

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
May 5, 2011

v

OUVINAY XAYSANA,  
Defendant-Appellant.

No. 295712  
Ottawa Circuit Court  
LC No. 09-033667-FC

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Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(ii), and the trial court sentenced defendant to concurrent prison terms of 114 to 480 months for each conviction. Defendant appeals as of right. We affirm.

This case arose from the sexual assault of defendant's stepdaughter beginning when she was thirteen years old.<sup>1</sup> The victim testified that she had sexual relations with defendant at least 100 times.

On appeal, defendant argues that he was deprived of the effective assistance of counsel at trial. To prevail on a such a claim a defendant must show that counsel's performance was below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). In showing that counsel's representation was deficient, a defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy under the circumstances. *Id.* at 687.

First, defendant argues that trial counsel failed to adequately investigate a defense witness. Hardman testified on direct examination that he and defendant were co-workers, that he

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<sup>1</sup> According to the victim, she did not learn until she was 15 years old that defendant was not her biological father.

saw defendant with his children on numerous occasions and that the children always appeared happy and at ease with defendant. He testified that he never saw any inappropriate contact between defendant and the victim nor any of his other children and that he was comfortable leaving his own son in defendant's care. Defendant argues that his attorney was ineffective for failing to know that Hardman would testify on cross-examination that, when defendant learned in a phone call from a police officer that he was being accused of sexual crimes against his child, defendant stated that his oldest daughter was accusing him of molesting her. Defendant asserts this was outcome determinative because the officer had testified that in the subject phone conversation with defendant he had not identified which of defendant's three daughters had accused him and Hardman's testimony therefore demonstrated defendant's guilty knowledge. Defendant points to the fact that during its deliberations, the jury asked to have the testimony of both the officer and Hardman concerning the phone conversation read back to them along with the entire testimony of the victim.

We reject defendant's argument that counsel's failure to know of this potentially damaging testimony rose to the level of ineffective assistance of counsel. We do not make judgments about a lawyer's performance based on hindsight alone. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Moreover, counsel is held to a standard of reasonableness, not perfection, and failing to discover this single statement did not render counsel's entire performance ineffective. Defendant's counsel's decision to call Hardman can certainly be understood given Hardman's testimony that defendant never engaged in any suspicious conduct with his children and that Hardman was comfortable leaving his own children in defendant's care. Finally, defendant has failed to demonstrate that, but for the claimed error, the result of the proceedings would have been different. *Stanaway*, 446 Mich at 687-688. First, the officer had already testified as to defendant's statements, so the damaging portion of Hardman's testimony was largely cumulative. Second, the victim provided detailed and substantial testimony regarding the sexual abuse.

Defendant also argues trial counsel was ineffective for failing to impeach the victim with inconsistent testimony from the preliminary examination concerning when she first disclosed the sexual abuse. This Court has held that "[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Moreover, the victim's trial testimony, that she previously told her friends of the rape, was confirmed by the testimony of those friends. Thus, impeachment on these grounds was unlikely to discredit the victim in light of the fact that her trial testimony was corroborated by the testimony of her friend from school. Defendant has not shown that defense counsel's performance fell below an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994). Indeed, after a review of the victim's testimony, we do not believe that impeachment with the preliminary examination testimony would have significantly diminished her credibility.

Finally, defendant argues that trial counsel was ineffective for failing to object to the late endorsement of a prosecution witness. Defendant has not alleged any facts to suggest trial counsel's failure to object to the late endorsement of the prosecution witness was not sound trial strategy, *Matuszak*, 263 Mich App at 58, particularly where the witness' testimony was not incriminating and could have been used by defense counsel to argue that there was no physical evidence to support the victim's story. Even assuming error, we cannot conclude that the late-

endorsed witness' testimony that the examination of the victim neither confirmed nor ruled out sexual abuse affected the outcome of the trial with a reasonable probability. Further, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant was able to attack the victim's credibility and claim the abuse never occurred without assistance from a rebuttal expert. Thus, defendant has not met his burden of demonstrating that defense counsel was ineffective.

Defendant next argues that the trial court erred when it prohibited defendant from questioning the victim regarding inconsistent statements she made about past sexual relations with her older boyfriend. Before trial, the prosecution moved to exclude any testimony regarding the victim's sexual relationship with her boyfriend pursuant to the rape-shield statute, MCL 750.520j. The admissibility of evidence pursuant to MCL 750.520j is reviewed for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). "In exercising its discretion, the trial court should . . . always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." *Id.*, quoting *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984). Defendant also argues that the trial court's decision violated his constitutional right to confrontation. This latter issue was not presented to the trial court; therefore, we review it for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763.

The rape-shield statute, MCL 750.520j, prohibits admission of evidence regarding the victim's sexual conduct unless the trial court finds that the proposed evidence is "material to a fact at issue" and that its "inflammatory or prejudicial nature does not outweigh its probative value." MCL 750.520j(1). Further, the evidence must be evidence of the victim's past sexual conduct with the actor or evidence offered to explain the source or origin of semen, pregnancy, or disease. MCL 750.520j(1)(a)-(b). In this case, defendant sought to introduce evidence of the victim's sexual conduct with her older boyfriend in order to attack the victim's credibility; thus, the proffered evidence did not fall within an exception set forth in MCL 750.520j. The rape-shield statute prohibits the admission of such evidence unless the specific statutory requirements are met. The trial court did not abuse its discretion when it precluded the testimony.<sup>2</sup>

Similarly, defendant's Sixth Amendment Confrontation Clause right was not violated. Defendant's right to confrontation requires "only that the defendant be permitted to introduce relevant and admissible evidence." *Hackett*, 421 Mich at 354. An offer of proof demonstrating that evidence is relevant to the right to confrontation, and not merely relevant to establish a

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<sup>2</sup> We also note that while the trial court excluded references of sexual activity, it did permit the jury to hear testimony that the victim had a 33-year-old boyfriend and this it was upon her defendant's learning of and objection to that relationship that the victim made the claims of molestation.

character trait or for impeachment, is required in order to admit evidence that would typically be barred by the rape-shield statute. *Id.* at 350. The Court in *Hackett*, 421 Mich at 353, held that a defendant's right to confrontation is not denied when the defendant is given only a limited opportunity to present his defense theory. In this case, defendant did not establish that the proffered evidence was relevant to his right to confrontation. He wanted to impeach the victim with her prior inconsistent statements regarding her sexual activity with her boyfriend in order to challenge her credibility. Defendant was permitted, however, to present his theory that the victim's testimony was not credible and that the alleged sexual abuse never occurred without impeaching the victim regarding her statements about her past sexual conduct. Thus, defendant's right to confrontation was not infringed.

Lastly, defendant argues that the cumulative effect of trial errors denied him a fair trial. Based on cumulative error, "[t]he effect of the errors must be seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Only actual errors may be aggregated when considering the cumulative effect of errors; thus, impact alone that is not traceable to error cannot form the basis for reversal. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). In this case, there were no actual trial errors to accumulate. Thus, when no errors are found, "a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Therefore, defendant was not denied the right to a fair trial because of cumulative error.

Affirmed.

/s/ Douglas B. Shapiro  
/s/ E. Thomas Fitzgerald  
/s/ Stephen L. Borrello