STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 22, 2011
v	No. 298183 Washtenaw Circuit Court
DWIGHT ERVIN TAYLOR, Defendant-Appellant.	LC No. 08-001947-FC

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendant, Dwight Ervin Taylor, appeals as of right his jury trial conviction of first-degree criminal sexual conduct (CSC 1), MCL 750.520b(1)(a) (sexual penetration with a person under 13 years of age). Consistent with MCL 750.520b(2)(b), which requires a minimum sentence of 25 years for a CSC 1 conviction involving a victim under the age of 13 and a perpetrator aged 17 or older, defendant was sentenced to 25 to 50 years' imprisonment. We affirm.

The jury convicted defendant of CSC 1 on the basis of a sexual assault against his ten-year-old daughter in the spring of 2008. The victim testified that defendant called her into his bedroom and told her to place a pillow over her face. Defendant indicated that he was going to check her vagina to see if she had been sexually active, given that he allegedly found a second sexually explicit note that talked about a boy.[1] The victim testified that she heard the sound of what she believed was a condom wrapper being opened and then heard defendant remove his pants. The victim testified that she felt defendant trying to penetrate her vagina with his penis and that it hurt. The defendant stopped the sexual assault when the victim told him that it hurt. The victim went downstairs, and after questioning from her two brothers, told them that "daddy tried to rape me." A few months later, the victim told her biological mother, who lived in

[1] The victim testified that one day earlier, defendant had found a sexually explicit note about a boy and defendant examined her to see if she had been sexually active. The victim admitted that this note did exist, but it was written by friends who were simply joking around. The victim denied that there was a second note found by defendant on the day of the sexual assault, as no such note existed.

Baltimore, Maryland, about the sexual assault. The victim's mother reported the incident to the police.

On appeal, defendant argues that defense counsel was ineffective for several reasons. Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and law, which matters are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the basic principles governing a claim of ineffective assistance of counsel, stating:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Additionally, we will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). In evaluating whether counsel's performance was deficient, we must determine whether counsel's representation fell below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

First, defendant argues that defense counsel should have objected to several portions of Detective Craig Raisanen's testimony because the detective impermissibly provided his opinion that the victim was credible and that defendant was guilty. A witness may not offer an opinion concerning the credibility of another witness because matters of credibility must be determined by the jury. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Similarly, witnesses may not voice an opinion or comment on the guilt or innocence of the defendant. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985); *People v Drossart*, 99 Mich App 66, 79; 297 NW2d 863 (1980). We find that much of the challenged testimony elicited by the prosecutor was simply aimed at explaining the steps in and the direction of the investigation leading up to the filing of the CSC 1 charge against defendant. See *People v Bennett*, __ Mich App __; __ NW2d __, issued November 2, 2010 (Docket Nos. 286960 and 287768), slip op at 6 ("the prosecutor's line of questioning . . . merely provided a context for the jury of the officer's

investigation and how it eventually led to defendants"). Moreover, assuming that counsel's performance was deficient for failure to object, defendant has not established the requisite prejudice; the challenged testimony was harmless. We find that there is not a reasonable probability that the result of the proceedings would have been different but for defense counsel's failure to object to the detective's testimony. The victim testified specifically and consistently about the sexual assault. In addition, there was evidence that the victim's two brothers both indicated that the victim was upset after the assault and told them that defendant "raped" her. We fail to see how defendant was prejudiced by the detective's comments, given the likelihood that a reasonable juror would probably already suspect that the detective testifying for the state against defendant believed him to be guilty and the victim to be credible, even absent an actual expression of those opinions. Reversal is unwarranted.

Defendant next argues that defense counsel was ineffective because counsel failed to adequately cross-examine the detective. Defendant specifically contends that defense counsel should not have emphasized the steps taken in the detective's investigation and that defense counsel should have questioned the detective regarding the victim's statements about penetration differently. Defense counsel's decision regarding how to question witnesses is presumed to be sound trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defendant has not demonstrated that defense counsel's cross-examination strategy fell below an objective standard of reasonableness, nor has defendant overcome the strong presumption that counsel's performance constituted sound trial strategy.

Defendant also argues that defense counsel was ineffective for questioning witnesses about the fact that defendant's former spouse accused him of sexual assault in the past. Additionally, defendant maintains that defense counsel was ineffective for questioning defendant about his former spouse's past allegations of child abuse against him because that line of questioning opened the door to evidence of defendant's conviction for third-degree child abuse in 1996. However, it is clear that defense counsel's trial strategy was to portray defendant's former spouse as the kind of person who used the police and prosecutor's office against defendant. Defendant's claim during trial was that his former spouse coached the victim and convinced her to lie about the alleged sexual assault. Thus, defense counsel's decision to expose previous actions by defendant's spouse to use the police against defendant was legitimate trial strategy. Again, defense counsel's decision regarding how to question witnesses is presumed to be sound trial strategy. "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). We find that defendant has not demonstrated that defense counsel's performance fell below an objective standard of reasonableness.

Defendant also argues that two of the trial court's evidentiary rulings constituted error entitling him to a new trial. A trial court's evidentiary decisions are reviewed for an abuse of discretion; however, whether a statute or rule of evidence precludes the admissibility of evidence is a preliminary question of law subject to de novo review. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). Defendant first appears to argue that the trial court impermissibly allowed the detective to testify that the victim's story remained unchanged from her forensic interview, through the preliminary examination, and to her testimony at trial. However, the argument is not

clearly made, is undeveloped, lacks supporting citation and legal analysis, and there is no discussion of MRE 801(d)(1)(B), which concerns the introduction of prior consistent statements where there is a charge of fabrication or improper influence or motive. Accordingly, reversal is unwarranted. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) (an appellant cannot leave it to this Court to discover and rationalize the basis for his claims, to unravel and elaborate for appellant his arguments, or to search for supporting authority).

Second, defendant argues that the trial court erred when it permitted the victim's brother to testify that he believed defendant was lying when he stated that the victim was not sexually assaulted. Any error in the admission of evidence is not grounds for reversal unless the error resulted in a miscarriage of justice, i.e., there was prejudice, in that, it is more probable than not that a different outcome would have resulted but for the error. MCL 769.26; *Lukity*, 460 Mich at 495. Assuming error in this case, the testimony was not outcome determinative, where the witness also testified that even though he believed defendant was lying at the time, he currently believed defendant was being truthful and that the victim lied about being sexually assaulted. Defendant is not entitled to any relief.

Defendant next argues that there was insufficient evidence to support the CSC 1 conviction because there was no evidence of sexual penetration. We review de novo claims of insufficient evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant was convicted of CSC 1 pursuant to MCL 750.520b(1)(a), which requires proof of sexual penetration with a person who is under 13 years of age. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). Defendant does not dispute that the victim was under 13 years of age at the time of the alleged offense, but argues that there was not sufficient evidence of sexual penetration. "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r).

In this case, the victim testified that she "felt [defendant's] private part touch [her] private part." She further stated that, although she first felt nothing, her vagina then began to hurt. The victim responded affirmatively when the prosecutor asked, "When you felt that sensation that you talk about in your private part are we talking about in your vagina?" She testified, "I think he was trying to rape me." The victim additionally indicated that defendant was attempting to put his penis in her vagina, but it was not going in "[a]nd that hurt." The victim testified that defendant stopped trying to put his penis in her vagina after she told him that it hurt. The

testimony of the victim alone is sufficient evidence to support a CSC 1 conviction. MCL 750.520h (victim's testimony "need not be corroborated in prosecutions under sections 520b to 520g"). The fact that the victim did not specifically testify that defendant's penis actually entered her vagina does not demonstrate that penetration failed to occur. The statute recognizes any penetration of the genital opening, "however slight." MCL 750.520a(r). Because circumstantial evidence and the reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime, a reasonable jury could have found that defendant penetrated the victim's genital opening based on the victim's testimony that defendant tried to put his penis in her vagina and that it hurt. Defendant mistakenly makes much of the fact that the victim occasionally spoke in terms of defendant trying or attempting to penetrate her vagina or rape her, as if such testimony meant that there was no intrusion or penetration. It is evident that the victim was simply communicating that there was not full and complete penetration, especially considering her testimony that it hurt, which would clearly reflect that there was at least some intrusion or penetration, however slight. Thus, when viewed in the light most favorable to the prosecution, there was sufficient evidence of penetration.

Next, defendant argues that the jury was improperly instructed regarding the requirement that it unanimously agree regarding the facts surrounding his conviction and more particularly on the *specific* act that constituted penetration. In *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007), this Court stated:

> Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her. The trial court's role is to clearly present the case to the jury and to instruct it on the applicable law. Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence. Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury. [Citations omitted.]

The trial court instructed the jury that in order to convict defendant it must find that defendant "engaged in a sexual act that involved entry into [the victim's] genital opening by defendant's penis. Any entry no matter how slight is enough." During deliberations, the jury sent a note asking whether it could "consider a hand, finger or object in the same way as the term penis. The jury also sent a note that asked: "Can we obtain a copy of the Michigan statute which covers the crime the defendant is accused of[?]" The trial court gave the jury a general unanimity instruction before it began deliberations, and after the jury's two notes were conveyed, the trial court provided this additional instruction to the jury:

> Jurors[,] the Michigan statute that is applicable is a person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and that other person is under thirteen years of age. Sexual penetration means sexual intercourse, cunnilingus, fellatio, anal intercourse or any other intrusion however slight of any part of a person's body or

> of any object into the genital or anal openings of another person's body but emission of semen is not required. Before you can find that there has been sexual penetration all twelve of you must unanimous [sic] agree on that intrusion.

A defendant is entitled to a unanimous verdict, and a trial court has a duty to provide a specific unanimity instruction if the state offers evidence of alternative acts allegedly committed by the defendant and "(1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or (2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006). We find that the trial court's instructions adequately protected defendant's rights. The state did not offer evidence or arguments regarding alternative acts of sexual penetration. The prosecution presented evidence regarding only one instance of penetration. The trial court gave the jury the definition of sexual penetration, and it then explained that before the jury could find that sexual penetration had occurred, it had to unanimously "agree on that intrusion." In light of the fact that sexual penetration is defined as any "intrusion" into the genital opening of another person's body, the trial court's instruction that the jury must agree on "*that* intrusion" adequately explained to the jury that it must agree on what specific body part or thing, be it a finger, penis, or other object, was inserted into the victim's vaginal opening. In other words, the jurors were instructed that they had to be unanimous regarding the specific act of intrusion. Reversal is unwarranted.

Defendant next argues that the trial court abused its discretion when it denied his motion for a new trial based on the fact that the victim recanted her testimony after defendant was sentenced. We review a trial court's ruling on a motion for a new trial for an abuse of discretion. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *Id.* Underlying factual findings are reviewed for clear error, which occurs if this Court if left with a definite and firm belief that a mistake had been made. *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). In order for the trial court to properly grant a new trial on the basis of newly discovered evidence, a defendant must establish the following:

> (1) [T]he evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (quotations omitted).]

"[W]here newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy." *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). Indeed, "[t]here is no form of proof so unreliable as recanting testimony." *Id.*, quoting *People v Van Den Dreissche*, 233 Mich 38, 46; 206 NW 339 (1925), quoting *People v Shilitano*, 218 NY 161, 170; 112 NE 733 (1916) (internal quotations omitted). "Michigan courts have expressed reluctance to grant new trials on the basis of recanting testimony." *Canter*, 197 Mich App at 560. This Court must give due regard to "the trial court's superior opportunity to appraise the credibility of [a] recanting witness and other trial witnesses." *Id.*

The trial court acknowledged that the first three factors set forth in *Cress* were satisfied and that the only issue was whether a different result was probable on retrial in light of the new evidence. The trial court found the recanted testimony to be unbelievable, and it found that the victim's testimony at trial was more credible. The trial court found the victim's testimony during trial credible because the victim was aggressively cross-examined and was not hesitant while testifying, and there was nothing in her demeanor that suggested she was uncertain about her testimony. Additionally, the trial court noted that the victim's story about the sexual assault was consistent throughout the proceedings leading up to the trial and during the trial. The trial court found the victim's recantation lacked credibility for numerous reasons. First, the timing was suspicious because the victim recanted only after learning of defendant's sentence and pressure from her family. The trial court also found that the victim had a motive to recant because she no longer wished to live with her biological mother. We note the following transcribed statement made by the victim to the interviewing officer:

> Well, I told her [victim's sister] that um. She was telling me that she was crying and she was all upset [about defendant's sentence]. And then I was, I felt like real bad. So I was just like. I was like well, we gonna have to get him out some kind of way. And she was like, we're not gonna be able to get him out unless, um unless you were lying or something. Like if you said that you were lying that's the only way he gonna be able to get out of jail.

We find that the trial court's denial of defendant's motion for a new trial was not an abuse of discretion.

Lastly, defendant argues that the statutorily imposed 25-year mandatory minimum sentence constitutes cruel or unusual punishment in violation of the Michigan and United States Constitutions. We review constitutional questions de novo. *LeBlanc*, 465 Mich at 579. The United States Constitution prohibits "cruel and unusual" punishment, US Const, Am VIII, and the Michigan Constitution prohibits "cruel or unusual" punishment, Const 1963, art 1, § 16. The Michigan Constitution's prohibition against cruel or unusual punishment is more broadly interpreted than the federal prohibition. *People v Bullock*, 440 Mich 15, 30-35; 485 NW2d 866 (1992). Legislatively mandated sentences are presumed to be proportional and valid. *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991). Further, [s]tatutes are presumed to be constitutional, and this Court must construe them as being constitutional absent a clear showing of unconstitutionality." *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996). CSC 1 is generally punishable by imprisonment for life or any term of years. MCL 750.520b(2)(a). However, the statute provides that in cases where the defendant is 17 years of age or older and the victim is under the age of 13, the offense is punishable "by imprisonment for life or for any term of years, but not less than 25 years." MCL 750.520b(2)(b). In order to assess whether a punishment is cruel or unusual, we consider the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties for other crimes in this state and the penalty for the same offense in other states, and the goal of rehabilitation. *People v Dipiazza*, 286 Mich App 137, 153-154; 778 NW2d 264 (2009).

We find that defendant's mandatory minimum sentence is not cruel or unusual. First, CSC 1 is a grave offense, and the circumstances of defendant's conduct carry sufficient gravity to justify a 25-year minimum sentence. Sexual penetration of not just a minor but a child under

the age of 13 is a horrific crime that will likely scar a young victim emotionally and psychologically for a lifetime. Here, we are also addressing a CSC 1 conviction involving defendant's own child. The violation of the parent-child relationship by way of a CSC 1 offense is clearly one of the worst acts an individual can commit. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 662-663; 620 NW2d 19 (2000) ("defendant's rape of his own minor child represents one of the most egregious forms of the crime of first-degree criminal sexual conduct because of the helplessness and harm to the victim when so abused by a parent[;] . . . it represents an act that has been historically viewed by society . . . as one of the worst types of sexual assault"). Further, while defendant's sentence is fairly harsh, we note the following life offenses in Michigan: counterfeiting, MCL 750.260, assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, carjacking, MCL 750.529a, serious drug offenses, MCL 333.7401(2)(a)(i), torture, MCL 750.85, and second-degree murder, MCL 750.317. Additionally, Michigan is not the only state to impose a mandatory minimum sentence of 25 years' imprisonment for CSC 1 involving children. See, e.g., Utah Code Ann 76-5-402.3; Ark Code Ann 5-14-103(c)(2); Ohio Rev Code Ann 2971.03(A)(3)(d)(i); Cal Penal Code 288.7(a); Conn Gen Stat 53a-70c(b); Del Code Ann, tit 11, § 4205A(a)(2); and Fla Stat 775.082(3)(a)(4a)(II). Finally, defendant's sentence is not contrary to the goal of rehabilitation because the possibility of re-entry into society is still available to defendant. Therefore, we find that defendant's statutorily-mandated minimum sentence does not constitute cruel or unusual punishment.[2]

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[2] We note that our Supreme Court recently denied an application for leave to appeal in a case where the defendant raised the same constitutional challenge made by defendant here regarding whether the mandatory minimum sentence constituted cruel or unusual punishment, and where this Court rejected the argument. *People v Correa*, 488 Mich 989; 791 NW2d 285 (2010). Indeed, three Justices affirmatively and specifically found that the 25-year mandatory minimum sentence did not constitute cruel or unusual punishment. *Id.* (concurring statement by JUSTICE MARKMAN, joined by CHIEF JUSTICE YOUNG AND JUSTICE CORRIGAN).