

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CLEE JACKSON,

Defendant-Appellant.

UNPUBLISHED
December 23, 2003

No. 241597
Wayne Circuit Court
LC Nos. 01-008235-01;
01-008240

Before: Wilder, P.J., and Griffin and Cooper, JJ.

PER CURIAM.

In LC No. 01-008235-01, defendant was convicted, following a jury trial, of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.¹ In LC No. 01-008240, defendant was convicted, following a separate jury trial, of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a).² He was sentenced to concurrent prison terms of two to five years for the felon in possession conviction, 10-1/2 to 15 years for each first-degree CSC conviction, and five to fifteen years for each second-degree CSC conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Underlying Facts

A. LC No. 01-008235-01

Defendant's convictions in LC No. 01-008235-01 arise from allegations that, on May 17, 2001, defendant, who was a convicted felon,³ negligently caused the death of his wife's eight-year-old son by leaving a loaded gun in a place accessible to the child.

¹ Defendant was acquitted of an additional count of involuntary manslaughter, MCL 750.321.

² Defendant was acquitted of an additional count of first-degree CSC.

³ The defense stipulated that defendant had previously been convicted of a felony and was not entitled to have possession of any type of firearm.

Madinah Grimmert testified that, at the time of the incident, she and her son had been residing in defendant's home for several months. Grimmert indicated that, on the day of the incident, she, defendant's wife, and four children were in the living room. Grimmert and defendant's wife told three of the children, including the victim, to leave the room, and the victim and defendant's nine-month-old daughter went into a room across the hall, which was set up as a bedroom with furniture and a television. Thereafter, Grimmert heard a noise, went into the room, and saw the victim, who had been shot, lying on the floor.

According to Grimmert, a friend of the Jacksons named Ty had also been living in defendant's house, and staying in the room where the incident occurred. She indicated that, approximately two or three weeks before the incident, she observed Ty with the gun. Grimmert acknowledged that she did not mention Ty in either a May 17, 2001, statement she gave to the police or in her preliminary examination testimony. She also acknowledged that, at the preliminary examination, she indicated that she was aware that a gun was kept in the closet.

At the time of the incident, defendant was not home. A Detroit police officer testified that he spoke with defendant shortly after the incident. According to the police report, defendant stated that "he got the gun from Ty for protection from his ex-girlfriend's brothers." He also stated that the gun was originally kept in the closet of the room where the incident occurred, but "[h]e had caught his three year old trying to get it so he put it in between the mattresses to keep it away from the three year old."

A Detroit police evidence technician testified that, upon searching the room, he found two mattresses, and a loaded .357 magnum on the floor. He also discovered a .56 magnum shotgun in the closet of the room. A medical examiner, who examined the eight-year-old victim's body, concluded that, although the child died of a self-inflicted single gunshot wound to the head, the manner of death was indeterminate because it was unclear if the child pulled the trigger accidentally or intentionally.

B. LC No. 01-008240

Defendant's convictions in LC No. 01-008240 arise from allegations that, on May 7 and 8, 2001, while his twelve-year-old daughter was visiting him, defendant touched her breasts and buttocks, put his mouth on her vagina, and inserted his penis into her vagina.

The twelve-year-old victim testified that, in May 2001, she and her eleven-year-old brother came from Georgia to Detroit to visit defendant, who is her father. On the first day of her visit, defendant told her to go take a bath and prepare for bed. The victim testified that defendant's wife was supposed to bring her some clothes, but, while she was taking a shower, defendant brought them to her. After bringing the clothes, defendant left, but returned and said that he had to use the bathroom. Defendant told her not to tell anyone that he was in the bathroom with her. According to the victim, after defendant returned, he pulled back the shower curtain, told her to stand on the front part of the tub, touched her on one of her breasts and her buttocks, and licked her vagina. The victim testified that defendant also asked her if she liked what he was doing, but she did not respond. She further indicated that, during the occurrence, she did not scream, yell or do anything. She indicated that she "was shocked" and "couldn't do anything."

The victim testified that, after the bathroom incident, she put on her clothes and went into the living room where she was supposed to sleep on the couch. Shortly thereafter, defendant awakened her and pulled down the right leg of her underwear and sweatpants. The victim testified that defendant then “us[ed] his tongue on [her] vagina,” “used his penis in [her] vagina, and “used his tongue again and he stopped.” The victim testified that her brothers were in bed and defendant’s wife was upstairs asleep with a baby, and that she cried during the incident, but did not tell defendant to stop. She further testified that defendant left and returned later to perform cunnilingus on her again.

According to the victim, on the following night, when Angela Johnson, a friend of the victim’s mother, came to defendant’s house, she told Johnson what had occurred. She testified that, after telling Johnson, she told defendant’s wife, who told her to sleep upstairs and made her tell her mother what had occurred. After telling her mother, she left defendant’s house.

Johnson testified that she is a friend of the victim’s mother and the mother of one of defendant’s sons. She testified that she went to defendant’s house, and the victim told her that she had something to tell her. The two then went to a store, where the victim told her what had occurred. Johnson testified that she took the victim to her mother, and that the victim and her mother had a conversation. The victim’s mother, LaToya Avery, testified that, after the victim told her what defendant had done to her, she called the police. She testified that, pursuant to the instructions she received from the police, she filed a formal complaint against defendant and took the victim to the hospital for a physical examination.

After initially being contacted by the police, defendant gave a statement wherein he denied engaging in any type of sexual activity with the victim. He was not under arrest at the time. A Detroit police officer testified that defendant subsequently waived his *Miranda*⁴ rights and gave two written statements, which were admitted into evidence and read into the record. In the first statement, defendant indicated that, while the victim was in the bathroom taking a shower, he entered to give her some clothes and to urinate. According to defendant, when the victim heard him, she pushed the shower curtain aside and grabbed his penis. Defendant indicated that he said, “What you trying to do get us both killed.” Defendant claimed that the victim then stood on top of the tub and he “kissed her womb.” Defendant stated that, after the victim got down and bent over, he “was about to have sex with her, but “something snapped and [he] remembered that she was [his] daughter and [he] stopped.” Defendant denied that he ever “entered her.” According to defendant, during the following days, he criticized the victim for “being mannish,” and the victim threatened to report him. Defendant claimed that the victim was angry and “decided to tell her side before [he] said anything. But [he] wasn’t because [he] was scared and embarrassed.”

In his second statement, defendant indicated that, when the victim came to visit him, he had not previously seen her in years, but “had heard rumors” about her. He indicated that the victim’s mother asked him if the victim and his son could stay with him for a while and he agreed. Defendant maintained that the victim’s mother told him that the victim had falsely accused someone of raping her in Georgia. Defendant stated that, on the first night that the

⁴ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

victim was visiting, she took a shower. According to defendant, he knocked on the bathroom door to give the victim some clothes, and the victim said that he could come inside because the curtain was closed. He went inside, put down the clothes, and began to urinate in the toilet. According to defendant, the victim pulled back the curtain and touched his penis. He stated that he admonished her, indicating that someone might open the door and blame him for her actions or say that they “were going together.” Defendant claimed that the victim responded that she did not care what people thought. Defendant stated that the victim then stood on the base of the tub and he “kissed her womb.” He stated that she then “got down [and] bent over.” Defendant said that he “went to her to have sex,” that his “penis did touch her vagina, but [he] never went in her.” Defendant stated that he stopped because he “realized it was wrong.”

Defendant testified on his own behalf at trial. He denied that he ever touched the victim in a sexual manner, and maintained that the victim’s allegations were an act of retaliation by the victim’s mother for not marrying her. Defendant indicated that the victim’s mother told him that they had to leave Georgia because the victim had falsely accused someone of rape, and that the accused was “after her.” Defendant also testified that, several days after the alleged incident, the victim visited him, sat on his leg, apologized for accusing him of rape, and indicated that she “tried to take it back, but her mother wouldn’t let her.” Defendant admitted that he gave two written inculpatory pretrial statements to the police, but maintained that the police threatened him with life imprisonment if he did not admit guilt. He also claimed that he made a total of four statements, but the police destroyed the first two.

Defendant’s fifteen-year-old daughter testified that the victim wrote her a letter, which she lost, indicating that the victim’s mother forced her to make false allegations against defendant. The victim denied ever writing a letter to defendant’s daughter. Defendant’s wife testified that she did not recall the victim crying or telling her anything about defendant’s alleged actions while in her home, nor did she notice anything unusual.

The defense also presented the physician who examined the victim following the alleged sexual assault. He testified that the victim’s physical condition was normal, that her hymen was not intact, and that there were no tears in the vaginal area. The doctor testified that, based on the victim’s physical examination alone, there was no evidence of sexual assault. He explained that, although the victim’s hymen was not intact, he could not conclusively determine that the condition was the result of an assault. The physician testified, however, that the victim’s mental condition was consistent with someone who had been sexually assaulted. He indicated that the victim was very upset and required sedation before the physical examination could be performed. He indicated that he had examined numerous patients who alleged they were sexually assaulted, and that the victim was the first patient to require sedation.

II. Defendant’s Claims in LC No. 01-008235-01

A. Double Jeopardy

Defendant first argues that his convictions of both felon in possession of a firearm and felony-firearm are prohibited by the Double Jeopardy Clauses of the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 15. We disagree.

Because defendant failed to raise this double jeopardy claim below, we review this unpreserved constitutional claim for plain error affecting defendant's substantial rights, i.e., affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The double jeopardy provisions of the United States and Michigan Constitutions protect citizens from multiple punishments for the same offense. *People v Torres*, 452 Mich 43, 63-64; 549 NW2d 540 (1996); *People v Harding*, 443 Mich 693, 699; 506 NW2d 482 (1993). The intent of the Legislature is the determining factor in evaluating a double jeopardy claim under both the federal and state constitutions. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997); *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984). This Court determines legislative intent with regard to the federal constitution by applying the "same-elements test" set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), which requires the reviewing court to determine "whether each provision requires proof of a fact which the other does not." Under the state constitution, legislative intent is determined by "traditional means . . . such as the subject, language, and history of the statutes." *Denio, supra* at 708. Relevant factors to consider in determining legislative intent include, but are not limited to, whether each statute prohibits conduct violative of distinct social norms, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, and the elements of each offense. *Id.*; *People v Fox (After Remand)*, 232 Mich App 541, 556; 591 NW2d 384 (1998).

Here, we reject defendant's argument in light of *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001), in which this Court held that convictions of both felon in possession of a firearm and felony-firearm do not violate the constitutional prohibitions against double jeopardy. *Id.* at 167-171. The Court in *Dillard* explained that the language of the felony-firearm statute shows that "the Legislature intended, with only narrow exceptions,⁵ that every felony committed by a person possessing a firearm result in a felony-firearm conviction." *Id.* at 167 (citations omitted). And, because the felon in possession statute does not constitute one of the explicitly enumerated exceptions to the felony-firearm statute, the Legislature intended to permit dual convictions for both offenses. *Id.* at 167-168. The Court also noted that, although the felon in possession statute was enacted after the felony-firearm statute, the Legislature is presumed to have been aware of the felony-firearm statute and its exclusions, and to have purposefully declined to amend the felony-firearm statute to exclude the possibility of a conviction under the felony-firearm statute that was premised on the felon in possession statute. *Id.* at 168. Additionally, the Court held that, because the two statutes have distinct purposes that address distinct social norms, they are amenable to multiple punishments. *Id.* at 169-171.

Defendant acknowledges this Court's decision in *Dillard*, but asks that we reject it. We decline to do so. Accordingly, because defendant's convictions of both felon in possession and

⁵ As noted by the *Dillard* Court, the four exceptions are MCL 750.223 (prohibiting unlawful sale of firearms), MCL 750.227 (prohibiting carrying of a concealed weapon), MCL 750.227a (prohibiting unlawful possession of a firearm by a licensee), and MCL 750.230 (prohibiting alteration of identifying marks on a firearm).

felony-firearm do not violate the double jeopardy protection against multiple punishments, defendant has failed to demonstrate plain error.

B. Corpus Delicti

Defendant also argues that the corpus delicti was not adequately established for the charge of involuntary manslaughter before his statement was admitted. To support this claim, defendant argues that, because the medical examiner could not determine whether the child discharged the gun intentionally or accidentally, there was no evidence that the victim died as a result of a criminal agency. Again, we disagree.

The corpus delicti rule provides that a defendant's confession may not be admitted as evidence unless there is direct or circumstantial evidence independent of the confession establishing the occurrence of a specific injury and some criminal agency as the source of the injury. *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995). The identity of the offender is not part of the corpus delicti. *Id.* The purpose of the corpus delicti rule is to prevent the use of a defendant's confession to convict the defendant of a crime that did not occur. *Konrad*, *supra* at 269; *People v Emerson (After Remand)*, 203 Mich App 345, 347; 512 NW2d 3 (1994).

“In Michigan, the corpus delicti of murder requires proof both of a death and of some criminal agency that caused that death.” *People v McMahan*, 451 Mich 543, 549; 548 NW2d 199 (1996). Thus, “the corpus delicti of a crime must be established by evidence independent of an accused's confession. This rule is limited, however, to admissions of fact which do not amount to confessions of guilt.” *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991) (citations omitted). “Once the corpus delicti of the crime is established, appropriate extrajudicial confessions of the accused are admissible.” *McMahan*, *supra*. This Court reviews a lower court's decision regarding whether the corpus delicti requirement has been met for an abuse of discretion. *People v Biggs*, 202 Mich App 450, 455; 509 NW2d 803 (1993).

The elements of involuntary manslaughter are (1) acting in a grossly negligent, wanton or reckless manner, (2) so as to cause the death of another. *People v Moseler*, 202 Mich App 296, 298; 508 NW2d 192 (1993). In other words, to establish involuntary manslaughter, the prosecution must show that an unlawful act occurred that was committed with the intent to injure or was committed in a grossly negligent manner that proximately caused the victim's death. *People v Datema*, 448 Mich 585, 606; 533 NW2d 272 (1995).

Here, the corpus delicti was adequately established for involuntary manslaughter before the admission of defendant's statement. There was evidence that the dead body of an eight-year-old child was found in defendant's home. There was also evidence that the eight-year-old child's death was caused by a single gunshot wound to the head. Contrary to defendant's argument, the determination of whether the child purposely or accidentally pulled the trigger of the loaded weapon is immaterial. Rather, the crucial fact is that there is evidence that a loaded gun was left in a place accessible to a child and that the child's death occurred as a result of this act. Because gross negligence and therefore criminal agency may be inferred from the fact that a loaded gun was left accessible to an eight year old, *People v Brasic*, 171 Mich App 222, 224-228; 429 NW2d 860 (1988), the corpus delicti rule was fully satisfied for involuntary manslaughter. Accordingly, this claim does not warrant reversal.

III. Defendant's Claims in LC No. 01-008240

A. Prior Consistent Statements

Defendant argues that the trial court abused its discretion by admitting the hearsay statements made by the victim's mother and Johnson, wherein both testified regarding the victim's prior consistent statements about the allegations of sexual assault against him. We find merit to this claim, but conclude that any error does not warrant reversal.

Defendant objected to Johnson's testimony about the victim's prior statements, but did not object to the victim's mother's testimony. As such, this Court reviews the trial court's decision to admit Johnson's testimony for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). But because defendant failed to object to the victim's mother's testimony, we review that claim for plain error affecting defendant's substantial rights. *Carines, supra*.

“ ‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c); *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998). Under MRE 801(d)(1), a prior statement of a witness is not inadmissible hearsay if

[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . .

In order for a prior consistent statement to be admissible under MRE 801(d)(1)(B), the following must be established:

(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [*People v Jones*, 240 Mich App 704, 706-707; 613 NW2d 411 (2000) (citations omitted).]

Here, plaintiff concedes that the victim's prior consistent statements to both Johnson and her mother were not admissible under this rule. But even if the testimony was inadmissible, any error was harmless. A preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, the victim's testimony, evidence of defendant's pretrial statement to the police in which he admitted that he “kissed [the victim's] womb” and touched her vagina with his penis, and the examining doctor's testimony that the victim's mental condition was consistent with someone who had been sexually assaulted, were all sufficiently detailed and compelling to render the admission of Johnson's testimony harmless. Had the

erroneous testimony in question not been admitted, the possibility of a different result was remote. For the same reasons, defendant has failed to demonstrate that the admission of the victim's mother testimony constituted plain error that affected the outcome of the proceedings. *Carines, supra*. Accordingly, reversal is not warranted on this basis.

B. Opinion evidence

We also reject defendant's claim that the trial court committed error warranting reversal by improperly precluding defense counsel from questioning Johnson about the victim's alleged untruthful character.

MRE 608(a) provides, in pertinent part:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Here, plaintiff concedes that the trial court erred by precluding the proposed opinion evidence, but maintains that defense counsel failed to lay a proper foundation for the evidence. We conclude that, even if the proposed opinion testimony was admissible, any error was harmless. *Lukity, supra*. Defendant sought to attack the victim's credibility and demonstrate her character for untruthfulness through his questioning Johnson. But at trial, defense witnesses, including defendant, defendant's fifteen-year-old daughter, and defendant's wife, testified and offered testimony challenging the victim's credibility. Besides categorically denying the victim's allegations, defendant also testified that the victim's mother told him that the victim had previously made false accusations of rape. Additionally, defendant's teenage daughter testified that the victim said that her mother forced her to falsely accuse defendant. Defendant's wife, who was home during the alleged incidents, also testified that she did not notice anything unusual on the night of the alleged incident, and that she did not recall the victim being upset. In sum, because it is highly unlikely that the alleged error affected the outcome, reversal is not warranted on this basis.

C. False Accusations of Rape

Defendant argues that the trial court erred by precluding testimony that the victim had previously made false accusations of rape under MCL 750.520j.⁶

⁶ MCL 750.520j provides, in part:

Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material

(continued...)

This Court reviews the decision to preclude evidence under the rape-shield statute for an abuse of discretion. *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984). Likewise, the scope of cross-examination on matters of credibility is left to the sound discretion of the trial court. *People v Von Everett*, 156 Mich App 615, 623; 402 NW2d 773 (1986).

The purpose of the rape-shield statute is to exclude evidence of a victim's prior sexual assault where the defendant seeks to use the evidence to establish that the victim was promiscuous, or to establish other character traits about the victim. *People v Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991). However,

the rape-shield statute does not preclude introduction of evidence to show that a victim has made prior false accusations of rape. Such false accusations are relevant in subsequent prosecutions based upon the victim's accusations because the fact that the victim has made prior false accusations of rape directly bears on the victim's credibility and the credibility of the victim's accusations in the subsequent case, and preclusion of such evidence would unconstitutionally abridge the defendant's right of confrontation. [*Id.*, citing *Hackett*, *supra* at 348-349.]

Here, defendant sought to introduce evidence that the victim had made prior false allegations of rape against persons in Georgia.⁷ We agree with defendant that information that the victim made false accusations could be relevant because such evidence directly bears on the victim's credibility and the credibility of her accusations in this case. Therefore, to the extent that defendant was able to introduce evidence that the victim made prior false accusations of sexual assault, and to the extent that the trial court concluded that the evidence was not probative, the trial court erred.

But even though the proposed evidence could be relevant, defendant is not entitled to reversal of his convictions because he failed to make the requisite offer of proof to justify introduction of the proposed evidence. In order for a victim's prior false accusations of rape to be admitted, a defendant must follow the procedures set forth in MCL 750.520j, which requires that the defendant initially make an offer of proof with regard to the proposed evidence and to demonstrate its relevance. *Williams*, *supra* at 273. "If necessary, the trial court should conduct

(...continued)

to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

- (a) Evidence of the victim's past sexual conduct with the actor.
- (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

⁷ At a hearing on defendant's motion for an independent investigator to explore the claim that the victim had made prior false accusations of rape, the prosecutor acknowledged that there was a Georgia rape case involving the victim, but indicated that there was no evidence that the allegations were false.

an evidentiary hearing in camera to determine the admissibility of the evidence, and at the hearing, the trial court has the responsibility of restricting the scope of cross-examination to prevent questions that would harass, annoy, or humiliate the victim and to guard against fishing expeditions.” *Id.* If a defendant cannot make a sufficient offer of proof, he is not entitled to reversal on the ground that his cross-examination was improperly limited with respect to false accusations. *Id.*

Here, defendant failed to offer any concrete evidence to establish that the victim made prior *false* allegations of rape. Rather, defense counsel sought to question the victim’s mother under oath concerning the alleged falsity of the prior allegations. Despite the fact that the trial court granted defendant’s request for an independent investigator to explore these allegations, the defense presented no definite evidence indicating that any prior allegations were false. In short, “if defendant has evidence of a prior false allegation, that [evidence] could be presented to the court. But defendant was not entitled to have the court conduct a trial within the trial to determine whether there was a prior accusation and whether that prior accusation was true or false.” *Id.* at 274. As such, defendant failed to make an adequate offer of proof that he had evidence of a prior false accusation. Because the trial court “reache[d] the right result, albeit for the wrong reason,” reversal is not warranted on this basis. See *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998).

D. Ineffective Assistance of Counsel

Defendant’s final claim is that he was denied the effective assistance of counsel because defense counsel failed to object to the victim’s mother’s hearsay testimony regarding the victim’s prior consistent statements, failed to call several witnesses who would have impeached the victim’s testimony, and failed to investigate the victim’s prior false allegations of rape.

Because defendant failed to make a testimonial record concerning this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court’s review of this issue is limited to mistakes apparent on the record.⁸ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Id.*

Defendant argues that defense counsel was ineffective for failing to object to the victim’s mother’s testimony regarding the victim’s prior consistent statements. But, as discussed in part III(A), in light of the admissible evidence introduced at trial, it is unlikely that the challenged

⁸ This Court denied defendant’s motion to remand for an evidentiary hearing on his claim of ineffective assistance of counsel.

evidence affected the outcome of the case. Accordingly, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's failure to object, the outcome would have been different. *Effinger, supra*. Therefore, defendant is not entitled to a new trial on this basis.

Defendant also claims that defense counsel failed to call several witnesses who were able to impeach the victim's testimony,⁹ including his mother,¹⁰ by offering testimony that the victim told them that defendant did not assault her and that her mother directed her to falsely accuse defendant.

The failure to call a supporting witness does not inherently amount to ineffective assistance of counsel, and there is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Moreover, decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant. *Kelly, supra*; *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

Here, because the prospective witnesses were listed on defendant's witness list, we assume that counsel was aware of the witnesses. However, defense counsel could have chosen not to call the witnesses for various reasons, including the fact that their testimony would have been unresponsive or injurious to defendant's case. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id.*

⁹ Defendant averred in an affidavit that, in addition to his mother and his wife, the following witnesses, who were listed on defendant's witness list, were available to testify that the victim stated that she had falsely accused him: Tequila Johnson, Angela Johnson, Nyesshia Thomas, Samuel Thomas, and Emanuel Thomas. Angela Johnson [who testified for the prosecution] is the mother of Tequila Johnson, and has a son by defendant. The three Thomas' are siblings, and Nyesshia Thomas lived in defendant's home before and during defendant's trial.

¹⁰ In defendant's mother's affidavit, she averred that the victim told her that defendant did not molest her, and that her mother forced her to falsely accuse him. She further averred that the victim's mother hated defendant because he married another woman and proclaimed that she would get even with him. She also averred that the victim's brother, who is her grandson, told her that the victim accused a person of raping her in Georgia, but the charges were dropped. She stated that the victim accused two other Michigan residents of molesting her, but no charges were filed. She averred that the victim told Nyesshia Thomas and Tequila Johnson that her mother made her falsely accuse defendant and that the victim gave defendant's fifteen-year-old daughter a letter indicating that she lied. Finally, she stated that she gave this information to defense counsel.

Moreover, even if defendant could overcome the presumption of sound trial strategy, it is unlikely that defense counsel's failure to call the potential witnesses prejudiced defendant by denying him a substantial defense. There was compelling evidence presented at trial, including the victim's own detailed testimony and defendant's own inculpatory statements. In addition, a review of the record reveals that defense counsel presented a vigorous defense, and presented the proposed evidence through the testimony of other witnesses. Thus, the evidence would have been cumulative. In addition, defendant testified and denied any involvement in the crimes. Accordingly, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged failure to call the proposed witnesses, the result of the proceeding would have been different. *Effinger, supra*. Defendant is not entitled to a new trial on this basis.

Defendant's final claim is that defense counsel was ineffective by failing to investigate the victim's false accusations of rape that occurred in Georgia. But defendant has not presented any evidence that the victim made *false* accusations of rape in Georgia, or that defense counsel failed to investigate the accusations. The record shows that defense counsel was aware of the alleged false accusations, and requested, and was granted, an independent investigator to explore the accusations. Although defendant assumes that defense counsel failed to properly utilize the investigator because he did not present any evidence that the prior accusations were false, the record is devoid of any evidence to support such a conclusion. Further, contrary to defendant's supposition, an assumption could similarly be made that the investigation resulted in findings that were not supportive of defendant's case. In sum, there is no indication that defense counsel failed to investigate the victim's prior accusations of rape, or that any prior allegations were actually false. Accordingly, defendant is not entitled to a new trial on this basis.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Jessica R. Cooper