

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD DAVID MARTIN,

Defendant-Appellant.

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UNPUBLISHED  
February 8, 2011

No. 293129  
Oakland Circuit Court  
LC No. 2009-224853-FC

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

PER CURIAM.

Defendant Ronald Martin appeals as of right his jury conviction of five counts of first-degree criminal sexual conduct (CSC I).<sup>1</sup> He also appeals his conviction of four counts of second-degree criminal sexual conduct (CSC II).<sup>2</sup> Both of these offenses involved a minor relative between ages 13 and 16. The trial court sentenced Martin to concurrent terms of 15 to 30 years in prison for each of his CSC I convictions and 8 to 15 years in prison for each of his CSC II convictions. We affirm.

**I. BASIC FACTS**

The complainant was age 16 at the time of trial in May 2009. Martin is the complainant's father. He and the complainant's mother were never married and do not live together. The complainant lives with her mother and would normally visit her father on weekends. The complainant testified that the first time Martin did something inappropriate to her was in mid-January to early-February 2008. She stated that he grabbed the front of her pants and pulled her towards him. Later in February, Martin came into the room of the complainant's sister where the complainant was watching television, laid down next to her, and began touching her breasts on top of her bra. He eventually stopped but stayed in the bed with her. The complainant acknowledged that there were other beds available, but she stayed in the bed with Martin. At the end of February, she told her friend, OR, about this incident.

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<sup>1</sup> MCL 750.520b(1)(b)(ii).

<sup>2</sup> MCL 750.520c(1)(b)(ii).

In March or April 2008, Martin, the complainant, and her younger sister stayed at a Holiday Inn. The complainant testified that, just after her sister left the room to go to the swimming pool, Martin took the complainant by the arms and pulled her towards him. The front of their bodies touched, and he tried to kiss her. Later that night, Martin lay down next to the complainant while her sister was in the other bed. He touched the complainant's breasts underneath her bra, put his hand down her shorts, and digitally penetrated her vagina. Martin then followed her into the bathroom, took off her shorts and his boxers, put her on the counter, and penetrated her vagina with his penis.

On cross-examination, the complainant testified that Martin had been in the bathroom and as he was walking out, she was walking in, and he then followed her back in. However, her testimony at the preliminary exam indicated that he had not been in the bathroom first. In a prior statement given to Amy Allen at Care House, the complainant said that she and her sister were in the same bed, that Martin moved her sister to the other bed, and then he got in bed with the complainant and penetrated her. She explained the discrepancy by saying that she must have mixed up the events. She acknowledged that she continued to visit Martin after the hotel incident, even though she was afraid he might rape her again, because she still wanted to see her dad.

During the summer of 2008, Martin was going through a divorce and began living with his brother, Don Martin. Martin occupied the guest bedroom in Don Martin's house. When the complainant stayed overnight with Martin, they slept in the same bed. The complainant said that she could not sleep on the couch because it hurt her back. On one occasion, she got into bed after Martin was already in bed. He touched her breast underneath her bra. She claimed that he then removed her shorts and asked her to remove her shirt. When she declined to do this, Martin took off his boxers and then penetrated her vagina with his penis.

Also during the summer of 2008, while the complainant was staying at her grandmother's house, Martin followed her into the bedroom and touched her breast underneath her bra. She initially said that he stopped and left when her sister came into the room to go to bed. On cross-examination, however, she said that he stayed in the room after her sister got in bed and resumed the inappropriate touching after her sister went to sleep. Also, she contradicted herself with regard to the timeframe, stating that this happened at the end of Spring 2008.

The complainant testified that, on a subsequent occasion at Don Martin's house, Martin joined her while she was in the shower. He pulled her towards him and his chest was touching her breasts. He asked if she wanted him to get out; he left when she said yes. She then finished her shower. When she went to the bedroom to get dressed, he was also getting dressed. At that moment, her sister called, asking to be picked up. After the phone call, Martin penetrated the complainant's vagina with his penis. This time he wore a condom. On cross-examination, the complainant said that she got dressed in the bedroom, whereas at the preliminary examination she said that she got dressed in the bathroom. Also, she said that Martin was in the kitchen when she initially entered the bedroom. She also stated that he stopped because of the phone call.

Toward the end of August 2008, the complainant went to a birthday party with Martin and then returned to Don Martin's house with him. She got in bed, and Martin joined her. She claimed that he then penetrated her vagina with his penis. Although she saw Martin after this

incident, this was the last time the abuse occurred. The complainant had previously told Amy Allen of Care House that everything started after Martin moved in with Don Martin. She also told Allen that two of the rapes occurred in her bunk bed. The bunk bed arrived at Don Martin's house in August 2008.

In October 2008, the complainant told her boyfriend, CH, about what happened. Two days later, she told her best friend, OR, the full story as well. The complainant said that she finally told someone because she did not want to have to keep visiting Martin and did not want the same thing to happen to her sister. She could not explain why she waited until October. She said that OR told her she had to tell someone about the abuse. They decided to tell OR's mother, CR. CR is also the complainant's godmother. OR was the one that actually told CR about what happened, but the complainant responded to questions. The three of them then told the complainant's mother.

On cross-examination of the complainant, defense counsel established that she had incorrectly told her mother that all four incidents of intercourse happened at Don Martin's house. Further, defense counsel established that during the time period of the assaults, the complainant had visited Martin more often than she previously had. The two of them had done many activities together, such as going to Cedar Point and Michigan Adventure. Although the complainant claimed that she went to Don Martin's home to see her sister, she stayed even when her sister was not there. Also, the complainant chose to stay with Martin even though she had the option to go to her grandmother's house. The complainant had also testified on Martin's behalf when a personal protection order was sought regarding visitation rights for her sister.

Further, defense counsel established that, in October 2008, Martin had refused the complainant's request that she be put on his cell phone plan. She made her allegations of sexual abuse shortly after their argument. The complainant wanted to be on Martin's phone plan because it would have been easier and cheaper to talk to her friends. She claimed that he put her off, saying that he would wait to look at her grades. Despite this testimony, the complainant maintained that, other than the touching and rapes, there was nothing that was making her angry with Martin during the relevant period.

In his affidavit, Martin claimed that he agreed to put the complainant on the cell phone plan if her grades improved and she stopped seeing SC. Martin claimed that SC, 18 years old at the time, was having sexual relations with the complainant. Martin and the complainant got into numerous arguments over her relationship with SC. In the spring of 2008, Martin told the complainant that he did not approve of her seeing SC. In the summer of 2008, Martin again told the complainant not to see SC anymore. Martin also threatened to report SC to the police if the complainant did not stop seeing him. Martin made a similar threat at the end of the summer of 2008. Before trial, Martin sought to have evidence of the complainant's relationship with SC admitted into the record. But the trial court precluded the evidence on the basis of the rape shield law.<sup>3</sup>

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<sup>3</sup> MCL 750.520j.

The complainant's mother testified that the complainant was upset and crying when she told her about what was happening with Martin. Her mother said that the complainant had told her that sexual intercourse had occurred on four occasions, each time at Don Martin's house. She said that during the relevant time period, the complainant would insist on going to Don Martin's home. The complainant never indicated that she did not want to go. After the complainant's disclosure regarding the abuse, her mother took her to see her pediatrician, Dr. Stacy Gorman.

Dr. Gorman testified that the complainant told her that Martin had forced her to have sexual intercourse four times since February 2008. Dr. Gorman took a patient history, which she said was necessary for treatment to know what happened and who was responsible. Dr. Gorman subsequently recommended counseling for the complainant. However, she did not perform a pelvic examination on the complainant. She explained that she did not perform a pelvic examination because the complainant had already had one in August 2008. Dr. Gorman further explained that she did not feel the need to repeat the exam because the complainant told her that August was the last time any sexual abuse had occurred.

After seeing Dr. Gorman, the complainant went to the Waterford Police Department and then to Care House, where Amy Allen conducted a forensic interview. Without objection, Allen was qualified as an expert in forensic interviewing, as well as on characteristics of children who report sexual abuse. Allen stated that she followed a forensic interviewing protocol that involved open-ended questions. In essence, she testified that it was not unusual for adolescents to delay reporting sexual abuse by a family member. Further, she said that it would not be unusual if one did not see outward signs of abuse. She also said it would not be unusual for a victim to show no fear. She explained that compliance might result because of the body's response to the abuse or because the child did not know how to make it stop. Allen also said that a child might return to the abuser because of a desire to protect someone else and might stay even if the person to be protected is not present because of compliance with the abuser. She explained that people change details when remembering traumatic events. Further, she said that a victim's motivating factor in reporting abuse was most often to make it stop, not trigger prosecution.

On cross-examination of Allen, defense counsel established that there were some similarities among child sexual abuse victims. Defense counsel further established that the complainant had not run away from home, did not use drugs, did not have poor hygiene, and was not underweight or overweight. Allen clarified, however, that an abused child could have really poor or extremely good hygiene, and really poor or extremely good grades. Allen did not know if the complainant suffered from low self-esteem. Defense counsel called into question that a 14- or 15-year-old child would withhold reporting abuse because he or she was close to independence. Further, defense counsel ascertained that Allen was not assessing truthfulness. Allen told the defense counsel that, in embellishing a story, a 15-year-old child would likely focus on what should have been done, like fighting the molester. Allen also acknowledged that inconsistent stories might result from blending events or from outright lying. Further, defense counsel established that Allen could not tell the difference between when a child was lying and when a child was changing the story based on more legitimate factors.

On a redirect examination, Allen testified that an investigator tries to develop alternative explanations for why a child is making the statement. She explained that when younger children

are involved, an alleged touching could be for hygienic purposes. Allen did not speak to alternative hypotheses in this case. Yet, she explained that her team ruled out any alternative hypotheses for the complainant.

As stated, the jury convicted Martin of five counts of first-degree criminal sexual conduct and four counts of second-degree criminal sexual conduct. Martin now appeals.

## II. EFFECTIVE ASSISTANCE OF COUNSEL

### A. STANDARD OF REVIEW

Martin argues that defense counsel deprived him of his right to effective assistance of counsel in several respects. We will address each of Martin's claims in turn below.

Effective assistance of counsel claims involve mixed questions of fact and constitutional law.<sup>4</sup> A judge must first find the facts and then decide if they establish a violation of the defendant's constitutional right to the effective assistance of counsel. This Court reviews the lower court's factual findings for clear error while reviewing de novo any constitutional determinations.<sup>5</sup>

### B. LEGAL STANDARDS

"Generally, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable."<sup>6</sup> Counsel's performance must be measured without the benefit of hindsight.<sup>7</sup> Effective assistance is presumed, and the defendant bears a heavy burden of proving otherwise.<sup>8</sup> "This presumption can only be overcome by a showing of counsel's failure to perform an essential duty, which failure was prejudicial to the defendant. The burden is on [the] defendant."<sup>9</sup>

Defense counsel has wide discretion regarding matters of trial strategy.<sup>10</sup> This Court will not substitute its judgment for that of defense counsel regarding such matters.<sup>11</sup> "An attorney's

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<sup>4</sup> *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

<sup>5</sup> *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004).

<sup>6</sup> *People v Seals*, 285 Mich App 1, 16; 776 NW2d 314 (2009).

<sup>7</sup> *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

<sup>8</sup> *Seals*, 285 Mich App at 17.

<sup>9</sup> *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988).

<sup>10</sup> *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

<sup>11</sup> *Payne*, 285 Mich App at 190.

decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy. . . . In general, the failure to call a witness can constitute ineffective assistance of counsel only when it ‘deprives the defendant of a substantial defense.’”<sup>12</sup> A determination regarding what evidence to present is also a matter of trial strategy,<sup>13</sup> as is the decision not to object to evidence.<sup>14</sup> There is no obligation to make a futile objection.<sup>15</sup>

### C. RAPE SHIELD MOTION

Martin argues that defense counsel provided ineffective assistance by inadequately arguing for the admission of evidence pertaining to the complainant’s prior sexual experience with SC. However, we find no merit to this argument because, as the trial court found, defense counsel did not engage in deficient conduct where he did in fact “argue[] for admission of the [complainant’s] prior sexual conduct with an older boy named [SC] to show bias and because it might be probative of the victim’s ulterior motive in making a false charge.” Again, defense counsel has wide discretion regarding matters of trial strategy.<sup>16</sup> And the fact that Martin’s current counsel would have handled the argument differently does not support a conclusion that the former counsel’s handling of the case was deficient. Defense counsel is not ineffective where he raises an argument, albeit unsuccessfully.<sup>17</sup>

Martin also argues that defense counsel should have presented the motion again following Dr. Gorman’s and Amy Allen’s testimonies. However, their testimonies did not give rise to the inferences that Martin posited. There was no basis for inferring that the complainant’s hymen was or was not ruptured. Dr. Gorman simply did not speak to the issue. Similarly, Allen testified that investigators *generally* try to develop alternative hypotheses. She did not speak one way or the other regarding whether there were any other hypotheses in this case. Given these considerations, there is no indication that a renewed motion would have been successful. In fact, the trial court’s opinion implies that it would have denied a renewed motion. Accordingly, defense counsel was not ineffective, neither for his initial arguments nor for failing to renew the motion.

### D. DR. GORMAN’S TESTIMONY

Martin further argues that defense counsel was ineffective for failing to challenge Dr. Gorman’s claim that the complainant had reported that he was the perpetrator.

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<sup>12</sup> *Id.*, quoting *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990) (citations omitted).

<sup>13</sup> *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

<sup>14</sup> *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008).

<sup>15</sup> *People v Davenport*, 286 Mich App 191, 199; 779 NW2d 257 (2009).

<sup>16</sup> *Odom*, 276 Mich App at 415.

<sup>17</sup> See *People v Weatherford*, 193 Mich App 115, 122; 483 NW2d 924 (1992).

Defense counsel did not object when Dr. Gorman testified that the complainant identified Martin as her sexual assailant. However, the trial court concluded that the testimony was admissible since Gorman testified that it was necessary for medical diagnosis and treatment.<sup>18</sup> And such statements are deemed inherently trustworthy because of a patient's self-interest in receiving proper care.<sup>19</sup> Thus, even had defense counsel made the objection, the trial court would have denied it. And, as noted, futile objections are not required.<sup>20</sup>

#### E. MEDICAL RECORDS

Martin also argues that defense counsel should have secured Dr. Gorman's medical records, as they may have identified an alternate source of the complainant's medical condition. We disagree. Regarding the medical records, the trial court noted that defense counsel had been given the medical record concerning the October visit. And Martin failed to show that a request for the earlier records would have been successful given their privileged nature. The issue was not whether the complainant had previously had sexual intercourse, but whether the evidence would have been admissible to support Martin's defense. Thus, because Martin has only offered speculation regarding how the records would have been relevant in that respect, counsel was not ineffective for failing to request the earlier medical records.

#### F. DEFENSE EXPERT

According to Martin, his defense counsel was also ineffective because he should have consulted with an expert to assist in effectively cross-examining Allen and should have presented a defense expert to respond to her claim of no alternative hypothesis.

With his motion for a new trial, Martin attached a compelling affidavit from psychologist Katherine Okla, Ph.D. to support his claim that defense counsel should have secured an expert to counter Amy Allen's testimony and to assist with cross-examining her. In the opinion denying the motion, the trial court failed to address this aspect of Martin's motion.

In retrospect, it is possible that defense counsel could have secured a counter expert. Allen tended to undermine various bases for the argument that the complainant's inconsistencies demonstrated a lack of truthfulness. While she did not say that the complainant was telling the truth, Allen explained the delay in reporting the abuse, gave an innocent reason for the inconsistencies in the complainant's testimony, and offered a plausible explanation for why the complainant may have voluntarily returned to Martin's home after suffering the abuse. However, ahead of trial, defense counsel may have legitimately thought that cross-examination would suffice. As previously noted, whether to call an expert witness is a matter of trial strategy,

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<sup>18</sup> MRE 803(4); *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992).

<sup>19</sup> *Meeboer*, 439 Mich at 322-323; *People v Crump*, 216 Mich App 210, 212; 549 NW2d 36 (1996).

<sup>20</sup> *Davenport*, 286 Mich App at 199.

and this Court will not judge defense counsel's performance with the benefit of hindsight.<sup>21</sup> For these reasons, we conclude that Martin has not established ineffective assistance of counsel based on the failure to call an expert witness.

### G. HEARSAY STATEMENTS

Finally, Martin contends that defense counsel was ineffective for failing to object on hearsay grounds to the complainant's alleged statements to others that Martin had molested her.

We first note that these were not excited utterances. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."<sup>22</sup> Although the passage of time is not conclusive, the focus is on the "possibility for conscious reflection."<sup>23</sup> Here, the complainant had such an opportunity for reflection during the approximately two- to three-month interval between the last instance of abuse and the statements she made to others.

Nonetheless, the prosecution argues that these statements were made to explain the complainant's ensuing actions. That is, the statements the complainant made to her mother and godmother served as the catalyst for Amy Allen's ensuing investigation. Moreover, defense counsel could have made a tactical decision that nothing was to be gained by objecting to these statements. Accordingly, Martin has not established ineffective assistance of counsel based on the failure to object.

### III. ADMISSION OF EVIDENCE TO REBUT EXPERT TESTIMONY

Martin argues that his motion for a new trial should have been granted based on the need for the evidence of the complainant's relationship with SC to rebut the testimony by Amy Allen of Care House and Dr. Gorman.

This Court reviews for an abuse of discretion a trial court's decision to preclude evidence.<sup>24</sup> An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes.<sup>25</sup>

#### A. TESTIMONY OF DR. STACY GORMAN

Dr. Gorman testified that she did not perform a pelvic examination in October 2008, because one had been performed in August 2008, and the incidents ended in August. Martin

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<sup>21</sup> *Payne*, 285 Mich App at 190.

<sup>22</sup> MRE 803(2).

<sup>23</sup> *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998).

<sup>24</sup> See *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984).

<sup>25</sup> See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

argues that this testimony led the jurors to believe that the complainant's hymen was ruptured and that the complainant had engaged in sexual activity. He further argues that, because of this inference, the jurors would assume that he ruptured her hymen. For these reasons, Martin contends that the evidence of the complainant's sexual conduct with SC would have given another explanation for her hymen being ruptured. However, Dr. Gorman gave absolutely no indication whether the complainant's hymen was or was not intact. Therefore, this argument has no merit.

## B. TESTIMONY OF AMY ALLEN

Amy Allen testified that an investigator tries to develop alternative explanations. She also testified that her team concluded that there were no alternative explanations for the allegations the complainant made in her interview. Martin posits that the jury must have inferred that there were no other hypotheses in this case and no other suspects. He suggests that a reference to SC would have given rise to another hypothesis and another suspect. While evidence of the complainant's sexual past may have developed an alternative hypothesis, such evidence is precluded by the rape shield law, and Martin has failed to show sufficient cause to circumvent the statutory prohibition.

## IV. SENTENCING

### A. STANDARD OF REVIEW

Martin argues that, despite the Michigan Supreme Court's contrary determination, Michigan's sentencing guideline system cannot be squared with *Blakely v Washington*.<sup>26</sup> Thus, he argues that he is entitled to resentencing because his sentence should have been based on facts found by a jury. Apart from *Blakely* considerations, Martin challenges the trial court's scoring of offense variables (OVs) 8 and 13 and prior record variable (PRV) 7.

This Court reviews the scoring of the sentencing guidelines to determine if the lower court properly exercised its discretion and if the evidence adequately supported a particular score. If there is any evidence to support a score, this Court will uphold the score.<sup>27</sup>

### B. *BLAKELY v WASHINGTON*

Martin, in essence, argues that the Michigan Supreme Court improperly decided *People v Drohan*.<sup>28</sup> However, this Court is bound by the Supreme Court's decisions.<sup>29</sup> Accordingly, *Drohan* is dispositive of this issue.

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<sup>26</sup> *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

<sup>27</sup> *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

<sup>28</sup> *People v Drohan*, 475 Mich 140; 715 NW2d 778, cert den sub nom *Drohan v Michigan*, 549 US 1037 (2006).

### C. OV 8

Martin challenges the trial court's scoring of OV 8 at 15 points. A trial court should score 15 points when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense."<sup>30</sup> Asportation does not require a forceful movement.<sup>31</sup>

The trial court appears to have based its 15-point score on the prosecutor's argument that Martin took the complainant to a hotel where there were no other adults around, creating a greater danger. Martin essentially claims that the purpose of the hotel visit was a family outing and the fact that the crime allegedly occurred in the hotel room did not establish any greater danger. While the location of the sexual assault may have been incidental to the crime, as opposed to part of the Martin's design for purposes of committing the crime, we conclude that the evidence supported the trial court's scoring. Accordingly, we uphold the trial court's scoring of 15 points for OV 8.

### D. OV 13 AND PRV 17

Martin argues that the trial court's scoring of 25 points for OV 13 and 20 points for PRV 7 amounted to impermissible "double counting." We disagree. Taking into account the same conduct when scoring an OV and a PRV does not result in double counting when the two separate categories address two different situations.<sup>32</sup> PRV 7 addresses "subsequent or concurrent felony convictions,"<sup>33</sup> whereas OV 13 addresses a "continuing pattern of criminal behavior."<sup>34</sup> Accordingly, the trial court's scoring was not improper.

We affirm.

/s/ Karen M. Fort Hood  
/s/ Kathleen Jansen  
/s/ William C. Whitbeck

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<sup>29</sup> *People v Tims*, 202 Mich App 335, 340; 508 NW2d 175 (1993), rev'd on other grounds 449 Mich 83 (1995).

<sup>30</sup> MCL 777.38(1)(a).

<sup>31</sup> *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

<sup>32</sup> *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996).

<sup>33</sup> MCL 777.57.

<sup>34</sup> MCL 777.43.