

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK E. RUST,

Defendant-Appellant.

UNPUBLISHED

July 28, 2000

No. 211982

Iosco Circuit Court

LC No. 97-003600-FC

Before: Owens, P.J., and Murphy and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of eight counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and sentenced to twenty to forty year terms on each count, to run concurrently. The trial court denied defendant's motion for new trial after holding a *Ginther*¹ hearing. Defendant appeals as of right. We affirm.

I

Defendant first argues that his trial counsel was ineffective for failing to challenge the competency to testify of the victim, who was mentally impaired. Defendant argues that counsel did not make a motion to voir dire the victim after the prosecutor established, at the trial's outset, that the fourteen-year-old victim functioned at an intellectual level such that he did not know the year he was born. Defendant also argues that counsel in cross-examination made no effort to determine whether the victim knew the difference between lying and telling the truth. He argues that the victim's testimony at the *Ginther* hearing established that he could hold completely contradictory beliefs and testify that both were true, and that he was incapable of appreciating the most simple and obvious contradictions in his testimony.

A

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

In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the results of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). A reasonable probability is a probability sufficient to undermine the outcome. *Pickens, supra* at 314, citing *Strickland, supra* at 314.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

“To the extent that [a defendant's] ineffective assistance claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately. *People v Hoag*, 460 Mich 1, 6; NW2d (1999), quoting *Ginther, supra* at 442-443.

B

The trial transcript establishes that the jury was informed from the outset that the victim was a mentally impaired young boy. The prosecution stated in opening statement that the victim was fourteen years old, attended special education classes and had “problems with dates and stuff.” The testimony of the victim, the prosecution's first witness, demonstrated that he had intellectual limitations. For example, although he described in detail the alleged incidents involving defendant, and knew the day and month he was born, he could not identify the year he was born, and could not identify what month of the year school finished. It was clear from the victim's testimony on direct examination that he could not recall the dates or months of the alleged incidents, although he could recall that one of them occurred when he was out of school for the summer, and could not remember how many times he had visited defendant or the precise time spans between the alleged incidents. However, the victim testified in clear fashion that he and his mother stayed for several days several times at defendant's home, that he was alone with defendant at defendant's home on two occasions, the first being the summer when he was twelve years old, that on the first occasion he had wanted to play Nintendo, and that defendant told him he could play it if he pulled down his pants. The victim testified that he complied and that defendant then wanted him to “put my private up his butt,” that defendant then did the same to him, that defendant then put his private in the victim's mouth, and then took the victim's private in his mouth. The victim testified that the same acts took place a second time when he was alone with defendant at defendant's home.

On cross-examination, defendant's trial counsel again elicited that the victim could not remember dates of, or precise time spans between, the alleged incidents; could not remember how long he stayed at defendant's home each time, the weather or time of day the alleged incidents occurred, what specifically defendant asked him to do, or how long the sexual contacts lasted. Defense counsel elicited that the victim did not tell his mother about the incidents when she returned to defendant's home, or the day after each incident. On re-cross examination, the victim testified that he usually does what adults tell him to do, unless they tell him to do "something wrong," and that what happened between him and defendant was wrong. He testified, however, that he did what defendant asked anyway because he was told to by an adult.

The victim's mother testified that she and her son were at defendant's home a number of times during the summer of 1996. The victim's special education teacher of 2 ½ years testified that the victim was educable mentally impaired, had an IQ of sixty-two, and that most of his abilities were at a kindergarten or first-grade level. She testified that he really did not have a concept of time, and got the large and small hands of clocks mixed up, so that he could not always tell time accurately.

Detective Allan MacGregor of the Oscoda Police Department testified that he learned of the complaint against defendant from Sergeant Thomas at the Waterford Police Department, and eventually spoke to and advised defendant that a complaint had been filed against him. MacGregor testified that he advised defendant of his *Miranda* rights, and that defendant told him the charges were not true, that he had been alone with the victim but that no sexual assault had occurred.

The defense called defendant's daughter, who testified that she was present when the victim and his mother stayed at her parents' home in the summer of 1996, recounted the specific activities of the various people present, and testified that defendant and the victim had not been alone.

Defendant testified that he recalled the victim and his mother visiting his home in June of 1996 and staying two nights. He testified that the victim had not visited in July of that year, that during the June visit he was never alone with the victim, and that he never engaged in any kind of sexual behavior with the victim. On cross-examination, defendant testified that he did not remember telling Detective MacGregor that he had been alone with the victim.

The prosecution recalled Detective MacGregor, who testified that he informed defendant that he was accused of being alone with the victim on two different occasions, that he asked defendant if he had been alone with the victim on two occasions, and that defendant indicated he was alone with him, but nothing happened.

In closing argument, defense counsel questioned the victim's credibility at length.

D

We conclude that defendant's claim fails. The victim's special education teacher's testimony set forth what his intellectual limitations were and supported that the victim was competent to testify. The record supports that defense counsel's cross-examination of the victim drew out the complainant's

substantial limitations in memory and comprehension skills, and that the victim could hold contradictory beliefs. The record supports that part of defense counsel's trial strategy was to discredit the victim's credibility and expose flaws in his recollection of the alleged incidents. Under these circumstances, we conclude that defense counsel's decision not to object to the complainant's competency to testify, and not to cross-examine expressly on the question whether the victim knew the difference between telling the truth and lying was reasonable trial strategy, *Mitchell, supra* at 165, and did not prejudice defendant because it has not been shown that the victim's testimony would properly have been excluded as incompetent. .

II

Defendant next argues that his trial counsel's decision not to use a prior false allegation of criminal sexual conduct in 1990 for impeachment purposes constituted ineffective assistance of counsel. Defendant argues that well before trial he requested that counsel investigate this prior allegation, which the victim later recanted, and that there was no conceivable strategy reason for not impeaching the prosecution's primary witness.

A

The victim testified at the *Ginther* hearing that he was in ninth grade, in special education and was fifteen years old. He testified that he recalled telling police that a person named John Warren had done something in 1989 or 1990, and testified that he recalled telling the jury at Warren's trial that Warren had not done anything. Later in the *Ginther* hearing, however, the victim testified that he could not remember going to court on the Warren case, but answered "yeah" when asked whether the charges against Warren were dropped because he had said it did not happen. The victim also testified at the *Ginther* hearing that he recalled speaking to Detective Thomas and was scared, but did not lie regarding defendant Rust.

Defendant testified at the *Ginther* hearing that he relayed to his trial counsel that the victim in 1990 had made a false allegation of criminal sexual conduct and discussed with him that he could look up the records, but that his trial counsel refused to check anything. Trial counsel did not appear at the *Ginther* hearing, and defendant's counsel stated that trial counsel had originally been subpoenaed, the hearing had been continued over to that day, and defense counsel had not re-subpoena him. Defense counsel asked for a continuance, which the trial court denied.

The trial court denied defendant's motion for new trial, noting that:

Number one, if there was a judicial proceeding involving the victim in this case . . . in 1990, apparently, there's been no effort to obtain the trial testimony in that case to enable this Court to determine what the victim here may have testified to concerning those allegations. It's clear on the record here that [the complainant] was confused and appeared to be indicating that, yes, the prior abuse by this other boy named John did occur, and, yes, he testified that it didn't occur, and he was incapable of recalling the reasons for his testimony, or, specifically, what his testimony was.

It's quite probable, certainly possible that a 6 year old child with [the complainant's] limited—limitations may well have been unable to testify sufficiently to support a conviction. This Court has experienced trials where young children are called and simply cannot testify with sufficient recall and sufficient credibility to support a conviction and, certainly, in some cases even to permit such allegation to go to a Jury. In this trial, [the complainant] did testify. His credibility was before the Jury as was that of the Defendant, and the Jury found [the complainant] to be more credible than the Defendant.

B

As the trial court noted at the *Ginther* hearing, the record of the proceedings involving the victim's purported prior false allegation was not before it. Thus there was no evidence from which the trial court could determine that trial counsel's failure to raise the prior allegation was objectively unreasonable, or that defendant was prejudiced by the failure to present the evidence. Absent such record support, we are unable to conclude that it was not sound trial strategy for counsel not to use the recanted sexual allegation, which was purportedly made when the mentally impaired victim was six years old, or that defendant suffered the requisite prejudice.

III

Defendant next argues that the trial court erred in excluding evidence regarding the circumstances under which the victim first accused defendant, and that his trial counsel was ineffective in the handling of the concordant pre-trial motion to allow impeachment evidence. We disagree.

Defendant's motion to allow impeachment evidence argued that he should be able to cross-examine Detective Thomas at trial regarding his interview of the victim and the circumstances that led to the interview, specifically, that the victim made the charges against defendant while the police questioned him on a separate criminal matter involving the victim's own sexual conduct with another child, to deflect attention from himself.

A

MRE 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909, modified and remanded on other grds 450 Mich 1212 (1995).

Detective-Sergeant Scott Thomas testified at the evidentiary hearing on defendant's motion that he interviewed the victim in the instant case regarding a complaint that the victim had fondled the genitals of a five-year-old neighbor boy on a number of occasions over a three-month period. Thomas testified that he advised the victim of his *Miranda* rights because he was considered a suspect in criminal activity, and that the victim fully disclosed, without keeping anything back, that he had the young

neighbor boy touch his penis a number of times. Thomas testified that he filed a petition on an open count of CSC, and that it was still at the prosecutor's office. Thomas testified that during the interview he explained to the victim the possible consequences of his acts, that he could go to counseling, or get probation, and that there was no mention that he would be removed from his home or placed in detention, or anything like that. Thomas testified that at the end of the interview, after the victim had made all of his admissions and they had discussed everything, he asked him a final question - - whether there was anything else he wanted to tell Thomas, anything else that took place, or if he had been involved with other kids, - -and that the victim responded something to the effect of "No, I've never done anything like my uncle makes me do."

The trial court ruled:

Under 404B, evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive . . . Where the victim in this case has made a clean breast of his sexual activity with the younger child I think hardly would appear that he would have a motive to then finger someone else, finger his Uncle for the same sort of conduct, unless there are factors that have not been raised at this hearing.

[Defendant's counsel]: If I may, your Honor, the only problem I'm having is it's not the acts of the boy that we're seeking to introduce. We don't care about that. We're seeking to have the jury know under what circumstances these allegations were raised. Unfortunately, it was a police interview involving criminal acts on this boy's part. We're not attempting to introduce that. It's just part of the res gestae, if you will, we're trying to show.

THE COURT: I believe the Officer . . . will be testifying that he was interviewing this boy in regard to another matter. The nature of the matter doesn't have to be disclosed, and the nature of the allegations against the present victim here . . . need not be disclosed and will not be disclosed. Okay, that's the Court's ruling.

[Defendant's counsel]: But that was going to be my next question. Could we question Sergeant Thomas, then, regarding the fact that there was an interview with [the victim], not question him regarding what the nature of the interview was, but that it involved [the victim's] possible prosecution, possible facing adverse consequences, and after conclusion of all those statements, this came out?

THE COURT: Okay, I believe that would be more prejudicial than probative, because that simply invites the jury to - to speculate as to what the nature of the other unmentioned allegations may have been, and, so, no, could not do that. Okay?

* * *

. . . in light of the testimony here showing that the interview had been, essentially, completed, there's not a basis to show anything further.

We conclude that the trial court did not abuse its discretion in determining the evidence would be more prejudicial than probative, under the circumstances that the victim had fully acknowledged his participation in the allegations made by the neighbor boy and, only in response to a final open-ended question by Detective Thomas, raised defendant's alleged conduct indirectly. There is no evidence in the record that the victim was in any way being threatened or under duress when he referred to defendant, such that he would have motive to accuse defendant falsely.

We disagree with defendant's argument that trial counsel was ineffective in handling the motion to admit this evidence. At the hearing, defense counsel extensively questioned Sergeant Scott Thomas regarding the circumstances surrounding the initiation of the victim's allegations against defendant. Counsel argued that this evidence demonstrated an ulterior motive for making a false charge against defendant and that it was admissible under MRE 404(B) to show the victim's motive for bringing charges against defendant Rust. The prosecution argued that the evidence was inadmissible under the rape shield statute. Defense counsel responded that this was not a rape shield situation because he was not seeking to show the jury specific instances of the victim's prior sexual conduct, but rather, was trying to show the situation under which accusations against defendant first arose. However, in response to the prosecution's argument, defense counsel cited case law supporting that defendant's right to confrontation stood superior to the exclusion of particular types of evidence, including under the rape shield statute.

We reject defendant's contention that defense counsel was unprepared to respond to the rape shield issue. The record does not support that counsel's performance at the motion hearing was objectively unreasonable. *Mitchell, supra* at 164.

IV

Defendant's final argument is that his conviction was against the great weight of the evidence. We disagree. We review a trial court's grant or denial of a motion for new trial for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 7; 576 NW2d 129 (1998). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). "New trial motions based solely on the weight of the evidence regarding witness credibility are not favored." *Lemmon, supra* at 639, citing *United States v Thomas*, 894 F Supp 58, 63 (ND NY, 1995). "Absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'" *Lemmon, supra* at 642, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963). The *Lemmon* Court noted several tests that would allow application of the exception:

if the "testimony contradicts indisputable physical facts or laws," [*United States v Kuzniar*, 881 F2d 466, 470-471 (CA 7, 1989)], "where testimony is patently

incredible or defies physical realities,” *United States v Sanchez*, 969 F2d 1409, 1414 (CA 2, 1992), “[w]here a witness’s testimony is material and is so inherently implausible that it could not be believed by a reasonable juror,” [*United States v Garcia*, 978 F2d 746, 748 (CA 1, 1992)], or where the witness’ testimony has been seriously “impeached” and the case marked by “uncertainties and discrepancies.” *United States v Martinez*, 763 F2d 1297, 1313 (CA 11, 1985). [*Lemmon, supra* at 643-644.]

Defendant argues that the great weight of the evidence showed that the victim was at defendant’s home only once during the months indicated in the complaint and warrant, i.e., June and July 1996, and was never alone with defendant. We disagree. The victim’s mother testified that she and the victim were at defendant’s home several times during the summer of 1996, and that one time was in June and one in July. The victim testified that he spent time at defendant’s home several times in the summer of 1996, when he was out of school, and that he thought he was there around the fourth of July. Defendant and his daughter testified that the victim and his mother were at defendant’s home only once, at the end of June, for a weekend. As there was conflicting testimony on these matters, the issue was one of credibility for the jury. *Lemmon, supra*, at 642-644.

Without citation to authority, defendant also argues that the victim’s testimony was sufficiently implausible as to be patently incredible and to defy biological realities because he testified that the oral sex occurred after the anal sex, and did not testify to any conduct or activities before the alleged anal intercourse which would have caused him to obtain an erection.

In denying defendant’s motion for new trial, the trial court noted that the victim’s credibility was before the jury, as was defendant’s, that the jury found the victim more credible, and that the victim’s testimony was sufficient to support defendant’s conviction of eight counts of criminal sexual conduct. We agree. On this record, defendant has not established that the evidence preponderated heavily against the verdict and that a serious miscarriage of justice would result from allowing the verdict to stand. We find no abuse of discretion in the trial court’s denial of the motion for new trial.

Affirmed.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Helene N. White