

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 8, 2014

v

ANTHONY WAYNE ANDERSON,

Defendant-Appellant.

No. 311448
Kent Circuit Court
LC No. 11-008032-FH

Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Following a bench trial, the circuit court convicted defendant of three counts of third-degree criminal sexual conduct (CSC) in violation of MCL 750.520d(1)(a) (sexual penetration of a victim between the ages of 13 and 16), and furnishing alcohol to a minor in violation of MCL 436.1701(1). Defendant’s convictions arise from his inappropriate relationship with his wife’s teenaged cousin. Defendant challenges the adequacy of his trial counsel’s performance in relation to the admission of several pieces of evidence. We discern no prejudicial error. Defendant also contends that he is entitled to a new trial based on newly discovered evidence. We are unconvinced by defendant’s interpretation of the proposed evidence. We affirm.

I. BACKGROUND

In 2010, defendant met the victim at a family function. They subsequently communicated online, with the victim confiding in defendant about her personal problems and defendant providing “father[ly]” advice. In the summer of 2011, the victim’s family and three of her friends were stranded near defendant’s home due to automobile trouble. The group stayed overnight with defendant’s family, during which time defendant allowed the victim and her friends to consume alcoholic beverages. The victim and her friends also joined defendant for a soak in his hot tub, with the victim and defendant lingering longer than the others. When they were alone, defendant exposed his penis to show the victim his piercing.

Shortly after this visit, the victim returned alone to the home of her cousin and defendant. The victim had been experiencing trouble at home and asked to live with her relatives for a time. Defendant provided the victim with alcohol several times throughout her stay. They engaged in long personal conversations and defendant eventually expressed romantic feelings toward the victim. One evening, after supplying the victim with alcohol, defendant and the victim went into the hot tub. The victim testified that defendant kissed her. It began to rain and defendant

suggested they escape to the garage. The victim, “wobbly” from the alcohol and hot water, needed defendant’s assistance. Inside the garage, defendant placed the victim on the stairwell leading into the house and engaged in oral, digital, and penile penetration. The victim returned to her parents’ home a few days later.

The victim testified that defendant sent her home with a vibrator. He e-mailed her more than 20 times a day, and sent her messages over Facebook and through text. In the messages, defendant expressed his love for the victim, referred to their sexual encounter, and stated his desire to continue their “relationship.” The victim’s parents reported defendant to the police after finding and reading the victim’s journal and discovering the vibrator. Under the supervision of a Michigan State police officer, the victim telephoned defendant. During the recorded conversation, defendant instructed the victim, “All we have to do is keep saying we never had, we never had sex.”

At trial, defendant denied any wrongdoing. The theory of the defense was that the victim or someone connected with her manipulated the electronic communications, making it appear that they came from defendant. However, defendant admitted that he remained in frequent contact with the victim, claiming authorship of only benign messages.

II. ELECTRONIC MESSAGES

Defendant raises several challenges in relation to the admission of certain e-mail and Facebook messages purportedly sent by defendant to the victim.¹ Specifically, defendant contends that defense counsel should have objected to the admission of the messages on various grounds. The subject messages were incriminating, reciting such phrases as: “I felt like I truly made love for the first time in my life,” “I Love you I miss you I want to hold you I want to kiss you,” and “I have been also thinking about how unfair it was for me to ask if you would run away with me.” Defendant did not move for a new trial or a *Ginther*² hearing in the trial court. Our review is therefore limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

“[T]he right to counsel is the right to the effective assistance of counsel.” *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). A defendant’s claim of ineffective assistance includes two components: “First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish the deficiency component, a defendant must show that counsel’s performance fell below “an objective standard of reasonableness” under “prevailing professional norms.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761

¹ The victim and defendant also communicated through text messages. Neither party placed the content of any text messages on the record, so their admissibility is not at issue on appeal.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

(2004). With respect to the prejudice aspect, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664. The defendant also must overcome the strong presumptions that his "counsel's conduct [fell] within the wide range of reasonable professional assistance," and that counsel's actions were sound trial strategy. *Strickland*, 466 US at 689. "[T]he defendant . . . bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Absent development of a record about counsel's plans for the defense, defendant has a strenuous battle to overcome the presumption that counsel employed sound trial strategy. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant contends that before the electronic communication evidence could be admitted, the prosecutor was required to present evidence definitively proving that defendant sent the messages, such as the IP addresses of the computers from which the messages were generated. At trial, defense counsel lodged a closely related objection, contending that the victim could say that the messages had "the defendant's identifier on" them, but should not be allowed to say that the messages "came from the defendant." The court accepted the evidence "with the understanding that the [victim] understood it to be from the defendant" because it bore his "e-mail return address." The court also stated "that I suppose it's possible that some intruder may have prepared it or the [victim] herself," and that the court would "be open to what the evidence shows as we proceed forward." As defense counsel's objection qualifies as substantially similar to defendant's appellate claim, we construe the gravamen of defendant's appellate challenge to be that counsel should have fought admission more vigorously on authentication grounds.

MRE 901(a) provides a lower threshold for admissibility than desired by defendant: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 903 makes it unnecessary to present the testimony of a subscribing witness to authenticate the evidence. Pursuant to Michigan's evidentiary rules, the prosecutor satisfied her burden of authenticating the evidence by presenting the messages, which contained defendant's identifying information as the sender. The prosecutor also presented the victim's testimony that she received the messages and believed they came from defendant.

This result is consistent with federal caselaw regarding the authentication of e-mail evidence under the substantively identical FRE 901(a) ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."). In *Lorraine v Markel American Ins Co*, 241 FRD 534, 537 (D Md, 2007), the federal district court for Maryland provided guidance regarding the admissibility of electronic communications. The court began by noting the interplay between relevancy and authenticity and describing "a two step process" for the court's consideration:

First, "[b]efore admitting evidence for consideration by the jury, the district court must determine whether its proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." Then, "because authentication is essentially a question of conditional relevancy, the jury

ultimately resolves whether evidence admitted for its consideration is that which the proponent claims.” [*Id.* at 539-540.]

It would be acceptable under this method for the parties to present conflicting information about the evidence’s authenticity at trial because the factfinder could weigh the information and make a reasoned decision.

The *Lorraine* court also noted that the evidence’s proponent “need only make a prima facie showing that it is what he or she claims it to be,” which “is not a particularly high barrier to overcome.” *Id.* at 542. The proponent need not present direct evidence, such as an admission by the author or the testimony of a witness who saw the purported author typing the message. *Id.* at 545; see also *United States v Fluker*, 698 F3d 988, 999 (CA 7, 2012). Rather, circumstantial evidence is sufficient to meet the proponent’s burden. *Lorraine*, 241 FRD at 556. The circumstantial proof might include the e-mail address, cell phone number, or screen name connected with the message; the content of the messages, facts included within the text, or style of writing; and metadata such as the document’s size, last modification date, or the computer IP address. *Id.* at 546-548, 554, 556. See *Fluker*, 698 F3d at 999; *United States v Siddiqui*, 235 F3d 1318, 1322-1323 (CA 11, 2000); *United States v Safavian*, 435 F Supp 2d 36, 40-41 (D DC, 2006); *Boyd v Toyobo America, Inc*, 434 BR 502, 504-505 (WD Mich, 2010). See also *People v Bernard*, 2013 Co App 79, pp 10-11; 305 P3d 433 (2013); McCormick, Evidence, § 227, pp 103-104 (7th ed).

Here, the prosecutor presented messages from Facebook and e-mail that were sent from defendant’s e-mail account or using his Facebook profile. One of the challenged messages included an inspirational quote, akin to several of the Facebook messages over which defendant admitted authorship. In another, defendant recommended a philosophy book, consistent with the tenor of other messages whose authorship was not challenged. While defendant challenged the accuracy of some of the information within certain messages, such as his GPA and the number of college credits he had earned, and claimed the use of slang and improper grammar was not his style, this information merely created a credibility contest for the factfinder to resolve. Defense counsel presented significant evidence to challenge the victim’s credibility regarding the authenticity of the proffered messages and was not ineffective in this regard.

Defendant also contends that the prosecutor should have offered into evidence the electronic versions of these messages so the court could have reviewed the metadata. The prosecutor was permitted to present a paper copy, however, under MRE 1001(3). The evidentiary rule includes in the definition of an “original” a “printout” of information stored on a computer. Therefore, defense counsel was not ineffective for failing to object on this ground. See *People v Hardy*, 494 Mich 430, 445; 835 NW2d 340 (2013) (holding that counsel is not ineffective for failing to raise meritless objections).

Defendant suggests that the metadata from the various electronic communications would have revealed that the victim actually used passwords she stole from defendant’s home to forge e-mail and Facebook messages from defendant on her own electronic devices. Defendant also

suggests that further investigation could have revealed that the victim only made it appear that incriminating text messages came from him.³ Accordingly, defendant implies that defense counsel was ineffective in failing to push the prosecutor to conduct such an analysis or to personally secure an independent forensic analysis.

Yet, defense counsel did present the defense that the victim, rather than defendant, generated these messages. Defense counsel elicited testimony from defendant's wife that the "cheat sheet" on which she kept the family's passwords turned up missing after the victim's visit. Mrs. Anderson also testified regarding an "unusual" incident with her personal e-mail account in which someone briefly blocked her access and deleted all of the information stored in the account. Defense counsel elicited testimony from Mrs. Anderson and a friend of defendant that the challenged messages were not drafted in defendant's style. Defendant had been studying to become a teacher and the witnesses claimed he always used correct grammar and spelling in his electronic communications. Counsel elicited testimony that certain information in the messages was inaccurate. Ryan Whitmore, defendant's friend, claimed that, during a conversation regarding the victim's mother reading the teenager's messages, the victim asserted that she knew "how to send a text message from [her] phone to make it look like it come from someone else."

Defense counsel also presented evidence that defendant could not have sent certain messages at the times identified on the paper copies. Counsel presented an AT&T representative who testified that defendant's cellular plan did not include data usage. Therefore, defendant could not access the Internet to use Facebook or e-mail without incurring additional charges. Defendant's phone records revealed that no such charges were incurred during the period in question, establishing that any messages sent by defendant must have been sent from a computer.⁴ Defense counsel presented the testimony of several witnesses that defendant was at a beach and nowhere near a computer on July 9, 2011, when one incriminating message was sent. A handful of witnesses testified that defendant did not use a computer on July 4, 2011, when another message was sent. At the time of a third message, defendant was at Menard's with his wife for over two hours. Defense counsel presented a receipt and security footage to prove this claim. Other messages were sent around 5:30 a.m., a time when defendant's wife would have been up and getting ready for work. She testified that her husband was never up that early, let alone using the computer. Various messages were sent at approximately 2:00 a.m., but his wife claimed that defendant's habit was to retire between 11:00 p.m. and midnight.

Defense counsel clearly conducted a thorough investigation and yet failed to seek an expert to forensically analyze the victim's cell phone and hard drive, which were in police custody. Although defendant presented his own hard drive to the investigating authorities (who declined to analyze it), defense counsel also failed to secure his own analysis of that evidence.

³ A quick Internet search reveals the availability of software applications that can be downloaded to a cell phone to conduct such trickery.

⁴ This defense theory was undermined, however, by testimony that a Facebook user can opt to have Facebook messages sent to his or her cell phone as text messages, allowing the user to respond via text even without Internet capabilities.

Absent any record indication to the contrary, we assume this was a strategic decision. Defendant admitted to having extensive electronic communications with the victim. The sheer volume of messages was incriminating in itself. Even those messages that defendant tried to prove he could not physically have sent might have traced back to him. It is not an uncommon occurrence that a message is delayed and therefore appears to have been sent at another time. And it would not have been difficult for defendant to sneak away from a family gathering to send a short missive. Also telling is that the victim did not reveal the inappropriate communications. Rather, her parents discovered her vibrator and secretly read her messages, then reported their concerns to law enforcement. The victim continued her communications with defendant for nearly two more weeks, completely oblivious that any investigation was being conducted. Accordingly, we reject defendant's argument that the trial court improperly admitted the electronic messaging evidence.

III. THE VICTIM'S MENTAL HEALTH RECORDS

Defendant also challenges defense counsel's failure to obtain the victim's mental health records. During the time in question, the victim was experiencing significant personal troubles. Defense counsel elicited testimony that the victim had been fighting with her parents, experimenting with alcohol, smoking and using drugs, engaging in sexual behaviors, cutting herself, and had attempted suicide.

We first note that there is no record indication that such mental health records exist. In one Facebook communication from May 2011, the victim stated that her parents had discovered her relationship with a boyfriend and that she had been cutting herself. She then wrote, "I'm seeing some type of doctor and idk [I don't know] what to really do with myself at this point." Defendant has presented no evidence that any mental health treatment actually followed and therefore failed to establish the factual predicate for his ineffective assistance claim. See *Carbin*, 463 Mich at 600.

Even if such records do exist, they would be privileged. MCL 330.1750; *People v Stanaway*, 446 Mich 643, 659-660; 521 NW2d 557 (1994). To present the evidence, defendant would first need to "establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense." *Stanaway*, 446 Mich at 649-650. Even then, the evidence would not be admissible until the court conducted "an in camera review of those records . . . to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense." *Id.* at 649-650. Given the lack of a record regarding the content of any mental health reports, defendant cannot show the requisite prejudice for relief. See *Solmonson*, 261 Mich App at 663-664.

In any event, defense counsel did present evidence that the victim suffered emotional troubles, supporting a claim that the victim fabricated the allegations. Evidence was presented through testimony and electronic communications that the victim cut herself and had been acting out. As such, defendant was not denied the use of this defense.

IV. THE VICTIM'S JOURNAL

Defendant contends that his counsel was ineffective for failing to obtain a complete copy of the victim's journal prior to trial and then failing to request the admission of the entire journal when parts were referenced at trial.

MRE 106 provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Contrary to defendant's assertions, no portion of the victim's journal was admitted at trial. Rather, the prosecutor used a portion of the victim's journal entries to refresh the victim's memory about the dates of the offenses. The journal excerpts themselves were never admitted into evidence and MRE 106 is inapplicable.

Defendant contends that counsel's failure to request discovery of the entire journal affected his ability "to effectively explore the reasons why [the victim] was fabricating this story." The journal entries would have offered insight into the victim's emotional troubles, better explaining her motives, defendant complains. Defense counsel did have access to those portions of the victim's journal written in June and July 2011, around the time of the offense. Those excerpts reveal that the victim was still cutting herself, and paint her as a sexually active teenager. Those excerpts also incriminate defendant, however, placing him in an even more negative light than that portrayed at trial. Defense counsel actually questioned the victim about facts included in these journal excerpts in an attempt to discredit her trial testimony. Even absent the rest of the victim's journal, defense counsel was able to present evidence about the victim's troubles. He presented a Facebook conversation thread describing the types of problems she was having. Defense counsel was able to argue from the existing evidence that the victim was a troubled young woman, prone to fabricate the allegations against defendant. Accordingly, defendant has not established that he was prejudiced by the absence of the victim's journal in its complete form.

V. FORENSIC INTERVIEW RECORDING

Next, defendant argues that his trial counsel was ineffective for stipulating to the admissibility of a DVD recording of the victim's forensic interview. At the close of the fifth day of trial, the parties stipulated to the recording's admission and it was marked as a defense exhibit. Defense counsel indicated that he had no objection to the trial judge watching the DVD outside the parties' presence. The judge and court reporter viewed the DVD that afternoon. On the seventh day of trial, the prosecutor presented Michigan State Police Trooper Yvonne Brantley as a rebuttal witness and asked several questions clarifying the information elicited during the victim's forensic interview. On appeal, defendant contends that the DVD prejudiced his defense because the victim's statements therein were largely consistent with her trial testimony, bolstering her credibility.

Decisions regarding what evidence to present are presumed to be matters of trial strategy, and "[w]e will not second-guess counsel on matters of trial strategy, nor we will assess counsel's competence with the benefit of hindsight." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). The fact that counsel's chosen strategy is unsuccessful does not render counsel's

performance constitutionally unreasonable. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008) (“A failed strategy does not constitute deficient performance.”).

In the recorded interview, the victim claims that the sexual encounter was extremely brief, while at trial she claimed it lasted over an hour. She could not remember the days on which events happened even though her memory was fresh at that time. The victim’s demeanor during the interview could also be interpreted in a less than favorable light. Accordingly, defense counsel reasonably believed the recorded interview could benefit the defense and was not ineffective in stipulating to its admission.⁵

VI. NEWLY DISCOVERED EVIDENCE

Defendant finally argues that he is entitled to a new trial based on newly discovered evidence. Defendant failed to preserve this issue for appeal by moving for a new trial. *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). Therefore, our review is for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

“Historically, Michigan courts have been reluctant to grant new trials on the basis of newly discovered evidence.” *People v Grissom*, 492 Mich 296, 312; 821 NW2d 50 (2012). “A motion for a new trial, upon the ground of newly-discovered evidence, is not regarded with favor . . . [because] [t]he policy of the law is to require of parties care, diligence, and vigilance in securing and presenting evidence.” *People v Rao*, 491 Mich 271, 280; 815 NW2d 105 (2012) (quotation marks and citation omitted, alterations in original).

For a new trial to be granted on the basis of newly discovered evidence, 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.” [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).]

The defendant bears the burden of satisfying each of these elements. *Rao*, 491 Mich at 279.

⁵ We briefly note that defendant interspersed prosecutorial misconduct challenges within his appellate arguments. Defendant did not raise prosecutorial misconduct in the statement of questions presented, however. As the issue is not properly before this Court, we decline to review it. See *People v Fonville*, 291 Mich App 363, 383; 804 NW2d 878 (2011).

Defendant also claims that he was entitled to a new trial based on the cumulative effect of “numerous constitutional errors” at trial. No “actual errors” occurred that could be “aggregated to determine their cumulative effect.” *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

Defendant contends that a message posted to a Twitter account, allegedly belonging to the victim, is newly discovered evidence that the victim committed perjury in her trial testimony. “The discovery that testimony introduced at trial was perjured may be grounds for a new trial.” *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). The subject message states: “I’m joining the club: prettttyyy litttle liaaarsss ♥ • • • !!” First and foremost, defendant presented no evidence that the Twitter account truly belongs to the victim. Secondly, the message was not posted until approximately six weeks after defendant’s trial and one week after his sentencing. It does not refer to the victim’s trial testimony in any manner. The message, disconnected in time to the trial, could easily refer to the writer’s enjoyment of the popular teenage television show “Pretty Little Liars.” We view purported recantation evidence as “suspect and untrustworthy,” even in cases where a witness expressly states that he lied in his trial testimony. See *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). We decline defendant’s invitation to read a recantation into this seemingly innocuous, far-removed “tweet.” As such, defendant cannot show that this evidence would make a different result probable on retrial.

Likewise, we reject defendant’s claim that photographs posted to the victim’s Facebook account during trial constitute newly discovered impeachment evidence that warrants a new trial. Defendant attached to his appellate brief a screen shot from the victim’s Facebook page that includes two photographs. In those pictures, the victim poses, smiling with friends who testified at trial. The date on which the photographs were posted to the Facebook account coincides with the day the victim testified at trial. This Court has no way to corroborate that these pictures were actually *taken* on the day of trial. Even if the victim took these pictures after giving her testimony, her contemporaneous comment—“I forget those who forget me and respect those who respect me, it’s as simple as that”—tends to disprove defendant’s interpretation that the victim could only be smiling because she lied on the stand. “It will be the rare case in which (1) the necessary exculpatory connection exists between the heart of the witness’s testimony at trial and the new impeachment evidence and (2) a different result is probable on retrial.” *Grissom*, 492 Mich at 318. The photographs proffered by defendant simply do not establish such a “rare case.”

We affirm.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher