

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 8, 2013

v

SEVAUGHN TAHLYIEL CHEVIS,
Defendant-Appellant.

No. 304358
Kent Circuit Court
LC No. 10-001166-FC

Before: MURPHY, P.J., and SAAD and SERVITTO, JJ.

SERVITTO, J. (*dissenting*).

Because I believe that defendant was denied the effective assistance of counsel in several respects and that because of the cumulative errors on counsel's part there is a reasonable probability that the result of the proceedings would have been different, I respectfully dissent.

To prove a claim of ineffective assistance of counsel, a defendant must establish that (1) counsel's performance fell below objective standards of reasonableness, and (2) but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different, *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), such that the resultant proceedings were fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Under the "reasonableness" prong of the test,

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. [*People v Gioglio (On Remand)*, 296 Mich App 12, 22–23; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012).]

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call a witness or present other evidence only constitutes ineffective assistance of counsel when it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have

made a difference in the outcome of the trial.” *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009), quoting *People v Kelly*, 186 Mich App 524, 526, 465 NW2d 569 (1990).

Defendant presented several credible claims of ineffective assistance of counsel in this matter. First, defense counsel was ineffective for failing to object to the testimony of Dr. Debra Simms. I disagree with the majority that this issue is not controlled by *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995). In *Peterson*, our Supreme Court specified that an expert may not testify in CSC cases that sexual abuse occurred or vouch for the veracity of a victim. Dr. Simms did both in this case. She explicitly testified, as to one of the twins, “. . . in giving a history, he was clear, consistent, detailed, and descriptive. And—I reached a conclusion of probable pediatric sexual abuse.” Dr. Simms conducted only a physical examination of the boys, however, many months after the assaults allegedly occurred and found no physical evidence that would suggest the abuse occurred. Significantly, it appears that the history given by the boys was not given by the boys to Dr. Simms but to a worker at the assessment center. Thus, when Dr. Simms testified as to the history given by the boys and the manner in which the history was given, she was not testifying as to her own perceptions or observations but of those reported by the assessment center worker. The only opinion Dr. Simms could give, then, was the opinion gleaned from her physical findings. While Dr. Simms did not specifically state that the boy was telling the truth to the assessment center worker, “the risk here goes beyond such a direct reference. Indeed, as we have cautioned before, the jury in these credibility contests is looking ‘to hang its hat’ on the testimony of witnesses it views as impartial. Such references to truthfulness as go beyond that which is allowed under MRE 702.” *Peterson*, 450 Mich at 376. Because defense counsel’s trial strategy was, by his own testimony, to establish that the assaults never occurred and to impeach the boys’ testimony, allowing Dr. Simms to bolster the credibility of one of the boys and state that the assaults probably did occur, without objection, was unreasonable and the trial court erred in finding otherwise. This error, alone, may not render the resultant proceedings fundamentally unfair or unreliable, such as to render counsel’s assistance ineffective. However, when combined with the other errors discussed below, I am convinced that the cumulative nature of the errors is sufficient to have made a difference in the outcome of the trial.

I also believe that defense counsel was ineffective for failing to consult with an expert in forensic psychology and forensic interviews. I believe the trial court erred in dismissing defendant’s argument on this issue as simply defendant’s disagreement with defense counsel’s trial strategy and am troubled by the trial court’s representation that defense counsel made a strategic choice not to call his own expert when the same is not borne out by the record. I agree with the majority that one could argue—and I would hold-- that defense counsel’s performance fell below an objective standard of reasonableness in this regard and I would further find that an expert in forensic psychology and forensic interviews could have made a significant difference in defendant’s case.

Dr. Swerlow-Freed, an expert in forensic psychology, testified at the *Ginther* hearing that he reviewed the forensic interviews conducted on the twins in this case and the various reports of the incidents that they had made. Dr. Swerlow-Freed testified that while it is not unusual for young children to add new details when interviewed multiple times, substantive changes in the twins’ reports raised concerns to him. Dr. Swerlow-Freed indicated that it was unusual, in the first place, for children to say more to an investigator than they would say to their own mother or

sister about sexual abuse, as it appears the twins did in this case. And, according to Dr. Swerlow-Freed, the kind of inconsistent details that exist here generally indicate problems with the way the children were questioned.

Dr. Swerlow-Freed expressed concern in the way that the forensic interview report was made in this case as the interviewer, Holly Bathrick, did not take notes during her interviews. Instead, a detective took notes during the interviews and Bathrick created a report based upon the third-party notes. Dr. Swerlow-Freed indicated that this is troublesome because the detective's notes are based on her interpretation of what transpired during the interview and then Bathrick's summary is based on her interpretation of the detective's notes. Dr. Swerlow-Freed also expressed concern over the way in which the forensic interviews were conducted. He pointed out that some of the twins' answers suggested that they did not understand the questions Bathrick posed to them and she did not attempt to clarify the answers. Dr. Swerlow-Freed indicated that using unfamiliar words may have influenced the children's responses. Dr. Swerlow-Freed also expressed concern as to how the topic of touching was raised with the children as the children did not raise the topic spontaneously and it is unclear whether Bathrick raised the topic in a leading or non-leading way. According to Dr. Swerlow-Freed, Bathrick did not follow the steps typically followed in conducting child forensic interviews. While defense counsel pointed out certain deficiencies in the way the interviews were carried out in his closing argument (which the trial court properly instructed was not evidence), his attempts hardly carry the same weight that the testimony of an expert would.

Dr. Swerlow-Freed further testified concerning the reliability of children's memories and their susceptibility to "taint" (i.e., outside influence). He also testified that having read the boys' preliminary examination testimony, he believes the circumstances under which they testified were coercive. Given that the only testimony against defendant came from the two young boys (or persons to whom they related versions of the incidents) the reliability of the boys' memories and statements was of utmost importance. Defense counsel testified at the *Ginther* hearing that he was concerned about the boys having been influenced in their telling of the incidents by outside persons. Defense counsel further testified that his defense was that the assaults never happened and part of his trial strategy was to point out to the jury how the boys' stories were inconsistent and acknowledged that cross-examining the boys was somewhat difficult.

An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). However, the failure to call a witness can constitute ineffective assistance of counsel when it "deprives the defendant of a substantial defense." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714, 722 (2009). Defense counsel's own statements concerning his trial strategy and his belief that the boys' memories may have been influenced by the many people they spoke with prior to trial, coupled with expert Dr. Swerlow-Freed's testimony at the *Ginther* hearing concerning the deficiencies in the forensic interviews and the ways in which the boys were questioned during the forensic interviews and at the preliminary examination in the instant matter indicates that a reasonable attorney would have at least consulted with an expert in forensic psychology and forensic interviews in this matter.

In *People v Trakhtenberg*, 493 Mich 38, 54; 826 NW2d 136, 144 (2012), our Supreme Court found that trial counsel was ineffective in a CSC case involving an 8-year-old child, in

part, for failing to call an expert witness. The *Trakhtenberg* Court stated, “. . . given the exposure the complainant had to multiple interviews and leading questions, a reasonable attorney would have consulted an expert . . . to testify regarding the propriety of how the complainant made her allegations.” Similarly, defense counsel’s failure to consult an expert in this case was inconsistent with his trial strategy of pointing out the inconsistencies in the boys’ testimony and the possible reasons for and significance of the same. And, this failure deprived defendant of a substantial defense. Given that this was a credibility-only case, with no forensic evidence and no admissions, in light of the evidence at trial, the failure to present an expert such as Dr. Swerlow-Freed adversely affected the outcome, depriving defendant of a fair trial. There is a reasonable probability that the outcome would have been different had an expert been consulted and had he testified. See *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

I further believe that counsel was ineffective for failing to adequately cross-examine the prosecution’s witness regarding the use of a forensic interview protocol. Defense counsel testified at the *Ginther* hearing that he was not aware that under the forensic protocol only certain types of questions are supposed to be asked of children. However, the forensic interviewer, Bathrick, testified that open-ended questions are supposed to be used, as did the prosecution’s expert, Tim Cottrell. In order to effectively cross-examine these experts, particularly the one who actually questioned the twins, counsel would clearly have to be familiar with the appropriate questioning methods.

In *Trakhtenberg*, 493 Mich at 54, our Supreme Court stated:

This case turned solely on credibility—the ultimate question at trial was whether the complainant's allegations of sexual abuse were truthful or, conversely, if her allegations were the result of improper motivations and interviewing techniques. Counsel's failure to cross-examine [the complainant’s mother] and adequately impeach the complainant was a result of counsel's unreasonable decision to forgo any investigation in the case.

Here, while it was not alleged that defense counsel failed to adequately investigate the case, this case too turned solely on credibility, and the ultimate question at trial was whether the complainants’ allegations were truthful or the result of improper interviewing techniques. This case thus depended on effective cross-examination and impeachment of testifying witnesses concerning the interviewing techniques. Where defense counsel admitted that he was not completely aware of the forensic protocols and Dr. Swerlow-Freed testified at the *Ginther* hearing that Bathrick did not comply with the forensic protocols in interviewing the boys, which could have impacted the allegations that they related, defense counsel’s failure to effectively cross-examine on compliance with forensic protocols was a significant factor at trial. The failure was not a matter of trial strategy as it was not consistent with his defense of proving that the assaults did not take place and did not support his strategy of pointing out the inconsistencies in the boys’ statements and why they may have occurred. This failure also deprived defendant of a substantial defense which adversely affected the outcome of the trial given the evidence presented. There is a reasonable probability that had defense counsel effectively cross-examined on the improper forensic interview techniques employed, the outcome of the trial would have been different.

As previously stated, perhaps any one of these errors, standing alone, may have been harmless. However, “the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not.” *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). “The effect of the errors must be seriously prejudicial in order to warrant a finding that defendant was denied a fair trial.” *Ackerman*, 257 Mich App at 454. In this case, I firmly believe that threshold has been met. I would thus reverse and remand for a new trial.

/s/ Deborah A. Servitto