STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2013
v	No. 311043 Saginaw Circuit Court
BEAU DILLON KONSDORF, Defendant-Appellant.	LC No. 11-036101-FH

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right from bench trial convictions on three counts of second-degree criminal sexual conduct with a victim under the age of thirteen, MCL 750.520c(1)(a), and one count of dissemination of sexually explicit material to minors, MCL 722.675. We affirm.

I. FACTS

Defendant was charged with numerous counts of criminal sexual conduct and related offenses stemming from allegations made by his step-daughter, S.F. Defendant subsequently waived his right to a jury trial, and the case proceeded to a bench trial.

At trial, S.F. testified that on numerous occasions defendant had made her watch pornographic videos with him, and that on one occasion he had made her touch his exposed penis. She also testified that on a separate occasion he had touched her breasts, vagina, and buttocks over her clothes while she was helping him clean out his van. She further testified that later that day, after she had been put to bed, defendant came up to her room and told her he would be back later. S.F. testified that she then texted her grandmother to tell her what had happened and that her grandmother came and picked her up from the house. Defendant denied any sexual contact with S.F.

At the conclusion of trial, the trial court found defendant guilty of three counts of second-degree criminal sexual conduct with a victim under the age of thirteen, and one count of dissemination of sexually explicit material to minors. The trial court found defendant not guilty of an additional count of second-degree criminal sexual conduct with a victim under the age of thirteen, as well as of a count of accosting, enticing, or soliciting a child for immoral purposes.

Defendant then moved for a new trial, alleging the same errors he is now asserting on appeal. Following a hearing on the matter, the trial court issued an opinion and order denying defendant's motion for a new trial. This appeal followed.

II. ANALYSIS

First, defendant argues that the trial court erred by denying defendant's motion for a new trial based on newly discovered evidence. We disagree. We review a trial court's ruling on a motion for a new trial based upon newly discovered evidence for an abuse of discretion. *People v Grissom*, 492 Mich 296, 312; 821 NW2d 50 (2012). "An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of principled outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

In determining whether a new trial may be granted because of newly discovered evidence, our Supreme Court has explained that a defendant must show that "(1) the 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." *Grissom*, 492 Mich at 313 (quoting *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (citations and quotation marks omitted by *Grissom*). "[T]he discovery that testimony introduced at trial was perjured may be grounds for a new trial." *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). Defendant argues that under *Grissom*, the newly discovered impeachment evidence constitutes grounds for a new trial. We find the facts in *Grissom* wholly distinguishable from the case before us.

In *Grissom*, also a criminal sexual assault case, there was actual evidence that the complainant had previously lied about being kidnapped and sexually assaulted based on numerous police reports. *Grissom*, 492 Mich at 305-311. Here, the newly discovered evidence is an affidavit, signed by defendant's mother, stating that S.F. told her that she had lied about the allegations against defendant. It can be argued that this evidence is newly discovered, not cumulative, and was not discoverable and producible at trial with reasonable diligence. According to the affidavit, the alleged recantation occurred after trial. However, there is no probability this evidence would have caused a different result at trial. The affidavit is unsubstantiated, and it is signed by defendant's mother rather than the victim. Because of the exceedingly dubious nature of the newly discovered evidence at issue, we cannot conclude that the trial court abused its discretion by denying defendant's motion for a new trial based on that evidence.

Second, defendant argues that the trial court erred by admitting evidence of internet searches made, and pornography found on, on a computer located at defendant's home. We find that even if the trial court technically erred, defendant was not prejudiced thereby. The trial court explicitly stated that it "did not consider the child pornography on the computer in reaching its decision." Although strictly speaking, we are unaware of how computer searches can themselves be pornographic, the results certainly can be, and in any event, it appears reasonably clear from context that the trial court intended by its statement to refer to all "inadmissible computer evidence" to which defendant objected in his motion for new trial. This was a bench

trial, not a jury trial, so there is no danger of a jury being unable to "unsee" inadmissible yet highly inflammatory evidence, nor is there any danger of simply not knowing what was considered. Consequently, irrespective of whether the computer evidence was admissible, because it was given no consideration by the trier of fact, its admission did not prejudice defendant.

Third, defendant argues that he was denied the effective assistance of counsel at trial. We disagree. The deprivation of effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended on other grounds 481 Mich 1201 (2008). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

Under both federal and state constitutional law, a defendant in a criminal case has a right to the assistance of adequate and effective counsel. US Const, Am VI; Const 1963, art 1, § 20. In order to prevail under a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below professional norms, that there is a reasonable probability that, but for counsel's error, the result of the proceedings would be different, and that the resultant proceedings were fundamentally unfair or unreliable. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713,(2007); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

At trial, defendant brought to the attention of the trial court various pieces of evidence relating to the victim's past sexual behavior, including photographs of the victim, out of court statements made by the victim, and the victim's past interactions with other men. The trial court refused to admit any of these pieces of evidence under the rape shield law.

On appeal, defendant asserts that some of that evidence was related to past accusations of sexual assault made by the victim, and that the his trial counsel was ineffective for failing to make this clear to the court. The record shows that defense counsel did speak about these events on the record and did make clear to the court that the victim had been sexually assaulted by two other men. The defendant's mother's affidavit explicitly indicates that she had no personal knowledge whether these other sexual assaults actually occurred. Defendant asserts that these are prior false allegations, but the record does not support that assertion. Therefore, defendant cannot show that his trial counsel's failure to vigorously advocate for its admission at trial was unreasonable, nor can defendant show that trial counsel's actions were prejudicial.

Finally, defendant argues that the cumulative effect of the errors alleged above entitles him to a new trial. We disagree. An accumulation of errors, none of which would individually merit reversal, may compound to such an extent that they collectively require a new trial. See *People v Skowronski*, 61 Mich App 71, 77; 232 NW2d 306 (1975). However, harmless errors cannot accumulate harm, and non-errors cannot accumulate at all. Because none of defendant's alleged errors were errors or were harmful, defendant cannot be entitled to a new trial on the basis of any cumulative effect.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra