

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 19, 2011

v

SCOTT ALLEN SPAULDING,
Defendant-Appellant.

No. 298743
Wexford Circuit Court
LC No. 2009-009234-FC

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

PER CURIAM.

Defendant appeals by right his jury-trial convictions of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b), and three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b). He was sentenced to concurrent prison terms of 6 to 30 years for the CSC I conviction and 3 to 15 years for the CSC II convictions. We affirm.

I

Defendant first argues that he received ineffective assistance of counsel at trial and asks this Court to remand the matter to the trial court for a *Ginther*¹ hearing. Defendant's earlier motion to remand for this purpose was already denied by this Court.² In his brief on appeal, defendant now renews his request to remand the matter for a *Ginther* hearing.

A motion to remand must identify an issue sought to be reviewed on appeal and show either (1) that the issue is one of record that must be decided by the trial court before this Court may review the issue, or (2) that development of a factual record is required for appellate consideration of the issue. MCR 7.211(C)(1)(a). The motion must be supported by an affidavit or offer of proof regarding the facts to be established at the hearing on remand. *Id.* Whether to

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

² *People v Spaulding*, unpublished order of the Court of Appeals, entered March 3, 2011 (Docket No. 298743).

grant a motion to remand is discretionary with this Court. *People v Hernandez*, 443 Mich 1, 15; 503 NW2d 629 (1993).

Defendant's convictions arise from allegations that he sexually abused his then 16-year-old stepdaughter. Specifically, the victim alleged that defendant fondled her on numerous occasions and performed oral sex on her once. Defendant denied these allegations, claiming that they were completely fabricated.

Defendant claims that his attorney rendered ineffective assistance by failing to adequately prepare for trial. In this regard, defendant asserts that trial counsel did not timely file a motion or witness list and was deficient in various ways based on his inadequate preparation and investigation. However, these claims raise questions concerning defense counsel's performance at trial, which is obviously documented in the transcripts and other parts of the lower court record. Thus, they simply present no need for a remand as this Court can review the existing record.

Defendant also faults trial counsel for not retaining an expert to rebut the testimony of Barbara Cross, the prosecution's proffered expert on child sexual abuse. In support of his claim in this regard, defendant has provided a report prepared by Katherine Keefer Okla, Ph.D., a psychologist, which largely attacks the conduct and testimony of Cross in this case.

Much of Dr. Okla's report criticizes the manner in which Cross and others interviewed the victim. The report also discusses how improper victim interviews might lead to false reports of sexual abuse or improperly suggest false memories by the victim concerning the events that actually transpired. However, we note that this is not a case involving a very young child who might be susceptible to being convinced that she was molested by an adult who did not actually molest her. Rather, this is a case in which a 16-year-old girl clearly and particularly accused her stepfather of sexual abuse that included oral sex. As a practical matter, there was no reasonable concern in this case that the victim might have been misled by her interviewers into falsely remembering the facts or falsely accusing defendant of molesting her. Consequently, we cannot conclude that a defense expert's attempt to rebut Cross's testimony would have been a significant factor in the jury's determination of guilt or innocence. It is axiomatic that in order to establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that, but for the deficient performance, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Defendant simply cannot establish that defense counsel's failure to retain an expert to rebut Cross's testimony was outcome determinative in this matter.

Defendant argues that, because Cross testified concerning certain behavioral characteristics of the victim, her testimony was improper. He also argues that, because Cross testified that defendants often lie in CSC cases, she improperly bolstered the victim's testimony. We acknowledge that Cross's testimony in this regard may have been improper. See *People v Peterson*, 450 Mich 349, 374; 537 NW2d 857, amended 450 Mich 1212 (1995). But this does not present a basis for a remand with regard to defendant's claims of ineffective assistance of counsel because (1) this Court remains able to review the existing record, and (2) trial counsel cannot be considered deficient for failing to have anticipated that Cross would offer such improper testimony and failing to have obtained an expert for the sole purpose of rebutting it.

Defendant lastly faults trial counsel for failing to discover that Cross allegedly lied about her qualifications in the unrelated, federal habeas corpus case of *LeBlanc v Berghuis*, 2005 WL 2206480 (WD Mich, September 12, 2005). However, we again conclude that this does not warrant a remand because this matter does not depend on developing a further factual record in the trial court.

For the foregoing reasons, we decline defendant's invitation to remand this matter to the trial court for a *Ginther* hearing.

II

Nor do we perceive any ineffective assistance of counsel on the existing record. See *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007) (observing that when no *Ginther* hearing has been held, "review is limited to errors apparent on the record"). It strikes us that even if trial counsel had timely filed a motion or witness list, retained his own expert to rebut the testimony of Cross, further impeached Cross's testimony, and conducted additional research and investigation prior to trial, the result of the proceedings would have been the same. See *Carbin*, 463 Mich at 600. The victim testified in detail that defendant had performed oral sex on her and had fondled her on several occasions. Defendant then testified in his own defense, denying the victim's allegations and claiming that he had never sexually assaulted her. At the same time, however, defendant admitted during his testimony that he had referred to the victim as "a snuggle ball," that he had laid on the couch and "spoon[ed]" with her on several occasions, that the victim was "cuddly," and that he had "possibly" touched the victim's breasts. It is solely for the jury to assess the credibility of the witnesses and to weigh their testimony. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). It would be difficult, indeed, to conclude that any additional actions by defendant's attorney could have altered the jury's view of the evidence in this case. On the record before us, we simply cannot conclude that the result of the proceedings would have been different but for the alleged deficiencies of defense counsel. *Carbin*, 463 Mich at 600.

III

Defendant also argues that the trial court abused its discretion by allowing the prosecution to amend the information to expand the timeframe during which the offenses were alleged to have occurred. We disagree.

The original information alleged that the charged offenses occurred between May 2008 and June 2008. However, during trial the court granted the prosecution's motion to amend the information to include the dates of October 2007 through June 2008. The trial court ultimately instructed the jury that it was required to find beyond a reasonable doubt that the crimes occurred "between the dates of October of 2007 and the end of June of 2008[.]."

We review for an abuse of discretion the trial court's decision to grant a motion to amend the information. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). A trial court may permit amendment of the information at any time during the trial to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant. *Id.*; see also MCL 767.76; MCR 6.112(H); *People v Russell*, 266 Mich App 307, 317;

703 NW2d 107 (2005). A defendant is unduly prejudiced by an amendment to the information if it unfairly surprises the defendant, causes him to have insufficient notice of the charges, or deprives him of a sufficient opportunity to present a defense. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). Here, defendant was fully aware that the prosecution intended to present evidence of similar acts of sexual abuse that he perpetrated against the victim outside the originally charged timeframe of May 2008 and June 2008. Thus, defendant was on notice that these additional acts of sexual abuse would be introduced at trial and had an adequate opportunity to defend against them. Because defendant was neither unfairly surprised nor unfairly prejudiced, we cannot conclude that the trial court abused its discretion by granting the prosecution's motion to amend the information during trial.

IV

Lastly, defendant originally argued that one of his three CSC II convictions should be vacated because there was insufficient evidence to support it. However, defendant has withdrawn this argument in his reply brief. We therefore decline to consider it further.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Pat M. Donofrio