STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 30, 2008
v	No. 282750 Montmorency Circuit Court
JOHN MICHAEL DUKE, Defendant-Appellant.	LC No. 05-001234-FC

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

After a bench trial, the trial court convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim younger than 13). The trial court sentenced defendant to three to fifteen years' imprisonment. Defendant appeals by leave granted. We affirm, and decide this case without oral argument pursuant to MCR 7.214(E).

The victim testified that in February 2005, when he had reached 11 years of age, he spent a weekend with defendant in his Lewiston cabin.[1] The victim recounted that on the evening of February 26, 2005, defendant "persistently request[ed]" that the victim lay on defendant's bed and permit defendant to "give [the victim] a back rub." According to the victim, after he removed his T-shirt and laid down on defendant's bed, defendant began rubbing the victim's back, but at some point removed the victim's sweatpants and underwear and placed the victim's penis in his mouth for several minutes. The victim believed defendant had undressed and requested that he touch defendant's penis, but the victim declined.

At some point during that weekend, the victim gave defendant a friendship bracelet. The victim testified that on the return drive home, defendant urged him not to "tell or speak to anyone on this incident, and . . . [that] it would ruin his life." Shortly after arriving home, however, the victim advised his mother what had occurred. The victim subsequently offered a videotaped statement concerning the incident. On April 24, 2005, the victim placed a phone call to defendant that the police tape-recorded, during which defendant repeatedly expressed regret and

[1] Defendant had worked with the victim's mother for several years, but the victim recalled knowing defendant only for about a week before the weekend trip, commencing when defendant had offered the victim's family a dog, which they soon thereafter returned to defendant.

made several inculpatory statements; the prosecutor played the audiotape at trial. Defendant averred at trial that he may have touched the victim's penis in play, but he denied either touching the victim's genitals for his own gratification or placing his mouth on the victim's penis.

Defendant contends that the trial court should have granted his motion for a new trial on the basis that his counsel was ineffective in several respects. "Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact." *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). This Court reviews for clear error a trial court's findings of fact, but reviews de novo questions of law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

When reviewing a claim of ineffective assistance, this Court presumes that counsel provided effective assistance, "and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and the existence of a reasonable probability that the deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). With respect to the prejudice prong of the analysis, the defendant must "demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *Rodgers*, *supra* at 714 (emphasis in original).

Defendant first maintains that his trial counsel failed to adequately impeach the victim. Specifically, defendant complains that counsel should have highlighted the victim's purportedly inaccurate statements during the videotaped interview at an advocacy center two days after the incident that he had rubbed defendant's back, but stopped because his back was rough and hairy, and that defendant bore a scar on his upper chest that he received while serving in Vietnam. But the trial court record does not contain the videotaped interview during which these alleged discrepancies occurred, even though defendant and his appellate counsel had the opportunity at the new trial motion hearing to supply or at least offer the trial court a copy. Because defendant failed to present the videotape, and thus "failed to establish a necessary factual predicate of this part of his ineffective assistance of counsel claim," this portion of his claim must fail. *Carbin*, *supra* at 601.

Furthermore, our review of the record reflects, and defendant concedes, that defense counsel did seek to challenge the victim's credibility by questioning him concerning two portions of his videotaped statement that did not match his trial testimony: the victim's initial statement that he gave defendant a friendship bracelet the day after defendant had placed his mouth on the victim's penis, and the victim's prior statement that defendant touched the victim's penis before placing it in his mouth. Defense counsel additionally cross-examined the victim at length concerning his specific recollections of events over the course of the remainder of his February 2005 weekend with defendant and his previously positive relationship with defendant. To the extent that defendant insists on appeal that his counsel should have admitted the entire videotaped interview of the victim because the "tape is ripe with opportunities to impeach the victim," we reject this suggestion as unfounded given his failure to ensure the videotape's inclusion in the record. *Carbin*, *supra* at 601.

Defendant next asserts that his trial counsel neglected to investigate and call a witness who would have testified that the victim's father may have sexually abused him before defendant allegedly did so. At the new trial motion hearing, defendant offered an affidavit of Patti Cole, a coworker of defendant and the victim's mother, who averred that when the victim and a sibling spent a weekend with their aunt, a social worker, "[a]round 2001," on returning the children to the victim's mother the aunt "informed [her] that there are signs of abuse in both children and if [the victim's mother] does not do something about it, the [aunt] would have to report it and the children may be removed from the home." Cole's affidavit otherwise mentions the victim's frequent disciplinary problems. Defendant also presented his own affidavit alleging that Cole would have testified as her affidavit suggested. We find no ineffective assistance arising from defense counsel's failure to investigate this matter because (1) both Cole's and defendant's affidavit assertions concerning the victim's aunt's statements plainly constitute inadmissible hearsay, MRE 801(c), MRE 802, and (2) defendant's claim regarding the victim's paternal sexual abuse otherwise rests entirely on speculation, given that defendant has presented no additional evidence from which a reasonable inference arises that the victim's father abused him.[2]

Defendant submits that his trial counsel also inexplicably failed to expose two motives the victim had for fabricating testimony incriminating defendant: (1) the victim wanted to punish him because the victim felt upset about losing the dog that defendant had given the victim's family for a short while, but was later returned to defendant, and (2) the victim might have advised his mother of the purported abuse to prevent her from leaving town on February 27, 2005. Once again, defendant offers primarily speculation concerning the victim's alleged motives, as he failed to provide the trial court in support of his motion for a new trial an offer of proof concerning these two motives. Even were we to assume some deficiency in counsel's investigation or promulgation of the victim's potential motives, our review of the record reveals no risk of prejudice to defendant in light of the facts that the victim testified at trial in a consistent fashion regarding the act of sexual abuse committed by defendant; that during the tape-recorded phone conversation with the victim defendant repeatedly expressed his regret and made several admissions that he had "touched [the victim] in the private area"; and that defendant even conceded at trial that he had made contact with the victim's penis, although not in the same manner described by the victim. *Rodgers*, *supra* at 714.

Defendant lastly argues that his defense counsel was ineffective for failing to notify him of his statutory right to a polygraph examination pursuant to MCL 776.21(5). "The purpose of affording individuals accused of criminal sexual conduct a right to a polygraph exam is to provide a means by which accused individuals can demonstrate their innocence, thereby obviating the necessity of a trial." *People v Phillips*, 251 Mich App 100, 107; 649 NW2d 407 (2002), aff'd 469 Mich 390; 666 NW2d 657 (2003). As the Michigan Supreme Court explained

[2] Similarly, although defendant complains that his counsel should have investigated why in February 2005 the victim had seen a psychologist for more than two years, he once again has offered nothing beyond speculation to substantiate that his trial counsel's additional investigation in this regard would have yielded some substantial trial defense. *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007), lv gtd 480 Mich 1195 (2008).

in *Phillips*, "under the clear and unambiguous language of MCL 776.21(5), the right is lost . . . when the presumption of innocence has been displaced by a finding of guilt, i.e., when an accused is no longer 'alleged' to have committed the offense." *Id*. at 396. Defendant reasons that had counsel offered him the test, he would have consented to the test and passed it, thus avoiding a trial. Yet again, however, defendant has offered no evidence and only speculation that he would have passed the test. *Carbin, supra* at 601. Moreover, defendant has presented no authority tending to suggest that his successful completion of a polygraph exam would have divested the prosecutor's generally broad discretion to bring or pursue "any charges supported by the evidence." *People v Nichols*, 262 Mich App 408, 414; 686 NW2d 502 (2004); see also *In re Clarence W Temple & Florence A Temple Marital Trust*, 278 Mich App 122, 139; 748 NW2d 265 (2008) (observing that an appellant may not announce a position and leave it to this Court to discover and rationalize the basis for his claims).

In summary, we find no ineffective assistance of counsel.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher