STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 7, 2011
v ALAA A. AL-TAMIMI, Defendant-Appellant.	No. 298210 Ingham Circuit Court LC No. 09-000614-FC

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of four counts of first-degree criminal sexual conduct, MCL 750.520b(2)(b). The trial court sentenced him to concurrent terms of 25 to 37 ½ years' imprisonment. We affirm.

This case arose from allegations that defendant orally and anally penetrated, with his penis, an acquaintance, E.Z., who was four or five years old at the time. Defendant denied committing the penetrations.

Defendant argues that his attorney, Mark Kamar, rendered ineffective assistance of counsel.

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further 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. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).]

Defendant contends that Kamar should not have allowed the jury to view the otherwise inadmissible videotape of an interview of E.Z. conducted by Detective Elizabeth Reust. In an affidavit, Kamar indicated that his decision to allow the jury to view the videotape was "a major

strategic error, prompted by the court's request to show the tape."[1] Kamar also indicated that he "did not consider playing only certain portions of the video for impeachment purposes only" and that he "did not consider requesting an adjournment so that an expert in forensic interviewing techniques could evaluate the video and testify to the jury about any flaws in the interview." Kamar stated that he "had no strategic basis for this failure."

Defendant argues that "[t]he videotaped interview corroborated and buttressed E.Z.'s otherwise problematic account of abuse." Defendant particularly takes issue with E.Z.'s drawing, during the course of the videotaped interview, a scar that she saw on defendant's penis. Defendant contends that this action corroborated the photographs of the scar on defendant's penis and was far more damaging than E.Z.'s trial testimony about "something pink" being on defendant's penis.

We find no basis for reversal. Before the jury was allowed to view the videotape, the trial court had an extensive discussion with both Kamar and defendant to ascertain whether they wanted the jury to view it. Both Kamar and defendant indicated that they did. The transcript reads, in part:

> *THE COURT.* Actually, I do want to--Mr. Kamar, you have discussed with your client whether this tape should be admitted into evidence, is that correct?
>
> *MR. KAMAR.* That is correct.
>
> *THE COURT.* And, I will be clear, I've said to you, it's up to you or your client, the Court would--because it ordinarily would not be substantive evidence, but could be used, in part, for impeachment, the Court would honor your request, in terms of admitting it or not admitting it. And, that was your understanding?
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> *MR. KAMAR.* That's my understanding.
>
> *THE COURT.* And, you've discussed that with your client?
>
> *MR. KAMAR.* That is correct.
>
> *THE COURT.* And, it's his desire that the jury see this taped interview, is that correct?
>
> *MR. KAMAR.* That is correct, your Honor. We had a discussion back with the interpreter, and I guess, in a nutshell, to put it on the record, he basically

[1] The transcript does not reflect that the trial court "request[ed]" that the tape be shown. The prosecutor submitted an affidavit in which she stated that the court "advised that it was entirely Mr. Kamar's decision whether or not to admit the video interview of the child victim as evidence and indicated that [the court] was not telling [Kamar] how to proceed."

thinks to tell me if you think it's helpful we'll go ahead and get it admitted, you're the lawyer. And, I tried to explain the pros and cons to him of doing this. And, after that, he's agreed to admit it.

THE COURT. All Right. Again, let me--you are Alaa Al-Tamimi? You are Alaa Al-Tamimi?

THE DEFENDANT. Yes.

THE COURT. And, again, you understand the nature of the charges against you?

THE DEFENDANT. Yes.

THE COURT. And, there are four counts of Criminal Sexual Conduct First Degree, do you understand that?

THE DEFENDANT. Yes.

THE COURT. Do you understand that each of those counts carries a maximum imprisonment of life in prison, do you understand that?

THE DEFENDANT. Yes.

THE COURT. Okay. Now, you were here when we played this tape of the interview with [E.Z.], correct?

THE DEFENDANT. Yes.

THE COURT. You saw that, and you had a chance to watch that with Mr. Kamar, is that true?

MR. KAMAR. Your Honor, I don't believe that the interpreter was here during the portion of the interview [sic].

THE COURT. I thought he was here.

MR. KAMAR. He was, and then I think he stepped out for a minute. Yea, he thought that just because you were watching it that he didn't need to be here.

THE COURT. Oh, okay. But, I'm--but, I want the record to reflect that--so, he was here part of the time?

MR. KAMAR. That's correct.

THE COURT. Right. Okay. But, you're aware of this tape, is that correct?

THE DEFENDANT. Yes.

> *THE COURT*. And, you're aware that the Court listened to that tape?
>
> *THE DEFENDANT*. Yes.
>
> *THE COURT*. And, you've discussed with your lawyer whether or not the jury should be allowed to hear the tape, is that correct?
>
> *THE DEFENDANT*. Yes.
>
> *THE COURT*. And, after conferring with Mr. Kamar, he's indicated that you agree that the jury should be allowed to hear this tape? Do you understand that? That's what he said, do you understand that?
>
> *THE DEFENDANT*. Yes. Yes.
>
> *THE COURT*. And, is that your desire? You want the jury to hear this tape?
>
> *THE DEFENDANT*. Yes.
>
> *THE COURT*. And, that's your choice?
>
> *THE DEFENDANT*. Yes.
>
> * * *
>
> *THE COURT*. My brain's a little dead, but I want to--this may be repetitive, but Mr. Al-Tamimi, so after discussing this with Mr. Kamar you agree that this should be shown to the jury, is that correct?
>
> *THE DEFENDANT*. Yes.

Clearly, counsel chose to play the videotape as part of his trial strategy, to show the jury that E.Z. had used different terminology in recounting the incidents to Reust and had in general presented the information about the incidents differently in her statement to Reust than she had at trial. We will not second-guess trial strategy with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart*, 219 Mich App 38; 555 NW2d 715 (1996).

Defendant argues that even if counsel wanted the jury to view certain portions of the videotape for impeachment purposes, he should have allowed the jury to view only portions of the tape. However, it is speculative that the trial court would have entertained a hearing regarding redaction of the tape and then allowed only portions to be allowed into evidence. Moreover, despite counsel's later assertions in his affidavit, it appears to have been a valid strategic decision, which we will not second-guess, to allow the jury to view the entire videotape and hear all E.Z.'s statements in context. Again, the trial court held an extensive discussion with Kamar and defendant, and Kamar and defendant concluded that the jury should view the tape.

At any rate, even assuming, for purposes of argument, that counsel erred in allowing the entire videotape into evidence, we cannot find that this action affected the outcome of the proceedings and rendered them unfair or unreliable. *Rodgers*, 248 Mich App at 714. Indeed, E.Z.'s statements to Reust were largely cumulative to her testimony at trial. To the extent that E.Z.'s statements to Reust differed from her statements at trial, Kamar emphasized this during his closing arguments and also argued that E.Z. had been asked leading questions during her interview with Reust. Counsel used the videotape to make plausible arguments on behalf of his client.

Defendant argues that the information E.Z. gave during the interview about a scar on his penis was particularly damaging. However, E.Z. mentioned "something pink" on defendant's penis during her trial testimony, and, during his trial testimony, defendant admitted that he had a "pinkish white" mark on his penis. He testified that there were three incidents during which E.Z. might have accidentally seen his penis, specifically a time when she and her sister walked in on him in a bathroom, a time when he was sitting on a sofa and E.Z. and her sister laughed and told him to cover himself and he immediately put his legs down, and a time when a friend pulled down his shorts as a joke when he was at a lake with E.Z. and her family. We cannot conclude that E.Z.'s additional information about the scar during the interview with Reust affected the outcome of the case, in light of the evidence already admitted.

Reust also testified, after defendant's testimony and before the videotape evidence, that E.Z. had told her that defendant had a "pink spot" on his penis. Defendant argues that counsel should have objected to this testimony because it was inadmissible. This argument has not been properly presented for review because it was not included in the statement of questions presented for appeal. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). At any rate, Reust's testimony was cumulative to E.Z.'s and we cannot find that it affected the outcome of the proceedings or rendered them unfair or unreliable. *Rodgers*, 248 Mich App at 714.

Defendant argues that Kamar was ineffective for failing to call an expert witness to testify about the interviewing techniques of Reust and for failing to demonstrate through cross-examination that the interview was based on suggestive interviewing techniques. However, defendant provides no affidavit or other evidence by a potential expert witness to demonstrate that the interview was improper. In fact, Reust testified that that she had been specially trained to interview children and to elicit information without leading. She stated that "you want to make sure that as an interviewer [you are] not guiding the child to an assumed result." Defendant has advanced only speculation in support of his argument for an expert witness. Moreover, we note that counsel did in fact argue vigorously during closing arguments that the interview of E.Z. had been based on leading questions; we cannot conclude that any additional cross-examination would have yielded a different trial outcome.[2]

[2] Defendant argues that this case should be remanded for an evidentiary hearing regarding ineffective assistance of counsel. This Court has already denied his motion for a remand, however, and we decline to revisit that decision.

Defendant next argues that the prosecutor violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), in producing a transcript of defendant's statement to the police only on the second-to-last day of trial, after defendant had already testified. Defendant contends that the trial court should have granted a mistrial based on this alleged violation.

We review constitutional questions de novo. *People v Hrlic*, 277 Mich App 260, 262; 744 NW2d 221 (2007). We review a trial court's denial of a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

As noted in *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998):

> A criminal defendant has a due process right of access to certain information possessed by the prosecution. *Brady*, [*supra*]. This due process requirement of disclosure applies to evidence that might lead a jury to entertain a reasonable doubt about a defendant's guilt. *Giglio v United States*, 405 US 150, 154, 92 S Ct 763, 31 L Ed 2d 104 (1972). Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence "may make the difference between conviction and acquittal." *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985).
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> * * *
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> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

The trial prosecutor filed an affidavit in which she stated the following:

> 4. During the course of the trial, on March 4, 2010, I became aware from the assigned Detective that an actual transcript of Defendant's interview to law enforcement had been translated from Arabic to English. Before this date, I did not know that such a transcript existed and both Mr. Kamar and I only had a synopsis of the interview as prepared by the interviewing officer. As soon as I was able to confirm that such a document did exist, I requested said document and provided same to Mr. Kamar.
>
> 5. Mr. Kamar made a motion for a mistrial in response to the disclosure of the transcript. Judge Giddings reviewed both the transcript and the previously available synopsis and denied the motion for mistrial citing that the synopsis was a fair representation of the content of the interview. Counsel was also allowed to conduct further direct examination of his witness or recall any witnesses who previously testified to address any issues raised by the actual transcript.

Defendant contends that a *Brady* violation occurred here because "[a]lthough the trial prosecutor also received the evidence on the third day of trial, the first prosecutor on the case had previously received it via e-mail and never forwarded it to trial counsel." Defendant states that "[a]s a full transcription of Mr. Al-Tamimi denying responsibility for the assault, the statement is obviously favorable to the defense."

Defendant contends that prejudice existed and the late disclosure affected the outcome of the trial because of discrepancies between the actual interview transcript and the summary of the interview that both parties had before trial. The summary indicated that defendant "stated that [E.Z.] was very beautiful and felt that [her mother] was a bad mother [and] the type of women [sic] that was jealous of [E.Z.'s] beauty . . . ." The actual interview transcript indicates that the *interviewing officer* suggested that the mother might have been jealous of [E.Z.'s] beauty and that defendant did not respond affirmatively to the suggestion. Defendant contends that the inaccurate summary damaged him because the prosecutor questioned defendant during his trial testimony about whether he had stated to police that E.Z.'s mother was a bad mother and jealous of E.Z.'s beauty.[3] Defendant's contention is unavailing, however, because it was made clear during later police testimony that it was an officer who made this suggestion and that the interview summary had been erroneous.

The summary also indicated that defendant initially stated that it was not possible for E.Z. to have seen his penis and then changed his story when confronted with information that E.Z. knew about his scar. The prosecutor questioned defendant about this during his trial testimony, and also elicited from a police officer that defendant had initially said it was not possible that E.Z. had seen his penis. Defendant contends that, in the actual interview transcript, defendant initially stated that he did not know whether E.Z. had ever seen him naked. This is an inaccurate characterization of the transcript by defendant, however, because the transcript progresses as follows:

> *Q*. She never saw you naked?
>
> *A*. Once I was coming out of the bathroom and the door was open.
>
> *Q*. May be [sic] she saw you naked.
>
> *A*. *No, no.*
>
> *Q*. She has never seen you naked?
>
> *Q*. Has she seen your penis accidentally?
>
> *A*. I do not know. How do I know? [Emphasis added.]

[3] Defendant answered "no."

Moreover, the transcript does indeed indicate that defendant's description of occasions on which E.Z. may have seen his penis became more numerous and detailed after he was confronted with information that E.Z. knew about the scar on his penis. Contrary to defendant's argument, the available information does not demonstrate that any prejudice was incurred or that the outcome of the case was affected based on the late disclosure of the transcript.

Moreover, the late disclosure dealt with defendant's own words. As such, defendant had access to the information, and we decline to base a reversal on the late disclosure of such information. See, e.g., *People v Taylor*, 159 Mich App 468, 487-488; 406 NW2d 859 (1987) ("[i]n this case we find that defendant was entitled to no remedy for the prosecutor's nondisclosure of the letter in question since the defendant, having written it himself, had knowledge of it independent of discovery"). The trial court did not err in denying defendant's motion for a mistrial.

In a supplemental brief filed *in propria persona*, defendant states that he was denied his constitutional right to present a defense because he was not informed by the police or defense counsel of his statutory right to take a polygraph examination. MCL 776.21(5) states that "[a] defendant who allegedly has committed a crime under sections 520b to 520e and 520g of Act No. 328 of the Public Acts of 1931, shall be given a polygraph examination or lie detector test if the defendant requests it."

However, defendant has submitted no evidence indicating that he was not informed of his right to take a polygraph examination. In fact, at a bail hearing on November 25, 2009, at which defense counsel, defendant, and an interpreter were present, the prosecutor, in arguing against defendant's release on bail, stated, "It's my understanding [defendant] has rejected taking a polygraph, and the People are prepared to proceed on January 11th." Defense counsel stated, "Whether he's going to take a polygraph-- . . . [t]hat's really irrelevant." The court stated, "[i]t's irrelevant." The only available evidence indicates that defendant *was* in fact informed of his right to take a polygraph examination. Accordingly, defendant's appellate issue is without merit.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Patrick M. Meter