STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2004
v	No. 241754 St. Joseph Circuit Court
MICHAEL JOHN SWIATKOWSKI, Defendant-Appellant.	LC No. 01-010583-FC

Before: Gage, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and CSC II, MCL 750.520c(1)(a). He was sentenced to 15 to 30 years' imprisonment for the CSC I conviction and to 6 to 15 years' imprisonment for the CSC II conviction. He appeals as of right.

At the time of the underlying events, defendant and the victim both resided in Cass County. Defendant frequently employed the victim as a babysitter for his daughter. On two occasions, the twelve-year-old victim accompanied defendant to St. Joseph County to babysit his daughter while he mowed the grass at a second home his extended family used. The victim testified that while at the second home, defendant penetrated the victim's vagina with his fingers and touched the victim's thigh with his penis. He also showed her teen pornography and sexual paraphernalia and had her pose nude for him. On the second occasion, defendant performed cunnilingus on the victim.

Defendant first argues that trial counsel denied him effective assistance when he committed various errors. We disagree. "To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). "In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id*.

Defendant asserts that trial counsel was ineffective for failing to investigate and use three potential witnesses. We disagree. The record reflects that trial counsel investigated these witnesses and made a tactical decision not to introduce their testimony after carefully weighing the evidence's potential to help defendant against its potential to harm him. "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was

ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Therefore, trial counsel's failure to introduce this testimony does not support defendant's ineffective assistance claim.

Defendant next asserts that trial counsel was ineffective for failing to introduce a photograph of a tattoo that is located on defendant's upper left thigh. We disagree. Defendant asserts that a photograph of his tattoo was introduced by counsel with some success at his separate trial in Cass Circuit Court for criminal sexual conduct involving the same victim. Trial counsel in the trial at issue did not introduce the photograph during direct examination of defendant and was then precluded from introducing the picture later during redirect examination. However, trial counsel testified at the *Ginther*[1] hearing that he made a strategic decision not to introduce the photograph on direct examination. Moreover, trial counsel had already introduced testimony regarding the tattoo, so the photograph itself would not have affected the outcome of the trial. *Riley*, *supra*.

Defendant next asserts that trial counsel was ineffective for failing to hire and call an expert witness. We disagree. Trial counsel testified that he discussed the possibility of hiring an expert witness with defendant and his wife, but they informed counsel that defendant did not have the money to pay an expert. Defendant's expert legal witness at the *Ginther* hearing testified that a defendant's ability to pay for the services of an expert is a legitimate consideration in deciding whether to retain one. Moreover, the decision whether to call an expert witness is presumptively a matter of trial strategy, and defendant merely speculates about the benefit an expert witness could have provided his case. *People v LeBlanc*, 465 Mich 575, 582-583; 640 NW2d 246 (2002). Therefore, defendant fails to establish ineffective assistance on this basis.

Next, defendant argues that trial counsel was ineffective for failing to bring a motion to bar the introduction of sexual materials, including teen pornography and sexual toys defendant showed the victim after one of the assaults. After obtaining a search warrant, police seized the items from defendant's second home in St. Joseph County. Defendant claims that the warrant was based on stale information, so trial counsel should have moved for its exclusion on the ground that the warrant was invalid. He also argues that the trial court would have excluded the evidence based on MRE 404(b) if trial counsel had objected. We disagree. The trial court would have denied any motion for the evidence's exclusion based on the warrant's staleness. The evidence seized was not the type to be transferred or otherwise disposed of, and the issuing court could reasonably assume that defendant maintained control over the house from the time the articles were displayed to the time the warrant was obtained. Therefore, the issuing judge had a "substantial basis" for believing that the evidence was located at the house. *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992).

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

Regarding defendant's other-acts argument, the evidence and its location were relevant to the prosecutor's theory that defendant showed these items to the victim to groom her for later assaults. The items were not introduced to show defendant's character, but rather to provide the jury with a complete picture of the circumstances surrounding the assaults. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Therefore, the trial court would have denied any objection based on MRE 404(b). *Id*. Trial counsel was not ineffective for failing to bring a meritless motion to exclude this evidence. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also argues that trial counsel was ineffective for his failure to raise objections to defendant's sentencing scores under offense variable (OV) 11 and 13. We disagree. These scores were supported by evidence introduced at defendant's trials and accurately accumulated in the pre-sentence investigation report (PSIR). Supporting the OV 11 score, the PSIR explained that defendant committed two sexual penetrations of the victim at the house in St. Joseph County, so a score of 25 points was appropriate for the one penetration scored. MCL 777.41. Furthermore, the trial court did not need to count this scored penetration to find three other patterned felonies against a person. MCL 777.43. The evidence supported a finding that defendant committed multiple felonies in Cass County *and* in St. Joseph County, all involving this victim. Therefore, any objection by counsel would have been meritless and futile. *Snider*, *supra*.

Next, defendant argues that the verdict was against the great weight of the evidence regarding whether the alleged acts occurred and whether they occurred before the victim's thirteenth birthday. We disagree. Here, evidence from some of the witnesses suggested that defendant committed the crimes charged and committed them before the victim turned thirteen. Other witnesses insisted that the second event must have transpired, if at all, after the victim's thirteenth birthday. Of course, defendant denied any wrongdoing. Therefore, this case boiled down to a credibility contest, and we will not usurp the jury's role of deciding the victor. *People v Brown*, 165 Mich App 376, 380; 418 NW2d 470 (1987).

Next, defendant argues that the trial court abused its discretion when it denied his motion for new trial based on newly discovered evidence. We disagree. Newly discovered evidence that does not relate to a defendant's guilt or innocence, but merely attacks the character and credibility of a prosecution witness, is not sufficient to warrant a new trial. *People v Snell*, 118 Mich App 750, 767; 325 NW2d 563 (1982). In the present case defendant attempted to bring forth a recent, allegedly false, accusation by the victim that her biological father also sexually molested her. Because the new evidence related only to the victim's credibility, the trial court did not abuse its discretion when it denied defendant's motion for a new trial. *Id*.

Next, defendant argues that the prosecution violated his due process rights because it never provided defendant with information regarding prior allegations the victim made against another adult. We disagree. The record demonstrates that defense counsel knew of the prior allegations but did not wish to use the evidence because of its questionable value. Therefore, the prosecution did not violate defendant's right to due process. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

Next, defendant argues that the cumulative effect of errors denied him a fair trial. We disagree. Without a showing of some substantive error, we will not reverse on this basis. *People*

v Mayhew, 236 Mich App 112, 128; 600 NW2d 370 (2000). Defendant does not demonstrate any error in this case, so he is not entitled to reversal.

Defendant's final argument is that the trial court abused its discretion in scoring 15 points for OV 8. We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will affirm a score that has any evidentiary support. *Id*. A trial court should score 15 points for this variable if the victim "was asported to another place of greater danger or to a situation of greater danger . . . ." MCL 777.38(1)(a). The evidence showed that defendant took the victim to a house located in a different county than where they resided. He then took her to an upstairs bedroom in the house, leaving his own young daughter downstairs. This evidence supported the score. See *People v Hack*, 219 Mich App 299, 313; 556 NW2d 187 (1996).

Affirmed.

/s/ Hilda R. Gage
/s/ Peter D. O'Connell
/s/ Brian K. Zahra