claim for the ineffective assistance of counsel, defendant must establish deficient performance by counsel and a reasonable probability that but for that deficiency, the result would have been different. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) citing *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996); *Snider*, *supra*, at 423-424.

Defendant has failed to satisfy his burden to rebut the presumption of ineffective assistance of counsel. Determinations regarding what witnesses will testify are matters pertaining to trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This court declines to "[s]ubstitute its judgment for that of counsel regarding matters of trial strategy,

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where there no criminal charges were ever filed against the alleged perpetrator and thus, no court ever made any decisions regarding the truth or falsity of the accusation); Cf *People v Haley*, 153 Mich App 400, 406; 395 NW2d 60 (1986) (wherein the court determined that the allegations of prior sexual abuse were sufficiently substantiated by a prior order of the probate court terminating the parental rights of the victim's parents on the grounds of physical and sexual abuse, and could be introduced to rebut the prosecution's evidence on the element of sexual penetration and thus, the attendant inference that the defendant was the responsible party.)

⁶ At trial, defense counsel voir dired the complainant on the issue of lying and established that the complainant worked with a social worker and one of their objectives was to teach the complainant not to lie to her foster mother.

[or] assess counsel's competence with the benefit of hindsight." *Rockey, supra*, at 76-77. The record does not demonstrate any error requiring reversal or otherwise require a remand for an evidentiary hearing on defendant's claim of ineffective assistance of counsel.

Affirmed.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ Kirsten Frank Kelly