

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 19, 2013

v

THOMAS KEANE STETLER,

Defendant-Appellant.

No. 310396
Kalkaska Circuit Court
LC No. 11-003398-FH

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant Thomas Keane Stetler appeals by right his jury convictions of two counts of second-degree criminal sexual conduct. MCL 750.520c(1)(f). The trial court sentenced Stetler to concurrently serve 30 to 180 months in prison for each conviction. On appeal, Stetler argues that he is entitled to a new trial because he did not have the effective assistance of counsel. Because we conclude that Stetler failed to establish that his trial lawyer was ineffective, we affirm.

I. BASIC FACTS

Stetler was a licensed physician's assistant and registered nurse. Although supervised by a medical doctor, Stetler essentially operated his own general practice out of the Boardman Health Clinic in Kalkaska County. The medical doctor who supervised Stetler testified that his supervisory role was limited to assuring the quality of Stetler's work by reviewing a sample of Stetler's charts on a monthly basis.

At some time before the events at issue, Stetler researched hypnosis. Stetler testified that he learned hypnosis from texts and through research available on the internet. He then began to use hypnosis to treat patients in his practice. He did not, however, inform his supervisor that he was using it in his practice.

In August 2010, TB began to see Stetler. She consulted with him about whether she might be a good candidate for weight-loss surgery. TB testified that Stetler did not believe that she was a good candidate for surgery; instead, he suggested hypnosis. Stetler used hypnosis to treat TB for weight loss and she felt that the sessions helped. For that reason, she asked Stetler to use hypnosis to help her quit smoking. In all, she had four hypnosis sessions with Stetler from August to October 2010.

TB returned to see Stetler for another hypnosis session to help her quit smoking in 2011. She stated that she went to Stetler's clinic at about 6 pm on August 25, 2011. When she arrived, Stetler was with another patient, but there was no staff or other persons in the clinic. She testified that, after Stetler finished with the other patient, he suggested that they move to his office for her hypnosis therapy.

TB agreed to have the session in Stetler's office. She lay down on the couch in the office and he proceeded to hypnotize her using language similar to that from her previous sessions. However, he soon began to make odd references—he told her to imagine a “pleasurable spot” and to imagine that he was rubbing her shoulders. Stetler also told her to imagine that he was rubbing her “all over now in that area that, you know, brings a woman pleasure.” He also told her to imagine “a big, strong man like me thrusting in and out, in and out to bring you pleasure.” He told her that the pleasure was building and getting more powerful and that she was going to “come”, which she understood to mean that he wanted her “to orgasm.” He then told her that it was ok to touch herself and told her to do so. She stated that she began to rub herself and he suggested that she should expose her breasts. She complied and he pulled her shirt down further and began to pinch her nipple. Eventually, she put her shirt back in place and put her arms across her chest. After he realized that she was not responding to his sexual suggestions any more, she said he “went back into talking about . . . smoking” and then brought her out of hypnosis.

TB testified that, after Stetler pulled her out of hypnosis, she tried to “play it cool” because she knew that she was alone with him and “he's a big guy.” She tried to “keep it together” after she left the clinic, but she had to pull over because she was “hysterical.” She called a friend who advised her to call the police. She then called 911 and an officer met her in a nearby parking lot.

An officer testified that he met TB and convinced her to come back to the post to give a statement. He interviewed Stetler later that same evening and Stetler admitted that he was using hypnosis in his practice, but denied TB's accusations: “He . . . told me several times that he was in shock, that he didn't know how to respond, and that, you know, he didn't do what he was being accused of.” The officer stated that he obtained a search warrant for Stetler's clinic and seized books, documents and computer materials from Stetler's office. Although some of the books and documents concerned hypnosis generally, other media involved the use of hypnosis for sexual or erotic purposes.

On August 31, 2011, another of Stetler's patients, TL, reported to a police officer that Stetler had touched her inappropriately during a hypnosis session. TL testified that Stetler suggested hypnosis to help her quit smoking and she agreed to have a session on August 11, 2011.

TL said that no one was in the office when she arrived for her session and that he locked the door. She had her session in one of the exam rooms. He began the session with a relaxation technique, but soon asked her to have an orgasm. TL stated that he touched her leg and moved his hand toward her groin area. She froze-up; she realized what was going on but “couldn't do anything about it. It's—I mean, like, my mind just shut down because I knew that what he was asking me was wrong.” She explained that she did not get up and leave because she “was scared

to death.” He then cupped her breast and asked “if that was turning me on.” Toward the end of the session, he told her she would not want to smoke anymore. TL stated that she felt betrayed, but agreed when he told her that she would need more sessions. She said she agreed because she just “needed to get out of there.”

Stetler testified that he taught himself hypnosis and used it to treat his patients. Although he admitted that he had documents and media files on the use of sexual hypnosis, he denied that he ever used sexual hypnosis on any of his patients. He explained that he used the sexual hypnosis on his wife to help with intimacy issues. Stetler said he never used hypnosis to treat TL and, although he did use hypnosis on TB, he only used hypnosis to help her quit smoking. He also denied having touched either TL or TB in a sexual manner.

Stetler’s wife also testified and confirmed that he had used sexual hypnosis on her with her consent.

In closing, Stetler’s trial lawyer argued that TL and TB’s version of events were not credible. He suggested that TB’s memories from the hypnosis session were not reliable; specifically, he noted that hypnosis involved a trance-like state that might have influenced TB’s memories. To support that theory, he quoted a section concerning the “confabulation” phenomena from one of Stetler’s hypnosis texts that had been admitted into evidence. He then suggested that the prosecutor failed to establish that TB’s memories were accurate:

It’s the burden of the prosecutor to prove beyond a reasonable doubt that these things happened. I—I don’t know whether this was a false memory or not, but we have somebody who comes in. We don’t know specifically what happened to her, but we know that [TB] had a dysfunctional childhood. Does that include—I don’t know; I don’t know what it includes. But is it certainly quite plausible that that is a false memory? And do false memories happen under hypnosis? They do; there’s no doubt about that at all.

As for TL, Stetler’s trial lawyer pointed out that her version of events was inconsistent over time and inherently implausible. He then suggested that she fabricated her story for financial gain after she heard that Stetler had been arrested.

After the close of proofs, the jury found Stetler guilty on both counts.

This appeal followed.

II. INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW

In his only claim of error, Stetler argues that his trial lawyer did not provide him with effective assistance. He argues that his trial lawyer “did little to attack the credibility” of TB and TL’s testimony. Had his trial lawyer conducted a proper investigation, he would have realized that TB and TL’s testimony might have been tainted by the phenomena of confabulation and that there were “a multitude of expert witnesses available to discuss both hypnosis and confabulation.” Further, had his lawyer made “any effort to attack the credibility of the

prosecution's witnesses through the testimony of an expert witness," the outcome of his case would likely have been different. Accordingly, Stetler maintains, he is entitled to a new trial. Because the trial court did not conduct a hearing and make findings of fact concerning this claim of error, this Court's review is limited to mistakes that are apparent on the record alone. *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), vacated not in relevant part 493 Mich 864 (2012). This Court reviews de novo whether the defendant's lawyer's acts or omissions amounted to ineffective assistance on the record. *Id.* at 19-20.

B. ANALYSIS

In order to establish his claim of error, Stetler must show that his trial lawyer's "performance fell below an objective standard of reasonableness under prevailing professional norms," and that there is a reasonable probability that, but for his trial lawyer's error, "the result of the proceedings would have been different." *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Stetler must first identify the acts or omissions by his lawyer that he claims were not the result of reasonable professional judgment. *Gioglio*, 296 Mich App at 22. Here, Stetler claims that his trial lawyer did not take adequate steps to challenge TB and TL's credibility; specifically, he contends that his trial lawyer should have used an expert to establish that their memories might have been tainted through hypnosis.

It is plain from the record that Stetler's lawyer did attack TB's credibility on the theory that her memories of the session might have been tainted by the hypnosis. His lawyer also tried to elicit testimony from Stetler on the phenomenon of confabulation, but was precluded from doing so after the trial court determined that Stetler was not qualified to testify on that subject. Nevertheless, Stetler's lawyer successfully addressed the issue of confabulation during closing arguments—over the prosecutor's objection—and, on that basis, argued that TB's memories might have been false. Because Stetler's lawyer did attack the weight and credibility of TB's memories from the hypnosis session, the real question is whether his failure to call an independent expert on hypnosis and memories fell below an objective standard of reasonableness under prevailing professional norms.

Although Stetler argues that his lawyer could have easily found an expert to testify about hypnosis, he has not identified an expert who was ready, willing, and able to testify on his behalf. Similarly, he has not established the nature of the expert's proposed testimony and how that testimony would have helped to undermine TB's testimony. That is, he merely speculates that there was an expert on hypnosis who was available to testify on his behalf and whose testimony would have convincingly established that TB's testimony was not worthy of belief. As such, Stetler has failed to establish the factual predicate for his claim of ineffective assistance. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (stating that the defendant has the burden to establish the factual predicate of his claim and, for that reason, must come forward with evidence that excludes hypotheses consistent with the view that his trial lawyer represented him adequately).

Even if he had identified such an expert, he has failed to overcome the presumption that his trial lawyer's decision to rely on Stetler's testimony and the texts that were admitted into evidence to support his theory fell below an objective standard of reasonableness. "Because there are countless ways to provide effective assistance in any given case, in reviewing a claim

that counsel was ineffective courts must ‘indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *Gioglio*, 296 Mich App at 22, quoting *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This presumption is strong: “[r]eviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to affirmatively entertain the range of possible reasons that counsel may have had for proceeding as he or she did.” *Id.* (internal quotation marks and citation omitted). “Accordingly, a reviewing court must conclude that the act or omission of the defendant’s trial counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission.” *Id.* at 22-23.

In this case, Stetler’s trial lawyer might reasonably have determined that Stetler was qualified to testify about the problem of false memories arising from hypnosis given his testimony that he had studied hypnosis at some length and his familiarity with the materials—materials that included a text that discussed the very phenomenon at issue. He might also have reasonably come to this conclusion because he was unable to find another witness who would testify favorably for the defense. Thus, there might have been a legitimate strategic reason for his decision to proceed as he did. *Id.* The fact that his effort to use Stetler to introduce this testimony ultimately failed does not render the decision to pursue that course constitutionally ineffective. See *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

With regard to TL’s testimony, it was Stetler’s theory at trial that TL had fabricated her testimony after the fact for financial gain—not that her memories were tainted by hypnosis. To that end, Stetler’s lawyer concentrated his efforts on showing that TL did not make her allegations until after there was some publicity about Stetler’s arrest and that she did not initially go to the police, but instead spoke to a lawyer about a possible civil suit. Given this theory and the fact that Stetler testified that he *never* treated TL with hypnosis, Stetler’s trial lawyer might reasonably have concluded that it was counterproductive to suggest that TL’s testimony was similarly tainted by hypnosis. *Gioglio*, 296 Mich App at 22-23.

Stetler failed to establish that his trial lawyer’s decision to attack TB and TL’s credibility in the manner that he did—and without the benefit of an expert on hypnosis—fell below an objective standard of reasonableness under prevailing professional norms.

Finally, even if Stetler had established that there was an expert ready, willing, and able to testify favorably to the defense, we would conclude that Stetler failed to establish that there is a reasonable probability that, but for this error, the outcome would have been different. The relevance of any expert testimony on the issue of false memories would have been limited to the weight and credibility that should be afforded to TB and TL’s testimony. *People v Sorscher*, 151 Mich App 122, 130; 391 NW2d 365 (1986). At trial, TB offered testimony about the events at issue and how she immediately reported those events to a police officer after she got away from Stetler. The immediacy and intensity of TB’s response was compelling evidence that she was reacting to actual events and not memories that were induced by an otherwise innocuous session of hypnosis concerning the need to quit smoking. Similarly, it was Stetler’s testimony that he never put TL under hypnosis; as such, the expert’s testimony would not—under Stetler’s own theory—even apply to TL. On this record, we would conclude that, even if Stetler’s lawyer’s

failure to call an expert witness on hypnosis and memories fell below an objective standard of reasonableness, that error did not prejudice his trial. *Uphaus*, 278 Mich App at 185.

III. CONCLUSION

Stetler has not established that his trial lawyer's decision to challenge TB and TL's credibility in the way that he did fell below an objective standard of reasonableness under prevailing professional norms. Even if his trial lawyer's performance could be said to have been below an objective standard of reasonableness under prevailing professional norms, Stetler failed to establish that his lawyer's acts or omissions prejudiced his trial. Consequently, he has not established that he was deprived of the effective assistance of counsel.

Affirmed.

/s/ Stephen L. Borrello

/s/ Michael J. Kelly

/s/ Mark T. Boonstra