

Order

Michigan Supreme Court
Lansing, Michigan

November 30, 2022

Elizabeth T. Clement,
Chief Justice

164604

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 164604
COA: 354888
Ingham CC: 19-000119-FC

DOUGLAS LEE HECKAMAN,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the May 19, 2022 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part III(A) of the judgment of the Court of Appeals and we REMAND this case to that court for reconsideration of that ineffective assistance of counsel claim. Although the Court of Appeals cited the correct standard for assessing prejudice under *Strickland v Washington*, 466 US 668 (1984), it failed to apply that standard. The defendant was not required to show that, but for counsel's deficient performance, he *would have been acquitted*. Rather, prejudice is established where a defendant shows that "but for counsel's deficient performance, there is a *reasonable probability* that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51 (2012) (emphasis added). On remand, the Court of Appeals shall resolve the defendant's claim of ineffective assistance of counsel set forth in Part III(A) under this standard. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.



s1121

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 30, 2022

Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS LEE HECKAMAN,

Defendant-Appellant.

UNPUBLISHED

May 19, 2022

No. 354888

Ingham Circuit Court

LC No. 19-000119-FC

Before: GADOLA, P.J., and SERVITTO and REDFORD, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(2)(b) (victim under 13, actor 17 or older). The trial court sentenced defendant to serve concurrent prison terms of 300 months (25 years) to 450 months (37 years, 6 months). We affirm.

I. FACTUAL BACKGROUND

From near the end of 2013 until 2015, complainant, who was eight years old at the time, and her slightly older sister, were placed in the care of the children's great-aunt, Nancy Huddleston, defendant's partner. The children were returned to the care of their mother, Rebecca Hammon, who, in 2018, became concerned regarding complainant's self-harming behavior of cutting herself. Around this time, complainant disclosed to her sister and a cousin that defendant had sexually assaulted her while she and her sister were placed with Huddleston and defendant. Later, complainant's grandmother overheard complainant's sister and cousin speak about the allegation. At a meeting with a school counselor and Hammon, complainant referenced the abuse. Her sister disclosed the allegations to Hammon at home around May 15, 2018. Complainant testified that while she lived with defendant, a large man, he digitally penetrated her labia and had her touch his penis multiple times.

Defendant moved for a new trial on the ground that his trial counsel provided ineffective assistance, or, alternatively, for an evidentiary hearing¹ to further develop that claim. The trial court denied the motion.

On appeal, defendant argues that his trial counsel provided ineffective assistance by not presenting evidence that Hammon had been arrested prior to the complainant's disclosure of abuse, which kept the jury from considering that complainant may have manufactured allegations against defendant to prevent being placed in his care again, and by not objecting to the testimony of plaintiff's expert, Thomas Cottrell.

For the reasons explained in this opinion, we agree that defendant's trial counsel performed deficiently by not presenting evidence of Hammon's arrest, but disagree that but for this error the outcome of the trial would have been different or defendant was denied a fair trial. We also disagree that trial counsel performed deficiently by failing to object to Cottrell's testimony.

II. STANDARDS OF REVIEW

We review for an abuse of discretion a trial court's decision whether to grant a new trial. *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010). We also review for an abuse of discretion a trial court's decision whether to hold an evidentiary hearing. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). A trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We review de novo the constitutional question whether an attorney provided ineffective assistance, depriving a defendant of the right to counsel. *Unger*, 278 Mich App at 253.

III. ANALYSIS

A. EVIDENCE OF HAMMON'S ARREST

Defendant argues that his trial attorney performed deficiently by failing to offer evidence that complainant's mother had been arrested before the complainant accused defendant of sexual abuse. According to defendant, the complainant fabricated the allegations of sexual abuse around the time of Hammon's arrest on March 15, 2018, in an effort to save her mother.

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This "right to counsel encompasses the right to the effective assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). The "[e]ffective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To prevail on a claim of ineffective assistance of counsel, a defendant must establish counsel's deficient performance, and that the "deficient performance prejudiced the defense." *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007) (quotation marks and citation omitted).

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

Defense counsel's performance is deficient if "it fell below an objective standard of professional reasonableness." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The performance will be deemed to have prejudiced the defense if it is reasonably probable that, but for counsel's error, "the result of the proceeding would have been different." *Id.* "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012) (citations omitted). "In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Id.* at 52 (citation omitted).

Defendant's trial attorney told the jury that the key motivation for the complainant's belated and false disclosure that defendant had abused her arose from her desire to protect Hammon. In his opening statement, defense counsel suggested that it was physically impossible for defendant to have committed the crime, that complainant's behavior did not change while living with defendant, that child welfare professionals visited complainant at defendant's home to ensure her safety, that no physical evidence of sexual aggression existed, and that complainant made inconsistent statements. In response to plaintiff's statement that complainant had no motive to lie, defense counsel told the jury that defendant's entire theory of the case was that complainant fabricated the allegations in an effort to save her mother. Defense counsel explained that complainant's father had passed away, and that she had previously been separated from Hammon for 15 months and "didn't want it to happen again, so she's going to do anything she can to stop it." During closing argument, defense counsel argued among other things that the complainant may have been cutting herself because she had been removed from her mother's care previously and did not want to be removed again and she needed Hammon during that time. Defense counsel concluded, "[Complainant] has the perfect motive to be less than truthful because she thought she's doing the right thing. And it's not her fault. She's . . . an innocent child who is hurting terribly." Defense counsel urged the jury to believe that complainant's desire to protect her mother and prevent separation from her triggered the false allegations against defendant.

Defense counsel, however, never presented any evidence to show precisely from what the complainant wanted to protect Hammon, including what might result from her and Hammon's separation. At trial, defense counsel attempted to present evidence of Hammon's arrest through Huddleston's testimony by asking her whether anything happened in the "first half of 2018 that relates to this case." Plaintiff objected. Outside the presence of the jury, the trial court heard Huddleston's proffered testimony that she believed that complainant made the allegations because Hammon had a court hearing, and because complainant was cutting herself and did not want to be removed from the custody of her grandmother and Hammon. Huddleston, however, based her testimony on what others told her. The trial court excluded this testimony as speculation and hearsay. Defense counsel failed to present any other evidence of Hammon's arrest on which to support the defense theory.

At the hearing on defendant's motion for a new trial, the trial court explained that defendant presented multiple defense theories at trial in addition to the strategy that complainant's mother's arrest triggered a false accusation. The court concluded that defendant's trial counsel made a "mistake" by not properly seeking admission of evidence of Hammon's arrest, but his

performance, nonetheless, did not fall beneath an “objective standard of reasonableness.” The trial court reasoned that defendant presented the defense that the complainant lied in several ways, and her motivation to lie was implicit in all of the ways that defendant argued that she lacked credibility.

The right to effective assistance of counsel is substantive and focuses on “the actual assistance received.” *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). A court must ensure that defense counsel provided the modicum of representation to which the defendant was constitutionally entitled. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). As the trial court noted, despite not successfully offering evidence of Hammon’s arrest as motivation for the complainant’s accusations, defense counsel ably introduced evidence that supported the argument that the complainant’s claims of abuse were not credible for a number of reasons. Counsel referenced different theories of impossibility based on defendant’s physical attributes, the complainant’s lack of reporting abuse despite the opportunities to safely do so, the lack of physical evidence or behavior changes, and inconsistencies in the complainant’s statements in contrast to defendant’s and his partner, Huddleston’s, consistent statements. Further, we note that defense counsel had some success at persuading the jury to retain doubt about defendant’s guilt, given that the jury found defendant not guilty of one count of CSC-II, and could not reach a verdict regarding another count of CSC-II. We conclude that, because defense counsel presented a substantial and partly successful defense that the complainant lacked credibility, counsel’s performance was not entirely deficient.

Defense counsel, however, had the duty to prepare, investigate, and present all possible defenses. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). The United States Constitution guarantees criminal defendants the right “to present a complete defense.” US Const, Ams VI, XIV; *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012). In this case, although defense counsel satisfactorily presented the defense that the complainant lacked credibility, defense counsel failed to deliver on the promise of evidence establishing that she manufactured the allegations against defendant to protect her mother. Despite counsel’s argument that complainant sought to protect Hammon and prevent being separated from her, defense counsel presented no evidence linking Hammon’s arrest to the timing of the complainant’s disclosure of sexual abuse. Without such evidence, defense counsel’s argument that the complainant felt a need to protect Hammon and schemed against being removed from Hammon’s care lacked a factual predicate.

The prosecution argues that the successful introduction of evidence of Hammon’s arrest would have presented only another reason why the complainant cut herself but would not establish that she lied about the sexual abuse. Nevertheless, had evidence of Hammon’s recent arrest been admitted, the jury would have had more information to determine the complainant’s credibility. Without such evidence, the jury had less context for consideration of defendant’s key defense argument. Defense counsel promised to establish that complainant fabricated the allegations to “save” Hammon and prevent being removed from her care and custody, but failed to deliver some of the evidence supporting the argument that the accusations were manufactured. Because of these shortcomings, we conclude that defense counsel’s failure fell below an objective standard of reasonable performance.

Defendant having satisfied the first prong of the *Strickland* test, we turn to the second portion of the test: is there a reasonable probability that, but for counsel’s substandard

performance, the result of the proceeding would have been different. *Jordan*, 275 Mich App at 667; *Trakhtenberg*, 493 Mich at 51. In this matter, defendant has failed to do so.

The record establishes that defense counsel presented evidence of the complainant's lack of credibility. Counsel discussed all of the evidence that he thought demonstrated that complainant invented the allegations. But defense counsel failed to present any evidence of the specific theory that Hammon's arrest factored into the complainant's motivation to manufacture false allegations. The trial court concluded that "the one more bit of evidence of the mom being arrested around the time that [complainant] disclosed . . . would [not] have changed the outcome."

Specifically, the trial court stated:

Well, the first part of the test is whether counsel's—, trial counsels [sic] performance fell below an objective standard of reasonableness. And the argument has been made here that the trial counsel made this motive to lie his entire strategy and then he didn't deliver.

And he didn't deliver because he had a way to put it into evidence, the arrest of the mother, that is, but he didn't use it and instead he used a failed, on multiple levels, a failed attempt to put it into evidence. It is true that in his opening statement, trial counsel put this as a he said/she said case. Said that [the victim] had lied to save her mother. But, in actuality, he did not announce a strategy of only showing that this, that there was an arrest of her mother that triggered a false accusation. In actuality, he introduced evidence and that's far more than just announcing an opening statement. He actually introduced evidence and argued multiple different theories and defenses.

The first one was [the victim's] credibility, which was basically the defense of "it didn't happen." Another, a different way of saying she lied. But, he attacked [the victim's] credibility by impeaching her with prior inconsistent statements. He addressed the failure of [the victim] to report this earlier, even when she was given a safe environment or at least a temporary safe environment, in which to do so. He brought out her lack of fear of the defendant and the fact that while she was living with the defendant, there was no change in her behavior. He brought out, of course, the obvious delayed reporting for a matter of some three years. And he also brought out multiple alternative and even credible reasons for [the victim's] cutting behavior. That was one, I, I'd put that under the category of [the victim's] credibility. He attacked all of that and he did it again with actual evidence. And then, he also addressed physical impossibility and he gave two reasons for physical impossibility. And also, introduced evidence about it.

One was that he, the argument was that the defendant's penis was not accessible when he was wearing pants and in a seated position. And the other was that he couldn't achieve an erection. And then he went to a third area of defense. And that is lack of injury to [the victim]. He brought out the defendants [sic] large rough hands and Nancy's testimony that she did [the victim's] laundry and never saw any evidence of injury. And then finally, he brought out the defendants [sic]

cooperation with police. Something that will often ring true to a jury that a person who didn't do this would not meet, in this case, two times with the police and cooperate fully with them.

So, even though there was a statement in opening, an opening statement about the theory of the defense, that was merely the defense attorneys [sic] opening statement. When it came down to actually producing evidence, which of course is the most important part of the trial, the opening statements not being evidence and the jury being told that, the, the defense produced all of this evidence or elicited all of this evidence as a multiple ways that the jury could look at a defense in this case.

Defendant disagrees, arguing that the additional evidence would have enabled the jury to understand why it was so important to complainant to place defendant in a bad light. The evidence of Hammon's arrest, however, would not necessarily establish that the complainant felt compelled to accuse defendant of misconduct to prevent being removed from Hammon and returned to defendant's home. The leap from Hammon's arrest to the conclusion that the complainant felt compelled to lie requires speculation and is devoid of direct evidentiary linkage. Nothing in the record establishes that the complainant even had knowledge of Hammon's arrest when she disclosed the sexual abuse. The record also does not indicate that Child Protective Services (CPS) even intimated to complainant that she would be removed from Hammon's care. To establish a causal connection, the jury would have had to assume that CPS intended immediately to remove complainant from Hammon and place her again with defendant and his partner, and that the latter had agreed to such an arrangement. But no evidence supports such assumptions. We are not convinced that the jury would have concluded that the complainant manufactured her allegations of sexual abuse because of her mother's arrest.

Further, to conclude that the complainant falsely accused defendant because of her concern that she would have to return to live with defendant, the jury would have had to discount the complainant's testimony about the process through which she actually disclosed the abuse. She testified that she initially asked her sister and cousin to keep her disclosure a secret, but that adults found out because her grandmother overheard her cousin and sister discussing the matter. The complainant testified that she did not want to disclose the abuse, but had her sister tell Hammon after the complainant's school personnel met with Hammon to discuss the complainant's self-cutting. Complainant provided an explanation for her late disclosure, independent of any fears about her placement with defendant, and her account of the disclosure attributed her motivation to an act of indiscretion by her cousin and sister, as well as a desire to discuss the antecedents of her cutting behavior with Hammon.

Moreover, the record indicates that the prosecution presented substantial evidence from which the jury could find defendant guilty beyond a reasonable doubt of sexually abusing the complainant. Although defendant challenged complainant's credibility in multiple ways, the jury found her testimony credible and was not persuaded that she fabricated her allegations. For all of these reasons, we are not persuaded that, had the jury been presented evidence of Hammon's arrest, the jury would have acquitted defendant. Accordingly, defendant is not entitled to relief and the trial court did not err by denying him a new trial.

B. OBJECTION TO EXPERT TESTIMONY

Defendant argues that his trial counsel performed deficiently by failing to object to the testimony of plaintiff's expert, Thomas Cottrell, a licensed social worker, who the trial court qualified as an expert in "child sexual abuse and the dynamics surrounding child sexually abusive episodes." We disagree.

MRE 702 permits the admission of expert opinion when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." The trial court serves as the gatekeeper and must perform a searching inquiry to determine whether proposed expert testimony rests on legitimate data and the conclusions have been reached through reliable principles and methodology. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). The trial court must consider several factors to determine "whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 592-593; 113 S Ct 2786; 125 L Ed 2d 469 (1993). The opinion of an expert must be shown to be reliable, including the data underlying the expert's theories and the methodology by which the expert draws his or her conclusions. *People v Yost*, 278 Mich App 341, 394; 749 NW2d 753 (2008). The admissibility of expert testimony is determined by a three-part test: "(1) the expert must be qualified, (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist the trier of fact in determining a fact in issue, and (3) the evidence must be from a recognized discipline." *People v Parcha*, 227 Mich App 236, 239-240; 575 NW2d 316 (1997) (citations omitted).

In this case, defendant does not dispute that Cottrell qualified as an expert. He argues, however, that defense counsel should have objected on the grounds that Cottrell offered unreliable testimony that would not be helpful to the jury. In denying defendant's motion for a new trial or an evidentiary hearing, the trial court stated that defense counsel did not provide ineffective assistance by failing "to do something that would be unsuccessful anyway or meritless." The trial court further reasoned that *Daubert* hearings were not required for behavioral health experts, and that the challenged testimony was helpful to the jury.

The record reflects that Cottrell provided testimony regarding the general characteristics of sexual abuse, victim disclosure of abuse, victim behavior in the presence of the perpetrator, and victim memory and emotions. Defendant argues that Cottrell's testimony failed to help the jury because it covered matters that were already within the knowledge of the jurors. Expert testimony is necessary when the facts require an "analysis by a competent expert," with "knowledge in a particular area that belongs more to an expert than an ordinary person" to "aid the factfinder in making the ultimate decision in the case." *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991). Expert testimony is not helpful when it "does not involve a matter that is beyond the common understanding of the average juror." *People v Kowalski*, 492 Mich 106, 121; 821 NW2d 14 (2012). An expert witness may testify about the general behavior of sexual abuse victims "for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to rebut an attack on the victim's credibility." *People v Peterson*, 450 Mich 349, 373; 537 NW2d 857 (1995). Expert testimony is permissible "to generally explain the common postincident behavior of children who are victims of sexual abuse." *Id.*

In this case, the trial court correctly explained:

The law . . . is that testimony like Mr. Cottrell's testimony is helpful to the jury because as we saw in this trial, it's often argued that some of these things like delayed reporting show that a victim is fabricating or make a jury believe that. It's counter-intuitive otherwise and Mr. Cottrell and others like him have assisted juries in order to show that it might seem counter-intuitive but here's why the delayed reporting makes sense. So, it is very helpful to juries and the law allows it for exactly that reason.

Defendant argues that the behavior of sexual assault victims, including delayed disclosure of the abuse, has become common knowledge in a culture that has more recently attempted to address sexually exploitative behavior. We are not persuaded that the entire field of study and practice constitutes "common knowledge." Cottrell's testimony covered at least six areas requiring specialized knowledge specific to his field, including the timing of disclosures, victim behavior in the presence of the perpetrator, the decision whether and to whom to disclose, and common misconceptions about abuse victims in terms of memory and emotion. Defendant's argument that Cottrell's testimony could not assist the jury lacks merit.

Defendant also argues that Cottrell's testimony lacked reliability because it appeared to be based on his treatment of victims, rather than research studies. The record, however, does not support defendant's contention. In addition to his work experience, Cottrell testified regarding his professional training, continuing education, and research, all of which served as sources of his specialized knowledge. He cited specific research statistics and literature that he had reviewed. A witness may be qualified "as an expert by knowledge, skill, experience, training, or education." MRE 702. In this case, Cottrell discussed each of these areas as the foundation of his professional knowledge. Defendant does not challenge the substance of Cottrell's testimony, other than that he did not discuss the studies that he consulted. The record reflects that, although Cottrell referenced scientific research in some of his testimony, he was not asked about research or studies. Defendant brings to light no basis for doubting Cottrell's reliability.

In light of Cottrell's extensive qualifications in the relevant field, defense counsel's making an objection to Cottrell's testifying as an expert would have been futile. Counsel is not ineffective for declining to raise a futile objection. *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007). Accordingly, defendant has failed to establish defense counsel's deficient performance in this regard and he is not entitled to any relief.

Affirmed.

/s/ Michael F. Gadola
/s/ Deborah A. Servitto
/s/ James Robert Redford