STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2012
v	No. 304318 St. Clair Circuit Court
LAWRENCE GEORGE MARTIN, Defendant-Appellant.	LC No. 10-001257-FH

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of third-degree criminal sexual conduct (CSC III), MCL 750.520d (multiple variables), and possession of a controlled substance, MCL 333.7403(2)(b)(*ii*). Defendant was sentenced to four to 15 years in prison for CSC III with credit for 36 days served, and 36 days in jail for possession of a controlled substance with credit for 36 days served. For the reasons set forth below, we affirm.

Defendant asserts that insufficient evidence supported his CSC III conviction. We review the question of sufficiency of evidence de novo. See *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

> When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding that the essential elements of the crime were proved beyond a reasonable doubt. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." "The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor." [Citations omitted.]

Defendant was convicted of CSC III under "multiple variables." Specifically, the court instructed the jury first to consider if the evidence established that defendant "is related to the complainant by blood or marriage within the third degree as first cousins." MCL 750.520d(1)(d). If the jury did not conclude that § 520d(1)(d) had been proven, it was instructed to then consider whether defendant "used force or coercion to commit the sexual act." MCL 750.520d(1)(b). It is undisputed that defendant and the victim are first cousins and thus "related . . . to the third degree." MCL 750.520d(1)(d). Therefore, to sustain defendant's conviction for

CSC III, a rational jury need have only found, beyond a reasonable doubt, that defendant "engage[d] in sexual penetration" with the victim. *Id*. "Any penetration, no matter how slight, is sufficient to satisfy the 'penetration' element of third-degree CSC." *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

It is a well-established principle of Michigan law that the uncorroborated testimony of a victim is sufficient to sustain a defendant's CSC conviction. MCL 750.520h; *People v Szalma*, 487 Mich 708, 724; 790 NW2d 662 (2010). Further, "questions regarding the credibility of witnesses are left to the trier of fact." *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997). The victim testified at trial that defendant "kept moving his fingers in and out of my vagina." The victim described the penetration graphically on both direct and cross-examination. By finding defendant guilty, the jury necessarily found the victim's testimony credible, thus satisfying the elements of CSC III at issue in this case. Because the uncorroborated testimony of a CSC victim is sufficient to sustain a conviction, and questions of credibility are reserved for the jury, defendant's conviction was not based on insufficient evidence.

Defendant argues that he was deprived of the effective assistance of trial counsel and that the trial court erred in denying his motion for a new trial. Defendant urges this Court to order a new trial, or, in the alternative, remand for an evidentiary hearing with expert witnesses provided at public expense.

Defendant's timely motion for a new trial preserved the issue of ineffective assistance of counsel for review. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). "However, because the trial court did not hold an evidentiary hearing, [this Court's] review is limited to the facts on the record." *Id*. A trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert is reviewed for an abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003), citing MCL 775.15. A trial court's decision to deny a new trial is reviewed for an abuse of discretion. *People v Terrell*, 289 Mich App 553, 558-559; 797 NW2d 684 (2010). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes." *Id*. at 559. In reviewing both a claim of ineffective assistance of counsel and the denial of a motion for a new trial, "[f]indings on questions of fact are reviewed for clear error, while rulings on questions of . . . law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007); see also *Terrell*, 289 Mich App at 559.

> To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. [*People v Aspy*, 292 Mich App 36, 45-46; 808 NW2d 569 (2011).]

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Trial "[c]ounsel's decision whether to call a witness is presumed to be a strategic one for which this Court will not substitute its judgment." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). This presumption applies to expert witnesses. *Id*. To overcome this presumption,

defendant must show that the "expert witness would have testified favorably if called" and, but for trial counsel's failure to call the expert witness, there is a "reasonable probability" that "the result of the proceedings would have been different." *Id*. at 455-456.

Defendant presents a lengthy argument regarding the merits of following forensic interviewing protocol in CSC cases involving a minor victim. Most of this argument consists of an examination of the problems that have been associated with questioning child victims of sexual abuse. Defendant cites several studies and he speculates on how informing the jury about the accepted forensic protocol for questioning children could have called into question the victim's reliability. He argues that a forensic interviewing expert could have educated the jury regarding possible motives for the victim to lie or fabricate allegations against defendant. However, "[i]t is well settled that an expert witness may not render an opinion as to a complainant's veracity in criminal sexual conduct cases." *People v Miller*, 165 Mich App 32, 47-48; 418 NW2d 668 (1987), remanded on other grounds 434 Mich 915 (1990). And again, witness credibility is solely a question for the jury. *Peña*, 224 Mich App at 659.[1]

Defendant also asserts that "[a]n expert could have explained how [the victim] could have found herself in a situation where she gave a false story and then was unable to protract herself from the situation and how family disharmony could have led to false accusations that became increasingly difficult to retract." Again, this is entirely speculative and insufficient to establish a claim of ineffective assistance of counsel. Further, these issues were explored on cross-examination and presumably considered by the jury in determining the victim's credibility.

Defendant argues that trial counsel was ineffective in failing to consult or seek the court's assistance in retaining a DNA expert and an expert in blood alcohol toxicity. Whether to call, consult, or retain witnesses is presumed to be a matter of trial strategy for which this Court will not substitute its judgment in hindsight. *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009).

As with his argument regarding an expert on the forensic protocol, defendant's argument includes a substantial discussion of the complications arising with DNA evidence. This discussion does little to support his argument. Assuming that DNA evidence is complicated, defense counsel's decision to approach the evidence through cross-examination was a reasonable strategy in light of the inconclusive nature of the DNA evidence presented. Counsel could have reasonably decided that using the prosecution's own expert to call into doubt how conclusive the DNA evidence would be more effective than calling his own expert. In any event, a failed strategy does not constitute deficient performance on the part of trial counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

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[1] If the protocol was not followed, there is nothing in the plain language of MCL 722.628 that requires reversal of defendant's conviction. Moreover, only once during the testimony of the first officer to speak to the victim did the officer recount anything that the victim told him, and that was the following: "I was advised by [the victim] that she was on her menstrual cycle." This statement is irrelevant to charges of CSC III. The officer's only other testimony regarding the victim consisted of general statements about her appearance and demeanor.

Additionally, the record does not support the conclusion that the court would have agreed to appoint such an expert. MCL 775.15 provides for a trial court's appointment of, and payment for, expert witnesses for indigent defendants. A defendant must show "that there is a material witness in his favor . . . without whose testimony he cannot safely proceed to trial." MCL 775.15. "[A]n indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert." *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). There must be an "indication that expert testimony would likely benefit the defense." *Id.* at 617. The mere "possibility of assistance from the requested expert" is insufficient. *Id.* "A trial court is not compelled to provide funds for the appointment of an expert on demand." *Id.* Defendant has not shown that an appointed DNA expert's testimony would have been a "material witness in his favor" or otherwise benefited defendant. *Carnicom*, 272 Mich App at 617. The mere "possibility of assistance from the requested expert" is insufficient. *Id.* The DNA evidence in defendant's case was inconclusive and did not definitively tie defendant to the crime.

The same logic applies to defendant's request for a blood alcohol toxicity expert. Defendant's state of intoxication was in evidence and presented to the jury. It is entirely unsupported speculation that, given his blood alcohol level, defendant could not have moved through the house unnoticed. Further, this argument is simply another attack on the credibility of the witnesses, a matter within the province of the jury.

Because defendant failed to establish ineffective assistance of counsel, the court did not abuse its discretion in denying defendant's motion for a new trial.

Lastly, defendant argues that the effect of several errors by the trial court combined to deprive him of a fair trial. "The cumulative effect of several minor errors may warrant reversal where the individual errors would not." *Ackerman*, 257 Mich App at 454. However, "[a]bsent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

As discussed, defendant has shown no error in the issues already examined. Defendant also argues that the trial court erroneously admitted the victim's statements to a nurse who treated her. Defendant's argument is without merit. At trial, defendant's counsel objected to the admission of this testimony as hearsay. Argument was made, and the prosecutor cited *People v Garland*, 286 Mich App 1; 777 NW2d 732 (2009) in support of admission. The next day, the nurse was called and a separate record was made. Correctly relying on *Garland*, the court admitted the testimony. As there, the challenged statements were admissible as an exception to the hearsay rule under MRE 803(4) and were not violative of the defendant's Confrontation Clause rights. *Id*. at 10-12.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Pat M. Donofrio