

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DENNIS CLINTON,

Defendant-Appellant.

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UNPUBLISHED

February 21, 2006

No. 257699

Wayne Circuit Court

LC No. 04-004695-01

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of three counts of second-degree criminal sexual conduct for engaging in sexual contact with a person under the age of 13, MCL 750.520c(1)(a). The trial court sentenced defendant to 29 months to 15 years in prison on each of his convictions. We affirm.

Defendant says that the trial court abused its discretion when it refused to allow defendant's proposed expert witness, Bonnie Tomblin, to testify. We disagree.

The determination of the qualifications of an expert witness and the admissibility of expert testimony is within the trial court's discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Here, Tomblin and defendant both admitted that defendant offered Tomblin as a witness so that she could give her "expert" opinion that the victim is not credible and that Tomblin believed that the victim's allegations are not true. Regardless of Tomblin's qualifications, it is well settled that an expert witness cannot be offered to render an opinion on a criminal sexual conduct victim's veracity. *People v Miller*, 165 Mich App 32, 47-48; 418 NW2d 668 (1987).<sup>1</sup> Moreover, an expert may not opine whether the defendant is guilty. *People v*

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<sup>1</sup> However, the record also reflects that the trial court correctly found Tomblin to be unqualified to testify as an expert. Tomblin was not a psychologist or psychiatrist. Rather, she testified that she has a bachelor's degree in human resources, a master's degree in counseling from an accelerated correspondence school, was a licensed counselor and social worker and was working at a hospital with developmentally disabled individuals. Tomblin stated that she met with the victim on two occasions, which were each one hour long. She also stated that the victim never discussed any sexual incidents with her, and Tomblin admitted that she did not see the victim

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*Peterson*, 450 Mich 349, 369; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995). Therefore, the trial judge did not abuse his discretion when he denied defendant's request to have Tomblin qualified as an expert to testify at trial. *Miller, supra*, p 48.

Defendant also claims that he was denied his constitutional right to the effective assistance of counsel when his trial attorney failed to file a discovery motion to view the records of the child's counselor and failed to call the counselor as a witness. We disagree.

Defendant failed to preserve this issue by raising a motion for a new trial or an evidentiary hearing. *People v Abraham*, 256 Mich App 265, 283; 662 NW2d 836 (2003). When reviewing an unpreserved claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). As a matter of constitutional law, this Court reviews the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).<sup>2</sup> Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy which a court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *Id.*

Here, defendant's trial attorney cross-examined the prosecutor's witnesses and presented his own witnesses to establish that the victim had emotional and relationship problems, that she sought her mother's attention and that her testimony regarding the sexual molestation at her birthday party directly conflicted with the testimony of other witnesses. Defense counsel elicited this testimony to establish defendant's theory that the victim fabricated her allegations to get her mother's attention. Defense counsel chose not to call the child's counselor as a witness to provide additional support for this theory. Defendant has presented no argument or evidence to rebut the presumption that his trial attorney's decision was sound trial strategy and it is clear that the decision did not deprive defendant of a substantial defense. Therefore, defendant has failed to establish that he was denied the effective assistance of counsel. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *Dixon, supra*, p 398.

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long enough to make an actual diagnosis. Tomblin further testified that she has known defendant for about 15 years. The trial judge correctly found that Tomblin was not qualified by education and experience to be an expert witness. Furthermore, the trial judge expressed reasonable concern that Tomblin knew defendant for so long, and that Tomblin only met with the victim for a total of two hours and had never discussed any sexual incidents with the victim.

<sup>2</sup> To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that 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). To show that counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Furthermore, trial counsel is not ineffective for failing to make a futile motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Also, it would have been futile for defense counsel to file a motion to discover the counselor's records. MCL 330.1750 provides that privileged communications shall not be disclosed in criminal proceedings unless the patient has waived the privilege. MCL 600.2157a states that "information transmitted between a victim and a sexual assault or domestic violence counselor" is a privileged communication. The only way that the privilege may be superseded is if the defendant can establish that disclosure of the "privileged materials" is necessary to prepare his theory of defense and is "not simply part of a fishing expedition" to see what may turn up. *People v Stanaway*, 446 Mich 643, 662, 680; 521 NW2d 557 (1994). Here, defendant never showed that anything in the counselor's records was necessary to establish his defense. Thus, the records would have been exempt from discovery. *Id.* Therefore, a motion by defense counsel would have been futile and defense counsel was not ineffective for failing to make a futile motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Further, defendant contends that the prosecutor presented insufficient evidence to convict him of his count three charge of second-degree criminal sexual conduct. We disagree.

The standard of review for insufficiency of the evidence claims is de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).<sup>3</sup> To convict a defendant of second-degree criminal sexual conduct in this case, the prosecutor had to show that defendant engaged in sexual contact with a person less than thirteen years old. *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997); MCL 750.520c(1)(a). "Further, MCL 750.520a(k) defines 'sexual contact' as 'the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.'" *Id.*

Here, the victim testified that shortly before she turned 11 years old, her family threw a pool party for her. According to the victim, as she and defendant swam in the pool, defendant pulled her close to him, put his hand inside her bathing suit and moved his hand in an up and down motion from the top of her vagina to the bottom of her vagina. Thus, even though defendant denied the victim's allegations, and four witnesses testified that defendant never entered the pool during the party, viewing the evidence presented in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of second-degree criminal sexual conduct were proven beyond a reasonable doubt. *Piper, supra*, p 645. This Court must afford deference to the jury's special opportunity and ability to determine the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Accordingly, we must show deference to the jury's apparent

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<sup>3</sup> When reviewing a sufficiency of the evidence claim, we review the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

decision to believe the victim's testimony, and the evidence presented at trial was sufficient to support defendant's conviction. *Johnson, supra*, p 723.

Affirmed.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Henry William Saad