

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD LEE FIKE,

Defendant-Appellant.

UNPUBLISHED

August 8, 2006

No. 260535

Lapeer Circuit Court

LC No. 03-007957-FC

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of one count of first-degree criminal sexual conduct (CSC I) (victim under 13 years of age), MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct (CSC II) (victim under 13 years of age), MCL 750.520c(1)(a). Defendant was sentenced to concurrent prison terms of 10 to 20 years for the CSC I conviction and 5 to 15 years on each CSC II conviction. We affirm.

This case arose when the complaining witness, defendant's step-granddaughter, was observed while asleep engaging in what the observing adult believed was suspicious behavior. The complaining witness was about one month away from her eighth birthday. The adult reported the incident to child protective services, which initiated an investigation. The complaining witness was interviewed at a facility called CARE House, and she was given a physical examination. On the basis of the interviews and examination, defendant was arrested and charged with sexually abusing his step-granddaughter. The incidents alleged in this matter would have taken place when the complaining witness was between the ages of four and five.

Defendant first argues that he was denied effective assistance of counsel, and he provides four specific arguments why. We disagree with all four. The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Where the issue is counsel's performance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994). Where, as here, the trial court conducted an evidentiary hearing to determine whether defendant was denied effective assistance of counsel, we review

the trial court's findings of fact for clear error, and we review constitutional questions de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant argues that trial counsel should not have stipulated to his prior misdemeanor conviction. We disagree. There is no reason why admitting to a "non-violent misdemeanor that did not involve children" would affect the outcome of this case, and admitting to it gave defendant control over the existence of that information, precluding plaintiff from using it for impeachment. We find this a legitimate trial strategy, *People v Mitchell*, 454 Mich 145, 155; 560 NW2d 600 (1997).

Defendant argues that trial counsel was ineffective for failing to find and use information in certain late-provided CARE House notes. However, plaintiff was just as surprised as defendant to discover that certain documents had been omitted, and when the omission was discovered, both parties were restricted to examining the original documents in the middle of trial at CARE House without the opportunity to make copies. At the time, seeking a continuance in a trial that appeared to be going well and would have been short in duration could have been reasonable trial strategy, which we will not assess with hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). We are not persuaded that, under the circumstances, it was objectively incompetent to have missed the particular detail involved.

Defendant argues that trial counsel was ineffective for failing to secure an expert witness to rebut the testimony of the CARE House interviewer. We are unconvinced that it was not sound trial strategy to decide against interrupting a trial that appeared to be going well in order to locate an expert, especially where there was already evidence presented about proper forensic interview techniques and the suggestibility of young children, where the interviewer was not permitted to testify as an expert, and where her testimony was strictly circumscribed.

Defendant's final argument on this issue is that defense counsel was ineffective when he asked questions of the complaining witness on cross-examination that introduced direct evidence of penetration.¹ The following exchange between defense counsel and the complaining witness is at issue:

Q. At this exam, do you remember if that was the first time you remembered that Don put his finger inside you, touched your private parts on the inside because we went over the CARE House and you didn't remember it there, right?

A. No, I didn't.

Q. And we went over it with Detective Stimson and you didn't remember him doing it there, did you?

A. No.

¹ MCL 750.520a(o) defines "sexual penetration" to mean, in relevant part, "any . . . intrusion, however slight, of any part of a person's body . . . into the genital . . . opening[] of another person's body."

Q. But once you got to court you remembered that he put his finger inside you, right?

A. Yeah.

It appears that “this exam” refers to the preliminary examination, where the complaining witness testified that defendant touched her underneath her clothes while she was sitting on the basement couch. She also stated that this touching hurt a “little.” Plaintiff cited this testimony, along with medical evidence suggesting penetration, to argue that there was sufficient evidence to bind over defendant on a charge of CSC I.

Before the exchange above, the only evidence presented of sexual penetration was medical testimony concerning inexplicable notching to the complaining witness’ hymen, and the complaining witness’ testimony that defendant had touched her under her clothes once and that it hurt. She had consistently testified that defendant touched her “on” her vagina, rather than indicating that defendant had penetrated her vagina. Direct examination was complete, so if not for trial counsel’s question, there would arguably have been insufficient evidence in the case to find beyond a reasonable doubt that defendant penetrated the complaining witness. However, we are unconvinced that trial counsel was ineffective. It appears that counsel’s strategy in bringing up the prior testimony was to further his goal of asserting that the story of the complaining witness had changed over time, becoming increasingly inculpatory each time it was told. Although this strategy may well have backfired, it was certainly a valid one. Counsel is not ineffective for pursuing a strategy that ultimately fails. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant also claims that the failure to take photographs of the gynecological exam and the failure to videotape the CARE House interview was a failure to preserve key evidence that should be held to constitute “bad faith destruction” of potentially exculpatory evidence in violation of due process. “[T]he suppression by the prosecution of evidence favorable to an accused on request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). However, there is no disagreement that no videos or photographs were made, so there could not have been anything to destroy. Failure to create evidence is not the same thing as the failure to preserve evidence, and defendant cites no requirement for police or prosecutors to find or create exculpatory evidence. See *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). We find no error.

We also reject defendant’s assertion that insufficient evidence of penetration was adduced to support his CSC I conviction. There was medical testimony that is consistent with penetration when viewed in a light most favorable to the prosecution. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The doctor who performed the complaining witness’ medical examination testified that certain notching he observed on her hymen could only be caused by penetration and that it was consistent with penetration by a finger. Moreover the complaining witness testified that she was touched underneath her clothes, on her vagina, and was penetrated by defendant. Defendant’s arguments tending to undermine confidence in the verdict only pertain to witness credibility, which is solely a matter for the trier of fact. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). The complaining witness’ testimony is all

that is needed to establish sufficient evidence to support a finding that defendant penetrated the complaining witness. *Id.*

Finally, we reject defendant's argument that he was denied a fair trial when the trial court permitted the late endorsement of the person at CARE House who interviewed the complaining witness. Given that the name of the witness was inadvertently left off the police report and that defense counsel did not seek a continuance, we find no abuse of discretion in the late endorsement. MCL 767.40a(4); *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

Affirmed.

/s/ Alton T. Davis

/s/ Jessica R. Cooper

/s/ Stephen L. Borrello