

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 15, 2014

v

DAVID ALAN LORIAUX,
Defendant-Appellant.

No. 312402
Wayne Circuit Court
LC No. 11-012444-FC

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (person under 13 years of age), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). We affirm.

The charges against defendant arose from sexual acts he perpetrated against his stepdaughter when she was eight and nine years old. Those acts included fellatio, as well as rubbing his penis between the child's breasts, on her vagina, and on her buttocks. At the time of this trial, the child was ten years old.

On appeal, defendant argues that the trial court abused its discretion when it denied his motion for a new trial because the testimony against him was weak, the key witness was impeached, and the case against him was marked by uncertainties and discrepancies. We disagree.

We review a trial court's decision whether to grant a motion for new trial for an abuse of discretion. *People v Craig Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008). "An abuse of discretion occurs when the result is outside the range of principled outcomes." *Id.* The trial court's factual findings are reviewed for clear error, but questions of law are reviewed de novo. *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010).

Pursuant to MCL 770.1 and MCR 6.431(B), a trial court may, in the interest of justice or to prevent a miscarriage of justice, grant a new trial to a defendant. In *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998), our Supreme Court explained that "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." *Id.* at 642 (internal quotation marks and citation omitted). The *Lemmon* Court further held that, "when

testimony is in direct conflict and testimony supporting the verdict has been impeached, if it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it, the credibility of witnesses is for the jury.” *Id.* at 643 (internal quotation marks and citation omitted). The *Lemmon* Court referred to tests developed by the federal courts in defining the exceptional circumstances that must exist before a trial court may interfere with a jury’s credibility determination, which include: (1) testimony that contradicts indisputable physical facts or laws, (2) testimony that is patently incredible or defies physical realities, (3) testimony so inherently implausible that it could not be believed by a reasonable juror, or (4) testimony that has been seriously impeached and the case is marked by uncertainties and discrepancies. *Id.* at 643-644 (quotation marks and citations omitted). If such a circumstance exists, the trial court must determine if there is a real concern that an innocent person was convicted or that it would be a manifest injustice for a guilty verdict to stand. *Id.* at 644 (quotation marks and citation omitted).

Here, defendant argues that the child-victim’s testimony was “rife with uncertainties, contradictions and conflicts, filled with such flaws that no reasonable jury should have found that the test of guilt beyond a reasonable doubt had been met.” We disagree. The 10-year-old child-victim testified that defendant made her suck his penis “a lot of times,” almost every day, and that it happened on her bed, in her closet, on defendant’s bed, and on the couch. There were times when she refused to suck his penis. She testified that the time she sucked his penis in the closet, white stuff came out of defendant’s penis and went onto the carpet. The carpet was removed by the police, analyzed by the Michigan State Police, and seminal fluid was found on the carpet. The DNA in the sperm cells matched defendant’s DNA. The child also testified that defendant would try to put his penis in her vagina and her butt, and that he would rub his penis between her breasts. Defendant also wrote a letter to the child. The letter indicated that defendant had spent a lot of money on her recently, and provided in relevant part:

[W]ith everything I done for you you should be begging me to let you suck my dick. Every day you should be looking for the opportunity to show me how much you love me. (suck, suck) It has really pissed me off after all I’ve done for you and your mom. The least you can do is suck my dick without me having to ask you 50 times or acting like you don’t like it because I know you do. So stop fucking around and do it already. You need to tell my dick how sorry you are that you have made him wait so long.

Defendant also wrote a letter to his wife, the child’s mother, and admitted that he needed professional help. And he wrote a letter to his parents as well and said that he prayed for the opportunity to talk to the child and “say I’m sorry.”

Defendant testified at trial and denied any sexual contact with the child. Defendant admitted that he wrote the above-referenced letter, but denied that he wrote it to the child. He testified that he had been having “disturbing dreams” and wrote the letter so that he could stop thinking about the “disturbing dreams.” Defendant testified that the seminal fluid found on the carpet in the child’s bedroom closet likely occurred because he had been having “like sleep withdrawals or sleep deprivation,” as well as black outs, and he probably masturbated in the child’s closet but did not know how he got there.

In denying defendant's motion for new trial, the trial court held that the child's testimony was not so inconsistent and unbelievable as to warrant the disruption of the jury's findings. This finding was not clearly erroneous, *Terrell*, 289 Mich App at 559, and the trial court did not abuse its discretion in denying defendant's motion for a new trial premised on this claim. See *Brown*, 279 Mich App at 144. Contrary to defendant's argument, it is clear from the record evidence that none of the exceptional circumstances set forth in *Lemmon* existed to justify the trial court's interference with the jury's credibility determinations. See *Lemmon*, 456 Mich at 643-644.

Next, defendant argues that he was denied the effective assistance of counsel because his attorney failed to investigate and utilize the services of a qualified expert psychologist to evaluate the child's allegations against defendant. We disagree. Our review is limited to errors apparent on the record because a *Ginther*¹ hearing was not held. See *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

"To prevail on a claim of ineffective assistance of counsel, defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable." *People v Bryan Brown*, 294 Mich App 377, 387-388; 811 NW2d 531 (2011).

Trial counsel is responsible for investigating and presenting all substantial defenses. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). The failure to reasonably investigate a case can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To overcome that presumption, defendant must show that he was prejudiced by counsel's failure. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

In support of his ineffective assistance of counsel claim premised on his attorney's failure to retain a qualified expert to investigate the child-victim's allegations and offer testimony in that regard, defendant refers to the "uncertainties, contradictions and conflicts" of the child's allegations and trial testimony. We disagree with defendant's characterizations of the child's allegations and testimony. She was a 10-year-old victim-witness attempting to testify in a public courtroom about a very difficult and embarrassing subject matter, i.e., being forced to suck her stepfather's penis on an almost daily basis, as well as other sexual assaults perpetrated against her. That she could not recall the exact days each assault occurred over the course of at least two years, what defendant or she were wearing during each assault, and the specific location of each separate assault does not constitute the type of "uncertainties, contradictions and conflicts" that

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

warrant serious concerns about her credibility. In any case, the child's testimony was not the only evidence in this case. The evidence also included defendant's seminal fluid on the carpet in the closet where the child said she was made to suck defendant's penis, the letter defendant wrote to the child—which she testified defendant gave her to read—as discussed above, the letter defendant wrote to his wife admitting that he needed professional help, and the letter that he wrote to his parents saying that he was praying for the opportunity to tell the child he was sorry. Further, defendant has not demonstrated that he was deprived a substantial defense by his counsel's failure to retain and present expert witness testimony. However, we agree with the trial court that, even if the failure to retain a qualified expert was not sound trial strategy, defendant has failed to establish that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different and the resultant proceedings were fundamentally unfair or unreliable. See *Brown*, 294 Mich App at 387-388. Thus, the trial court did not abuse its discretion when it denied defendant's motion for a new trial premised on this claim.

Finally, defendant argues that he was denied the effective assistance of counsel because his attorney failed to contest the prosecution's motion in limine to exclude evidence relating to the prior sexual abuse of this child by her uncle, failed to fully investigate this prior abuse, and failed to request an in camera hearing to determine if that evidence provided him a substantial defense. We disagree.

As discussed above, defendant's ineffective assistance of counsel claim is reviewed for errors apparent on the record. See *Jordan*, 275 Mich App at 667. Further, unpreserved constitutional and evidentiary issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the defendant's innocence. *Id.* at 774.

Defendant appears to contend that his counsel improperly interpreted the rape-shield statute, MCL 750.520j, to preclude evidence related to the prior sexual abuse of the child-victim in this case. Defendant claims that the rape-shield statute did not prohibit this evidence; rather, it was admissible to refute the inference that the child's apparently age-inappropriate sexual knowledge was acquired from defendant's alleged sexual conduct. Defendant appears to be correct that there are circumstances under which the prior sexual abuse of a child-witness may be admissible to rebut such an inference. See *People v Morse*, 231 Mich App 424, 433-435; 586 NW2d 555 (1998), citing *People v Hill*, 289 Ill App 3d 859, 862-865; 683 NE2d 188 (1997). In this case, the child's allegedly "age-inappropriate sexual knowledge" consisted primarily of her testimony that defendant forced her to "suck his dick" and her reference to defendant rubbing his penis between her breasts as the "boo be doo." However, in the letter that defendant wrote to the child, he repeatedly referred to his penis as "dick," and repeatedly stated that she should "suck" his "dick." Further, when defendant was questioned as to what the unique phrase "boo be doo" meant, he readily explained its meaning which was consistent with the child's testimony. Consequently, any such prior sexual abuse by the child's uncle would not tend to explain the child's "age-inappropriate sexual knowledge" or refute the inference that the child's knowledge was acquired from defendant's sexual conduct. Thus, defendant has neither established a relevant basis for the admission of evidence related to the prior sexual assault, nor that he was

deprived of a substantial defense because of his attorney's failure to further investigate the prior abuse.

Further, an attorney's decisions regarding what evidence to present, what questions to ask witnesses, and whether to make an objection are presumed to be matters of sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008); *Davis*, 250 Mich App at 368. In this case, defendant has not overcome the presumption. It is likely defendant's attorney decided not to raise the issue of the prior sexual abuse committed against this child because it might tend to show that defendant was an opportunistic child predator who believed that this previously abused child-victim would not be believed or would be considered confused with regard to his sexually assaultive behavior. Defendant's attorney may have also believed that the admission of such evidence would have made the child appear to be more vulnerable or a more credible witness and defendant to be more heartless. Consequently, defendant failed to establish his ineffective assistance of counsel claim. Moreover, considering all of the evidence in this case, including but not limited to the seminal fluid matching defendant's DNA on the carpet in the child's closet where the child testified she was forced to "suck his dick" until "white stuff" came out of it, as well as the letter that defendant wrote to the child which repeatedly referenced her "sucking his dick" and defendant's own testimony, defendant did not establish that any error related to evidence of the child's prior sexual abuse constituted plain error warranting appellate relief. See *Carines*, 460 Mich at 763-764, 774.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen