

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ANTHONY WITHERSPOON, a/k/a
ANTHONY WHITHER SPOON

Defendant-Appellant.

UNPUBLISHED

November 19, 2002

No. 233774

Wayne Circuit Court

LC No. 00-008989

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for second-degree criminal sexual conduct, MCL 750.520c(1)(a). The court sentenced defendant as a fourth habitual offender, MCL 769.12, to eight to twenty years in prison. We remand for further proceedings consistent with this opinion.

Defendant was convicted of second-degree criminal sexual conduct on the basis of the victim's testimony. The nine-year-old victim testified that defendant, her mother's boyfriend at the time, made sexual contact with her while she was folding clothes in the basement of their home.

Twice, during cross-examination, defense counsel attempted to question the victim about her relationship with her father. Each time, following objection by the prosecution, the trial court disallowed the questions on the basis of relevance. Defense counsel attempted to make an offer of proof in an effort to show why the victim's relationship with her father was relevant, but the trial court refused to hear the offer of proof.¹ Defendant's sole witness was the victim's mother. Through questioning of the mother, defense counsel again sought to elicit testimony concerning the victim's relationship with her father. After another objection by the prosecution

¹ Specifically, the court stated to defense counsel, "[y]ou don't have any facts, here. What you're doing is you have a theory that you've made up. Your theory is not going to work, because it is not relevant." The court further stated, "So I'm going to sustain the objection. The only thing that's relevant in this case is whether or not there was a contact between this young lady and him. That's all." We note, however, that the child did testify that her father did not tell her what to say in court.

based on relevance, the court refused to allow defense counsel to question the victim's mother in this regard.² Following the conclusion of proofs and during its findings of fact, the court found the child's testimony credible, stating, "[t]he Court finds that the witness is not only credible, but that she is very intelligent. And that from what I could hear, not one single motivation for her to do anything except tell the truth." As a result, the court convicted defendant of one count of second-degree criminal sexual conduct.

On appeal, defendant claims that, by denying him the opportunity to inquire into the victim's relationship with her father, the trial court erred by preventing him from establishing that the victim had a motivation to lie. A trial judge's decision on the relevancy of certain evidence will not be set aside absent an abuse of discretion. *People v Sabin*, 463 Mich 43, 60; 614 NW2d 888 (2000). An abuse of discretion exists when an unprejudiced person, considering all the facts on which the trial court acted, would conclude there was no justification for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

We note initially that to his brief on appeal, defendant attached his own affidavit, alleging in part that the child's parents were involved in a custody dispute over the child. This affidavit is not properly before this Court because it is not part of the lower court record. *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992). Therefore, we will not consider it.

This Court has consistently held that "[a] witness' motivation for testifying is *always* of undeniable relevance and a defendant is entitled to have the jury consider any fact that may have influenced the witness' testimony." *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995) (emphasis added). Additionally, this Court has held "[i]t is axiomatic that the credibility of a witness is an issue 'of the upmost importance' in every case." *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990). Based on the record before this Court, we are unable to determine whether the proffered evidence was relevant. The trial court denied defense counsel any opportunity to offer proof regarding the relevancy of the evidence, while speculating concerning what defendant's theory was. Although the trial court has wide discretion in determining the admissibility of evidence, the court improperly denied defense counsel his offer of proof. Consequently, we express no opinion on the admissibility of the proffered evidence, but find remand is necessary for defendant to make an offer of proof regarding the relevancy of the proffered testimony and for the trial court to consider the admissibility of the evidence after a proper offer of proof is made.

Defendant also argues on appeal that the trial court erred in scoring the sentencing guidelines. Because remand for an offer of proof is necessary, we do not reach this issue. However, while this appeal was pending before this Court, defendant filed a motion to remand for an evidentiary hearing raising yet a third issue. In his motion to remand, defendant argues that the trial court improperly ordered defendant to sit with his back to his accusers and that he was denied effective assistance of counsel for counsel's failure to object to this unusual trial procedure.

² Again, the court stated, "I don't think a nine-year-old child has a Machiavellian brain developed at this point to get involved in some kind of strange relation between a mother and her father and bring false charges against him. And I know that's what your theory is."

To establish ineffective assistance of counsel, a defendant must show: (1) counsel's performance fell below an objective standard of reasonableness; (2) a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). While there is a preference for face-to-face confrontation under the Sixth Amendment, this right can be denied to a defendant if there has been a case-specific finding that dispensing with this right is necessary to protect a child from the emotional trauma of confronting the defendant. *People v Pesquera*, 244 Mich App 305, 309-311; 625 NW2d 407 (2001), citing *Maryland v Craig*, 497 US 836; 110 S Ct 3157; 111 L Ed 2d 666 (1990).

In Michigan, MCL 600.2163a(12), (13), and (14) provide that, if after a motion by a party the court determines, on the record, that it is necessary to protect the welfare of a victim of sexual misconduct who is less than sixteen years old, the court can employ one of several special procedures. The most restrictive procedure under the statute is to admit a videotape of the victim's deposition that was taken subject to cross-examination, but not confrontation, by the defendant. MCL 600.2163a(13) and (14). The most restrictive procedure authorized by statute for taking the witness' testimony in the presence of the defendant is to arrange the courtroom so that the defendant is as far away from the witness as is possible for the defendant to still see and hear the witness and communicate with his attorney. MCL 600.2163a(12)(b).

In this case, defendant alleges that while present at trial, he was forced to sit with his back to the witnesses, judge and prosecution. To his motion for remand, defendant attached his own affidavit, in which he alleges this unusual seating arrangement, as well as a purported affidavit of a witness who avers that she was present at trial and that defendant was forced to sit in the manner defendant alleges. However, the record is devoid of any indication that defendant was compelled to sit in this position. We are disturbed by the fact that the record in no way reflects this situation because, if in fact defendant was forced to sit in this unusual position, the record should reflect this in some way. Most importantly, the court was required to make a finding, on the record, that defendant's seating arrangement was necessary. Because the record is devoid of any indication that this situation occurred, but defendant has produced affidavits averring that it did occur, we find remand is necessary for a hearing to develop an evidentiary record regarding defendant's allegations that he was ordered to sit with his back to the witnesses, judge and prosecution.

Remanded to the trial court for further proceedings consistent with this opinion. We retain jurisdiction and instruct the trial court to conduct a hearing on this matter within 28 days of the release of this opinion, render any opinions on the issues within 28 days of the hearing, and forward its findings and a transcript of the hearing to this Court within 84 days of the release of this opinion. Defendant may file a supplemental brief with this Court within 14 days after the trial court renders its opinion and the prosecutor may file a supplemental brief within 14 days after receipt of defendant's supplemental brief.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter