STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 2010
v	No. 288514 Dickinson Circuit Court
WILLIAM CHARLES DOERS, Defendant-Appellant.	LC No. 07-003807-FC

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13), and three counts of CSC I, MCL 750.520b(1)(b) (multiple variables). The victim is defendant's adoptive daughter. Defendant was sentenced to concurrent prison terms of 15 to 30 years for each conviction. We affirm.

Defendant argues that the trial court erred by denying his motion for new trial based on the argument that an interview conducted by a Department of Human Services (DHS) worker with the victim was coercive and produced unreliable evidence, and that his trial counsel was ineffective for not challenging the coercive nature of the interview. A criminal defendant may be granted a new trial on grounds that would support reversal on appeal or because the verdict resulted in a miscarriage of justice. MCR 6.431(B); *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008).[1] A trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). An abuse of discretion occurs in this circumstance when the court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). The constitutional question of whether an attorney's ineffective assistance deprived a defendant of his Sixth Amendment[2] right to counsel is reviewed de novo.

[1] Additionally, MCL 770.1 provides that "[t]he judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs."

[2] US Const, Am VI.

People v LeBlanc, 465 Mich 575, 579; 640 NW2d 246 (2002). Because an evidentiary hearing was not conducted, our review of counsel's effectiveness is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Defendant asserts that his trial counsel erred below by focusing on the suggestibility of the victim instead of the coerciveness of the forensic interview. The stark distinction defendant is drawing between suggestibility and coerciveness does not accurately reflect trial counsel's approach. Counsel elicited a statement from the husband of defendant's natural daughter that the victim told him she was pressured by DHS into saying bad things about defendant when nothing happened. Counsel then argued to the jury that the evidence showed the victim was pressured into making her statement. However, counsel also examined the suggestiveness of the DHS caseworker's forensic interview procedure.

Significantly, the details of the victim's abuse came into evidence through her own trial testimony. The contents of the victim's statement to the DHS caseworker were not admitted and the jury did not have an opportunity to consider whether the statements were reliable. There were no allegations that the victim was coerced into testifying at trial, and the jury was able to perform its proper role to determine the credibility of her testimony after cross-examination. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

Defendant argues that *Jackson v Denno*, 378 US 368; 84 S Ct 1774; 12 L Ed 2d 908 (1964), stands for the broad proposition that all evidence submitted to the jury must be "reliable." The United States Supreme Court in *Jackson*, 378 US at 376-378, considered a New York trial procedure that allowed juries to determine whether a defendant's confession was voluntary. The Supreme Court noted that it was firmly established that the Fourteenth Amendment[3] prohibited the use of involuntary confessions because of the probable unreliability of confessions that were obtained in a coercive manner. *Id.* at 386, 393-394. Accordingly, "[a] defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." *Id.* at 380. The *Jackson* Court concluded that the procedure used there, whereby the issue of voluntariness was presented to the jury, "inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness." *Id.* at 388. However, the instant case does not consider the reliability of information contained in any confession. Indeed, defendant denied the charges against him, and the statement he contested was the victim's. The constitutional protections applicable to the introduction of a defendant's confession do not apply to a victim's story of the crime. In sum, the record does not support a finding of a miscarriage of justice warranting reversal for a new trial.

Alternatively, defendant argues that he was denied his right to effective assistance of trial counsel. Defense counsel's duty is to prepare, investigate, and present all possible defenses. *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007), rev'd on other grounds 482 Mich 1156 (2008). Counsel's failure to call witnesses can constitute ineffective assistance when

[3] US Const, Am XIV.

it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *Id*. The effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578.

Again, it is significant that the details of the abuse were offered through the victim's trial testimony. There are no allegations that she was coerced into testifying at trial or perjured herself. Defendant cites *People v Grant*, 470 Mich 477, 491; 684 NW2d 686 (2004), wherein our Supreme Court found that trial counsel's assistance was ineffective because counsel failed to prepare himself, and failed to appreciate his client's predicament. In *Grant*, defense counsel presented a credibility defense, but failed to present the jury with evidence of an alternative hypothesis about one of the victim's injuries because of counsel's failure to conduct a more thorough investigation. *Id.* at 486, 491-492. In the current case defendant alleges that trial counsel's failure to raise the issue of coercion similarly deprived him of the ability to present an alternative explanation that would have best refuted the charges brought. However, unlike counsel in *Grant*, trial counsel in the instant case did not did fail to pursue an alternative explanation, i.e., that the allegations were false. Rather, counsel chose a manner of approaching this explanation that defendant now argues was misguided. That the chosen manner in approaching this alternative explanation "ultimately failed does not constitute ineffective assistance of counsel," *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001), nor does it mean that defendant was denied a substantial defense, *Hyland*, 212 Mich App at 710. Defendant has thus failed to show that counsel's performance was deficient, that counsel's deficient performance prejudiced the defense, or that the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

We do agree with defendant that the court erred by admitting testimony by the doctor that performed a successful sterilization vasectomy on defendant in 1981. The purpose of the patient-physician privilege is to protect the doctor-patient relationship and ensure that communications between the two are confidential. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 470; 608 NW2d 823 (2000). Because privilege statutes may inhibit the search for truth by shielding potentially reliable evidence in effort to protect relationships, privileges are not easily found or endorsed by the courts. *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994). Nonetheless, the statutory physician-patient privilege is to be narrowly construed, and its exceptions are to be applied broadly. *In re Brock*, 442 Mich 101, 119; 499 NW2d 752 (1993).

The privilege in issue is found in MCL 600.2157, which provides in relevant part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon. . . .

The statute broadly and clearly forbids physicians from disclosing "any information" acquired under the described circumstances. *Baker*, 239 Mich App at 475. The statute controls the scope of the privilege, and only the patient can waive it. *Id.* at 470.

The prosecution sought to admit evidence of defendant's vasectomy, arguing that it was necessary in order to understand the DNA evidence[4] and to explain to the jury how the victim did not get pregnant. The prosecution argued that *People v Johnson*, 111 Mich App 383; 314 NW2d 631 (1981), was controlling. In *Johnson*, the trial court permitted testimony by a doctor who treated the defendant "for a cough and headaches." *Id.* at 385. The defendant had asked the doctor to prescribe a controlled substance, and the doctor provided a prescription for 15 tablets. *Id.* at 385-386. When presented at a pharmacy, the prescription read 45 tablets. *Id.* at 386. This Court found admissible the testimony of the doctor to show that a prescription was altered because the physician who issued it was the only one who could verify the prescription. *Id.* 388-389. The *Johnson* Court reasoned that the privilege should give way in that case because "defendant's request . . . was made in furtherance of a criminal purpose." *Id.* at 391. The Court emphasized the "demonstrably relevant" nature of the testimony:

> [W]here the evidence sought is "demonstrably relevant" to the case at issue, a generalized claim of privilege must yield to the specific need for evidence. As mentioned above, crimes of this nature are difficult to prove at best, and, in the case at bar, [the doctor's] testimony regarding the . . . prescription is "demonstrably relevant" to the case at issue. [*Id.* at 389 (internal citation omitted).]

In the instant case, the trial court concluded that the purposes for which the prosecution wished to use the evidence were "a demonstrably relevant purpose for which the privilege should yield on those issues."

In *People v Childs*, 243 Mich App 360, 363; 622 NW2d 90 (2000), this Court considered the prosecutor's request to admit evidence of the defendant's blood alcohol level to prove defendant was intoxicated while not attending to the stove that caused a fatal fire, despite defendant's assertion of the physician-patient privilege. The prosecutor argued, based on *Johnson*, that the privilege should not apply because the prosecutor's need for specific evidence in a criminal proceeding should defeat the privilege. *Id.* at 368. The *Childs* Court distinguished *Johnson*:

> First, we believe that *Johnson* is distinguishable from the present case. In *Johnson*, the physician's testimony regarding the number of tablets initially prescribed was absolutely essential to the prosecution. As this Court stated, "[t]he prescription could only be verified by the physician who issued it. Without the doctor's testimony, convictions for forgeries of prescriptions would be well-nigh impossible." In the present case, the prosecutor argues that the blood test results are similarly essential to the case against defendant. We disagree. Blood test results are not the sole means of proving intoxication, and manslaughter convictions are not precluded by the exclusion of such evidence. Presumably, the prosecutor could introduce the testimony of various witnesses who observed

[4] Two state police forensic scientists testified that seminal fluid found on the victim's bed sheets was consistent with that of a male who had a vasectomy.

> defendant consume alcohol on the night in question, if in fact that occurred. Because the need for this specific evidence is not as compelling as the need for specific evidence found in the *Johnson* case, we believe that holding is distinguishable. [*Id.* at 371-372 (citation omitted).]

The *Childs* Court declared that it would clearly be inconsistent with the Legislature's intent, as expressed in the statutes, for the Court to create a broad exception to the statutory privilege that was applicable in all criminal cases. *Id.* at 373-374.

Here, like *Childs*, it was possible for the prosecution to demonstrate that defendant had a vasectomy without the doctor's testimony. Indeed, there were two other witnesses that did testify that defendant told them he had a vasectomy, and the victim herself testified that defendant told her she could not get pregnant because he had had a surgery. Accordingly, the trial court erred by relying on *Johnson*, and abused its discretion by admitting the evidence.

However, this error does not require reversal because it was harmless beyond a reasonable doubt. "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of . . . the improper admission or rejection of evidence . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MCL 769.26; see also *People v Young*, 472 Mich 130, 141; 693 NW2d 801 (2005). A defendant on appeal must demonstrate that an error was not harmless by persuading the reviewing court that it is more probable than not that the error affected the outcome of the proceedings and undermined the reliability of the verdict. *Young*, 472 Mich at 141-142.

Here, the jury was presented with the testimony of the victim, her family members, and professionals involved with the victim, as well as serology and DNA evidence. Understanding the import of this evidence was not dependant on knowledge that defendant had a vasectomy. Further, the vasectomy evidence was properly admitted through other testimony. Thus, this error does not require reversal.

Defendant also argues that the prosecution issued an illegal discovery subpoena to obtain his doctor's medical records. MCR 6.201(C)(1) states, "Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in subrule (2)." Subrule (2) provides a procedure by which a defendant may seek to have a court conduct an in camera review of protected records in order to determine if they contain evidence "necessary to the defense." MCR 6.201(C)(2). That circumstance does not apply in the case at hand. For the reasons set forth above, the privileged evidence was protected from disclosure. Again, however, this error was not outcome-determinative and does not require reversal.

Defendant next argues that the court erred by allowing the prosecution to amend the felony information to comport with the evidence adduced. We disagree. *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001), provides:

> An information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as a defendant is not prejudiced by the amendment and the amendment does not charge a new crime. [Accord *People v Stacey Jones*, 252 Mich App 1, 4-5; 650 NW2d 717 (2002).]

The defendant's right to receive a preliminary examination is possibly violated if the amendment charged a new crime. *Id.* at 5.

The prosecution initially filed a complaint alleging seven counts of CSC I: two of the counts charged, one digital and one penile penetration, occurring when the victim was under 13, and five counts of penile penetration, occurring when the victim was between the ages of 13 and 16. The district court bound over defendant on five counts: digital penetration in the bedroom when the victim was under 13 (Count I), penile penetration in the bedroom when the victim was under 13 (Count II), penile penetration in the bedroom when the victim was between 14 and 16 (Count III), penile penetration in defendant's truck when the victim was between 14 and 16 (Count IV), and penile penetration in the basement when the victim was between 14 and 16 (Count V). Defendant was not bound over on alleged assaults occurring in the garage and living room because the court could not identify a specific time from the victim's testimony. The information did not specify where the offenses occurred.

After jury selection defendant argued that due to the non-specific nature of the information and the notice of intent to introduce other acts evidence, he did not have notice of which specific instances of alleged sexual abuse were being charged and which were being testified to as other acts evidence. The court noted that while the information had been filed for quite awhile and that it had denied a previous motion to quash the information, it would require the prosecution to specify the particular charges as the trial proceeded.

Late in the trial, the prosecution specified the charges against defendant in a proposed verdict form describing Count I as digital penetration in Cynthia's bedroom while she was under 13, Count II as penile penetration in the basement while she was under 13, Count III as penile penetration in the living room while she was between 13 and 16, Count IV as penile penetration in Cynthia's bedroom while she was between 13 and 16, and Count V as penile penetration in the garage while she was between 13 and 16. In defendant's motion for a directed verdict, he pointed out that the district court had refused to bind over counts charging penetration in the garage and living room, and that Count II had changed from the bedroom to the basement. The trial court concluded that the prosecution was "permitted to make the allegations as to each count as they have been made in the proposed verdict form."

Defendant cites *People v Raymond Jones*, 483 Mich 899; 761 NW2d 97 (2009), where our Supreme Court remanded the case to the Court of Appeals for consideration of whether a midtrial amendment of the information entitled defendant to a new trial. However, on remand, the Court of Appeals concluded that the defendant had not demonstrated he was unfairly surprised or prejudiced by the amendment.

The prosecution urges that the instant case is similar to *People v Stricklin*, 162 Mich App 623, 632-634; 413 NW2d 457 (1987), where the Court found that defendant was not prejudiced by the trial court's amendment of the information to change a CSC I count from attempted

vaginal and anal penetration to oral sex. The Court reasoned that defendant was not prejudiced because he was not convicted of a new crime, but just a different form of CSC I than the one with which he was charged, and that the amendment would not have changed the way the charges were defended. *Id*. at 633-634. Similarly, here defendant was aware of the locations and manner of the victim's allegations against him from her previous testimony in a companion trial, a motion to admit other acts evidence in defendant's trial, and from preliminary examination testimony. See *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005). That the victim clarified the time frames and locations where and when the abuse occurred during her trial testimony was not a surprise to defendant, and defendant was able to attack this testimony by highlighting inconsistencies in the victim's recollections and by questioning her motive for reporting the abuse after years of not reporting it. Additionally, as the trial court noted in denying defendant's motion for a new trial, there was no evidence presented to demonstrate that this defense would have been different had the information been amended before trial.

Finally, we reject defendant's argument that evidence of uncharged sexual acts was erroneously admitted in violation to his due process right to a fair trial. MCL 768.27a(1) provides that "[n]otwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." The evidence to which defendant objected related to the commission of other sexual offenses against a minor. When a defendant is accused of a sexual offense against a minor such evidence is admissible. MCL 768.27a(1); *People v Dobek*, 274 Mich App 58, 88 n 16; 732 NW2d 546 (2007). The purpose of the statute is to broaden the range of evidence admissible in such cases. *People v Smith*, 282 Mich App 191, 204; 772 NW2d 448 (2009).

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio