

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID JACK FINK,

Defendant-Appellant.

UNPUBLISHED

September 20, 1996

No. 167536

LC No. 86-054950-FY

Before: McDonald, P.J., and Wahls and D.B. Leiber,* JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and second-degree criminal sexual conduct, MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). Defendant was sentenced to concurrent terms of ten to twenty years' and seven to fourteen years' imprisonment. He appeals as of right. We reverse.

The convictions stemmed from defendant's alleged sexual activity with the complainant, who was twelve or thirteen at the time and resided at the St. Vincent's Home for Children. During the time in question, defendant was a staff member at St. Vincent's. A second child who resided at St. Vincent's testified that he witnessed the alleged activity through a door that was partially ajar and corroborated the complainant's allegations.

The trial court quashed defendant's subpoena to examine Catholic Social Services (CSS) files relating to the complainant and the second child on the basis of the statutory privilege concerning social workers and clients. In *People v Fink*, 437 Mich 987; 468 NW2d 856 (1991), the Michigan Supreme Court remanded this case to the trial court with the following instructions:

[T]he case is remanded to the Ingham Circuit Court for an in-camera review of documents requested by the defendant. If any of the documents are favorable to defendant and

* Circuit judge, sitting on the Court of Appeals by assignment.

material to the case, a new trial should be granted. If the documents were not favorable or material to defendant's case, any error in failing to have such an inspection prior to trial would be harmless.

On remand, the trial court found that no documents were discovered that would have been material to the case and denied defendant's motion for a new trial.

I

Defendant argues that the trial court should have granted him a new trial. More specifically, defendant contends that the evidence revealed to the defense as a result of the trial court's in-camera review was favorable and material to the defense, and formed a sufficient basis for a new trial. We agree.

Following the in-camera hearing, the trial court provided defendant with three documents from CSS files. These documents consisted of two teacher reports regarding the second child and a review summary of the complainant written by a social worker with Lutheran Social Services (LSS).

The two teacher evaluations of the second child indicated respectively that he was an "accomplished liar and thief" and that he lied "even when confronted with direct evidence of wrongdoing and will insist loudly that he didn't do anything." The LSS review of the complainant indicated that, at two foster homes, his behavior included "threatening to report adults to various authorities, threatening to charge them with various forms of abuse, if he was not granted his every wish." The report noted that "in both homes this agency had absolutely no concern about any abuse or neglect, but rather saw it as [the complainant's] need to be manipulative and his desire to be in control." The complainant's behavior also included "sexual provocation directed mostly at other children."

We believe that the trial court abused its discretion in denying defendant a new trial. First, the documents cast doubt on the credibility of the prosecution's two star witnesses. Accordingly, it is beyond dispute that the documents were favorable to defendant.

In addition, the documents were material to the case. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Pennsylvania v Ritchie*, 480 US 39; 107 S Ct 989, 1001; 94 L Ed 2d 40 (1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* It is axiomatic that the credibility of a witness is an issue of the utmost importance in every case. *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990). A defendant is entitled to draw out from the witness and lay before the jury anything tending to affect the credibility of the witness. *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995) (Markman J); *Mumford, supra*, p 153.

At trial, both defendant and a second employee of St. Vincent's testified that the complainant frequently made sexually propositioning comments to staff members. A third staff member was more

equivocal. He testified that although the complainant made false accusations against staff members, he would be surprised if the complainant made up a false allegation against a staff member in a sexual way. The complainant admitted that he had asked other boys at St. Vincent's to play with his penis, and that he asked them if he could suck their penis. The complainant also admitted that, to get out of trouble, he would say that other boys had approached him for sexual activity.

It is apparent that there was reason to question the veracity of the complainant's testimony. However, the evidence that was suppressed at trial was the strongest evidence which defendant had. The LSS report on the complainant indicated that the complainant threatened to charge adults with abuse in order to exert control. Moreover, the author of this suppressed report was not a colleague of defendant, but a social worker of an independent organization. Accordingly, there is less likelihood that this potential witness was biased in favor of defendant.

Similarly, the reports on the second child were written by teachers who did not work with defendant and who indicated that this child was a liar. Moreover, these reports were the only evidence which directly challenged this child's reputation for veracity. We believe that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Ritchie, supra*, 107 S Ct at 1001. Accordingly, we hold that the trial court's finding that the documents were not material to the case was clearly erroneous. *In re Forfeiture of Bail Bond*, 209 Mich App 540, 550; 531 NW2d 806 (1995).

The trial court based its ruling on several factors. First, the trial court stated that no evidence was presented that the two boys were friends. However, at trial, the complainant testified that the second child liked him a lot and that he was that child's good friend. The trial court stated that no evidence was presented of a motive for either boy to accuse defendant. However, as stated *supra*, the LSS report explicitly stated that the complainant had threatened foster parents with false accusations of abuse in order to exert control. Finally, the trial court stated that the documents did not refer to false accusations against staff members of St. Vincent's. However, a defendant is permitted to show that the complainant has made false accusations in the past. *People v Hackett*, 421 Mich 338, 348-349; 365 NW2d 120 (1984); *People v Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991). Such false accusations are relevant in subsequent prosecutions because the fact that the victim has made prior false accusations directly bears on the victim's credibility and the credibility of the victim's accusations in the subsequent case. *Williams, supra*, p 472. Significantly, in *Williams*, the defendant accused the complainant of making a false accusation against a different person. *Id.* Thus, the trial court's reasoning here that the documents did not refer to false accusations against staff members of St. Vincent's was erroneous. Because we believe that the documents were favorable to defendant and material to the case, the trial court abused its discretion in denying defendant's motion for a new trial. *Fink, supra*, p 987; *People v Legrone*, 205 Mich App 77, 79; 517 NW2d 270 (1994).

In reaching our conclusion, we did not apply the harmless error standard. This is because the Supreme Court ordered that if the documents were favorable to defendant and material to the case, a

new trial should be granted. *Fink, supra*, p 987. Because the documents in question were favorable to defendant and material to the case, we are obligated by the Supreme Court's order to grant a new trial. *Hauser v Reilly*, 212 Mich App 184, 187; 536 NW2d 865 (1995).

II

Defendant also argues that he was denied his right to a speedy trial. We disagree. In its remand, the Supreme Court did not mention this issue. The scope of a second appeal is limited by the scope of remand. *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975); *People v Kincade (On Remand)*, 206 Mich App 477, 481; 522 NW2d 880 (1994). Accordingly, any improper delay between arrest and trial is not within the scope of this appeal of right. *Jones, supra*, pp 435-436; *Kincade, supra*, p 481. With regard to delay after the remand order, time reasonably consumed on appeal cannot be considered as in derogation of a speedy trial. *People v Chism*, 390 Mich 104, 113; 211 NW2d 193 (1973); *People v Hammond*, 84 Mich App 60, 67; 269 NW2d 488 (1978). Defendant has not shown that the delay between the date that the Supreme Court issued its order of remand and the date that the trial court considered this case on remand was unreasonable. *People v Simpson*, 207 Mich App 560, 563; 526 NW2d 33 (1994). Accordingly, defendant has not been denied his right to a speedy trial.

Reversed and remanded for proceedings consistent with this opinion.

/s/ Gary R. McDonald

/s/ Myron H. Wahls

/s/ Donald B. Leiber