

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DAVID PHILLIPS,

Defendant-Appellant.

UNPUBLISHED

March 26, 2013

No. 301366

Oakland Circuit Court

LC No. 2010-230433-FC

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree criminal sexual conduct with a person under the age of thirteen, MCL 750.520b(1)(a), and two counts of first-degree criminal sexual conduct with a person who is at least thirteen but less than sixteen years old, MCL 750.520b(1)(b). The convictions arise out of defendant's year-long sexual relationship with his stepdaughter. The trial court sentenced defendant to the following concurrent prison terms: one prison term of 8 to 40 years and two prison terms of 7 to 40 years. We affirm.

I. BASIC FACTS

The prosecution presented evidence that defendant began having a sexual relationship with his stepdaughter when she was 12 years old. Witnesses testified that they repeatedly caught defendant and the victim snuggling and sleeping together on the couch. Defendant and the victim would also "sneak off" with one another for hours at a time. This conduct corresponded with a change in the victim's behavior and a decline in her scholastic performance. Defendant's wife at the time—the victim's mother—suspected foul play between the victim and defendant, but the two denied that they were engaged in anything inappropriate. At trial, however, the victim testified that defendant had in fact initiated a sexual relationship with her and that they were having sex several times a week. She did not think that she was being sexually abused at the time because she felt like she was defendant's girlfriend.

When defendant's relationship with the victim's mother soured, defendant moved out of the house. Nevertheless, defendant would sneak into the victim's bedroom at night, and they had sex a few times a week. Defendant gave the victim a cellular telephone so that they could keep in contact, which he told her to keep secret. The victim's father confronted her about her relationship with defendant, but she did not provide details and shared only that they talked a lot. The victim's mother reported her concerns to Child Protective Services.

The victim went to live with her father because her parents thought it would be best to get her out of the environment where they felt something was going on with defendant and their daughter would not talk about it. The victim's father found a cellular telephone hidden between the mattress and box springs of the victim's bed and noted that she had previously denied having a cellular telephone. The victim's father called the police because she was threatening to run away. Although she wanted to see defendant, the police and the victim's father reiterated to her that she was prohibited from seeing him. Even though the victim repeatedly denied that she was having a sexual relationship with defendant, her parents had her physically examined for signs of sexual molestation. At trial, the parties stipulated to the admission of the victim's medical records from Hurley Medical Center, which contained the following physician notation in the discharge summary: "there is no evidence on my exam of damage to her hymen. This does not disprove a sexual relationship."

The victim testified that her relationship with defendant lasted for over one year and ended after she moved in with her father. The victim first told someone about the relationship when she was in ninth grade, when she disclosed it to her boyfriend. Eventually, she told her stepmother, then her sister, and finally a detective because she wanted to rid herself of the emotional strain she had been carrying.

Among the witnesses called by the prosecution was K.M., who testified that defendant showed her pornography and sexually molested her. At the time of the molestation, K.M. was in the fifth grade, and defendant was engaged to her mother and living in their apartment.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that he is entitled to a new trial because he was denied the effective assistance of counsel. Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). We review for clear error a trial court's factual findings and de novo its constitutional determinations. *Id.* "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

Both the United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51-52; 826 NW2d 136 (2012) (citations omitted).

It is presumed that counsel provided adequate assistance. *Strickland v Washington*, 466 US 668, 690; 104 SCt 2052; 80 LEd2d (1984). "Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to 'affirmatively entertain the range of possible' reasons that counsel may have had for proceeding as he or she did." *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012), quoting *Cullen v Pinholster*, 563 US ___; 131 S Ct

1388, 1407; 179 L Ed 2d 557 (2011). “[A] reviewing court must conclude that the act or omission of the defendant's trial counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission.” *Id.* at 22-23, citing *Cullen*, 131 S Ct at 1407. Defense counsel has wide discretion in matters of trial strategy because many calculated risks may be necessary to win difficult cases; thus, this Court will not substitute its judgment for that of counsel in matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). “Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy.” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

A. FAILURE TO CALL A MEDICAL EXPERT REGARDING THE SIGNIFICANCE OF AN INTACT HYMEN

Defendant contends that his trial counsel was ineffective for failing to call an expert witness to testify regarding the significance of the fact that the victim had an “intact hymen” despite her claim that she had a significant amount of sex with defendant, an adult male. Defendant offered in support of his motion for a new trial before the trial court an unsworn letter by pediatrician Dr. Stephen R. Guertin.¹ Dr. Guertin’s letter is over four pages long and summarizes a number of studies addressing the probability of physical findings being present in instances where prepubertal and postpubertal girls have admitted to penile/vaginal intercourse or are pregnant. At the end of the letter, Dr. Guertin summarized his findings:

The bottom line is that in most studies in which confessed cases are analyzed, there is a better than 50% likelihood of injury. Most of those studies included adolescents, were of adolescents or had subpopulations of adolescents.

In summary, in the best study (in my opinion) of frequent penile/vaginal intercourse in post-pubertal girls, three quarters or more of the examinations were abnormal. This does, however, leave 20% to 25% (even in that study) of cases in which post-pubertal girls who had experienced recurrent episodes of intercourse had normal exams.[²]

¹ The record reveals that the trial court gave defendant extensive opportunities to present evidence in support of his claim that an expert witness would have provided him with a meaningful defense concerning the significance of the victim’s medical examination findings.

² In his letter, Dr. Guertin noted several factors that are relevant to the probability of there being physical findings upon examination, including the age that penile/vaginal intercourse began, whether there was intercourse involving bleeding, the frequency of intercourse, and how soon after intercourse the individual is examined.

In response, the prosecution offered a letter by Dr. Mary Smyth from Beaumont Hospital. Dr. Smyth stated that her understanding of the current medical literature indicates that “NO, the absence of genitourinary findings upon physical examination of female sexual abuse victims should not lead to” the conclusion that an “intact” hymen proves that a young woman has not been sexually abused. She maintained that “[m]any reports and textbooks contain pictures taken during the examination of abuse victims, as well as non-abused, sexually active females showing normal exams.” The trial court considered the proffered evidence, deemed it to be no more compelling than the evidence that was actually presented at trial, and denied defendant’s motion for a new trial because it did not find a reasonable probability that, but for counsel’s alleged error, the result of the proceedings would have been different.

Although defense counsel did not call an expert witness at trial regarding the likelihood of a person’s hymen remaining “intact” in the face of frequent sexual intercourse, he did argue the point repeatedly at trial. When cross-examining the victim and her mother and father, counsel questioned them about the fact that a medical examination revealed that the victim’s hymen was intact. Such finding was also admitted into evidence through the victim’s medical records. During both the opening statement and closing argument, defense counsel argued that common sense defies the victim’s credibility because it would be impossible for the victim’s hymen to be intact if she had as much sex with defendant as she asserted.

Even assuming that an expert witness would have bolstered defendant’s argument, plaintiff has not proven that counsel’s failure to call an expert was objectively unreasonable or that there is a reasonable probability that the result of the proceedings would have been different. See *Strickland*, 466 US at 687-688, 694. There might have been a legitimate strategic reason why counsel did not call an expert witness: counsel may have believed that a common-sense argument regarding injury to a child’s hymen after repeated sexual intercourse with an adult man would have a greater chance of success than leaving the hymen issue to battling experts. See *Gioglio*, 296 Mich App at 22-23; *Cullen*, 131 S Ct at 1407. Indeed, defendant’s proffered expert acknowledges that it is possible for a young woman to have a normal genitourinary examination despite sexual intercourse. Furthermore, the testimony from multiple witnesses at trial strongly supported a finding that the victim’s allegations of a sexual relationship with defendant are true. As such, defendant’s claim of ineffective assistance of counsel on this basis lacks merit.

B. STIPULATING TO THE ADMISSION OF THE VICTIM’S UNREDACTED MEDICAL RECORDS

Defendant argues that his counsel was ineffective for stipulating to the admission of the victim’s unredacted medical records from her physical examination at Hurley Medical Center. We disagree and conclude that defendant has not overcome the presumption that counsel’s action constituted sound trial strategy. See *Horn*, 279 Mich App at 39.

The medical records contain information that is favorable to the defense: a denial by the victim that defendant had an inappropriate relationship with her, a statement that the victim’s hymen was not damaged, and the lack of a definitive conclusion that defendant had a sexual relationship with the victim. Indeed, defendant concedes that “the ultimate finding of the treating physician was favorable to the defense.” Thus, counsel’s decision to stipulate to the admission of the medical records may have been a legitimate strategic decision. See *Gioglio*,

296 Mich App at 22-23; *Cullen*, 131 S Ct at 1407. Nevertheless, defendant contends that he did not have the opportunity to confront witnesses who provided what amounted to unsworn testimony in the medical records. Review of the record, however, makes clear that defense counsel had the opportunity to cross-examine any of the lay individuals who may have made hearsay statements.³ Regarding defendant's ability to cross-examine the medical providers, defendant does not present a compelling argument other than that he did not have the opportunity to cross-examine. According to the medical records, the victim's hymen did not show damage, and the conclusion was possible sexual abuse by defendant. In fact, had defendant had the opportunity to question the medical experts, the record indicates that they may well have testified that it was possible for the victim to have engaged in the amount of sexual activity she alleged and have no damage to the hymen, thus diminishing defendant's common-sense argument that it was completely unrealistic. Finally, it is not reasonably probable that the outcome of defendant's trial would have been different had counsel not stipulated to the admission of the medical records where the notations in the records that refer to comments made by lay individuals are largely cumulative of the lay witnesses' testimony at trial and the testimony of multiple witnesses provided strong evidence that defendant engaged in sexual conduct with the victim. See *Strickland*, 466 US at 694. Accordingly, defendant has not established a claim of ineffective assistance of counsel on this basis.

C. FAILURE TO OBJECT TO OTHER-ACTS EVIDENCE

Defendant argues that his trial counsel was ineffective because he did not object to the admission of K.M.'s testimony that defendant exposed her and her stepsisters to pornographic movies, touched her inappropriately, and placed a vibrator on her.

“[I]n 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.” MCL 768.27a. Even when testimony is admissible under MCL 768.27a, the trial court must still determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, MRE 403. *People v Watkins*, 491 Mich 450, 481; 818 NW2d 296 (2012). Although all relevant evidence is inherently prejudicial, it is only unfairly prejudicial evidence that should be excluded under MRE 403. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998); *People v Wilson*, 252 Mich App 390, 398; 652 NW2d 488 (2002). “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given

³ Defendant generally attacks defense counsel's decision to stipulate to the admission of the victim's medical records; he does not contend that his counsel should have stipulated to admission but sought redaction of any hearsay statements contained therein. Statements made for purposes of medical diagnosis or treatment are not considered hearsay. MRE 803(4). With respect to any entries that may have amounted to hearsay, the witnesses were, in fact, cross-examined.

undue or preemptive weight by the jury. In the context of prior bad acts, that danger is prevalent.” *Crawford*, 458 Mich at 398.

In *Watkins*, 491 Mich at 487-488, the Michigan Supreme Court addressed MRE 403 as it applies to MCL 768.27a, stating:

[W]hen applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect. That is, other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference. . . .

This does not mean, however, that other-acts evidence under MCL 768.27a may never be excluded under MRE 403 as overly prejudicial. There are several considerations that may lead a court to exclude such evidence. These considerations include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant’s and the defendant’s testimony. This list of considerations is meant to be illustrative rather than exhaustive. [Footnote omitted.]

In the present case, the evidence of sexual conduct between defendant and K.M. had significant probative value that outweighed any danger of unfair prejudice. The evidence was probative because it illustrated defendant’s propensity to commit criminal sexual conduct with young girls under his control. Evidence of defendant’s propensity to commit criminal sexual conduct can be relevant and admissible because it demonstrates defendant’s likelihood of committing criminal sexual conduct toward another victim. See *People v Mann*, 288 Mich App 114, 118; 792 NW2d 53 (2010). In addition, defendant’s prior criminal sexual conduct upon another child lent credibility to the victim’s testimony about defendant’s conduct with her. See *id.* While the evidence may have been prejudicial, the “danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself.” *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998).

Defendant argues that the acts to which K.M. testified were “highly dissimilar” from those alleged by the victim in this case and, thus, unfairly prejudicial. We disagree. In both situations, defendant initiated sexual contact with the minor daughter of the woman with whom he was in a relationship and cohabitating. While one responded to his efforts and the other ultimately rebuffed him, defendant in each case used his position of trust as the husband or fiancé of the victim’s mother to gain access to the victim and initiate sexual contact.

Because K.M.’s testimony was highly relevant and not unduly prejudicial, the trial court properly admitted the evidence under MCL 768.27a. Moreover, the trial court gave a proper limiting instruction on the use of the “other acts” evidence. As such, defendant’s trial counsel was not ineffective for failing to object because the failure to advance a “futile objection does not

constitute ineffective assistance of counsel.” *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

D. FAILURE TO OBJECT TO UNSOLICITED TESTIMONY BY THE PROSECUTION’S EXPERT WITNESS

Defendant contends that his counsel was ineffective because he did not object when the prosecution’s expert offered her opinion on the ultimate issue of whether sexual abuse occurred in this case. Catherine Connell, a child forensic interviewer for the FBI, testified as a profile expert regarding child abuse. During her redirect examination, the prosecution asked Connell to explain what it meant to be a “compliant victim.” Connell explained that compliant victims are those who become willing participants in their victimization. After she finished her explanation—which was appropriate and admissible testimony—she continued as follows:

And I think, now looking back with everything that’s happened and what, what’s happened with [the victim], I really think that’s the situation that was happening, is that she was compliant in this situation and didn’t understand what was happening. And then as she got older and realized that she really -- there was something that wasn’t right about this.

Defense counsel did not object to this opinion testimony or request a cautionary instruction.

In criminal-sexual-conduct cases, an expert may not (1) testify that the sexual abuse occurred, (2) vouch for the veracity of a victim, or (3) testify whether the defendant is guilty. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended on other grounds 450 Mich 1212 (1995). When an expert offers improper opinion testimony that a sexual assault in fact occurred, “generally effective cross-examination will prevent the jury from drawing such a conclusion; however, a limiting instruction may also be necessary and should be given on request.” *People v Beckley*, 434 Mich 691, 725; 456 NW2d 391 (1990).

In this case, Connell’s opinion testimony was clearly improper. See *Peterson*, 450 Mich at 352. However, this unsolicited, improper testimony did not deny defendant a fair trial. The testimony was brief and accounted for only a small portion of the overall testimony concerning the victim’s allegations that defendant had repeated sexual intercourse with her over the period of more than one year. Further, the prosecutor did not attempt to use the testimony in her closing argument. Although the trial court did not offer a limiting instruction, defense counsel did not request an instruction, and an instruction is not required to cure improper prejudice. See *Beckley*, 434 Mich at 725. Although defense counsel should have objected to portions of Connell’s testimony, relief is not required because defendant has not established a reasonable probability that, but for defense counsel’s error, the result of the proceeding would have been different. See *Strickland*, 466 US at 694. There was a significant amount of other evidence introduced by the prosecution that would allow a rational juror to find defendant guilty beyond a reasonable doubt of criminal sexual conduct.

E. FAILURE TO PRESENT ALIBI EVIDENCE

Finally, defendant argues that his counsel rendered ineffective assistance because he did not present alibi evidence, including the fact that defendant was in the Oakland County Jail for

much of June 2003, which is the time frame when the victim's testimony placed the first act of sexual conduct. We disagree. Defendant has neither overcome the presumption that counsel's failure to present this alibi evidence was reasonable trial strategy nor established a reasonable probability that the result of his trial would have been different had counsel presented the alibi evidence. See *id.*; *Horn*, 279 Mich App at 39. "Time is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim." *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). "Moreover, an alibi defense does not make time of the essence." *Id.* When the victim was testifying in this case, she was recalling events that happened years earlier, and her testimony regarding the first incident was that it occurred "around the time before" she turned 13. On cross examination, the victim agreed with defense counsel's assertion that "these things" started sometime in June of 2003." However, the victim did not provide specific dates in her testimony, and defendant was neither in jail the entire month of June nor away from the victim for the entire beginning of July leading up to the victim's thirteenth birthday. Thus, notwithstanding defendant's claim of an alibi, there were days "around the time before" the victim turned 13, i.e., days in June and July, that defendant was available to engage in the sexual conduct with the victim. Furthermore, counsel could have made a legitimate strategic decision not to pursue the alibi defense because he did not want to inform the jury that defendant had been incarcerated. See *Gioglio*, 296 Mich App at 22-23; *Cullen*, 131 S Ct at 1407. Accordingly, defendant has not established that counsel was ineffective for failing to introduce evidence of defendant's confinement in the county jail or other specific dates of his unavailability.

Affirmed.

/s/ William B. Murphy

/s/ Peter D. O'Connell

/s/ Jane M. Beckering