STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2008
v	No. 278901 Wayne Circuit Court
JOHN DAVID STOCKMAN, Defendant-Appellant.	LC No. 03-007369-01

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

This Court previously affirmed defendant's jury convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of accosting a child for immoral purposes, MCL 750.145a, for which he was sentenced to concurrent prison terms of 18 to 50 years for each CSC conviction and one to four years for the accosting a child conviction. *People v Stockman*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2005 (Docket No. 251711), lv den 474 Mich 906 (2005). Defendant subsequently filed a motion for relief from judgment, which the trial court denied, and this Court denied defendant's application for leave to appeal from that order. *People v Stockman*, unpublished order of the Court of Appeals, entered October 11, 2006 (Docket No. 269343). This case is now before this Court pursuant to our Supreme Court's order, remanding the case to this Court for consideration as on leave granted. *People v Stockman*, 478 Mich 923; 732 NW2d 903 (2007). The Supreme Court's order directs this Court to consider the following questions:

> (1) whether the defendant has raised a "significant possibility" that he is innocent of the alleged crimes under MCR 6.508(D)(3); (2) whether the affidavits accompanying the defendant's motion for relief from judgment entitle him to an evidentiary hearing on any of the issues his application has raised regarding that proposed evidence; and (3) whether the defendant is entitled to an evidentiary hearing on the ineffective assistance of trial counsel for the alleged failures to investigate and procure the favorable medical testimony referenced in the affidavits.

We now affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of accosting and sexually penetrating a six-year-old girl, JB. One of the criminal sexual conduct convictions arose from the insertion of an object into JB's

genital opening. See MCL 750.520a(r). At trial, JB testified that defendant "got the thing" that was used to "[p]ut gravy on the chicken." The object was described as a "turkey baster" by other witnesses. JB testified that defendant "put that up here," pointing to her genital area, and described the area as being for "[u]sing the bathroom." When asked if the thing went "into where pee comes out," she responded yes. She also stated that she felt something. She explained, "It felt like it was in my stomach," and that it hurt. Dr. Hon Lee, who examined JB about a month after the incident, testified that he knew that the allegations were that "an object" had been inserted into JB's "genital area." He found no evidence of trauma from insertion of an object into the genital area or of a sexually transmitted disease. Dr. Lee testified that insertion of an object may or may not cause an injury. Dr. Lee concluded that "the general examination was normal, but sexual abuse cannot be ruled out because the time has passed since the alleged abuse."

Defendant's motion for relief from judgment was predicated in part on a claim that penetration with the turkey baster was medically impossible. The first question that our Supreme Court has directed this Court to consider is "whether the defendant has raised a 'significant possibility' that he is innocent of the alleged crimes under MCR 6.508(D)(3)" and the second is "whether the affidavits accompanying the defendant's motion for relief from judgment entitle him to an evidentiary hearing on any of the issues his application has raised regarding that proposed evidence." *Stockman*, *supra*, 478 Mich 923.

Defendant submitted an affidavit from Dr. Mark Richter, who averred that JB had testified "that she was sexually assaulted by . . . insertion of a '*turkey baster*' deep into her vaginal canal, internally to the point of her abdomen, causing extreme pain." Dr. Richter stated that if such testimony were true, there would be obvious signs of trauma to the vaginal area, even after several weeks, and such trauma would include "likely rupture" of the hymen, stretching or tearing of the vaginal walls, and damage to the abdominal organs. Dr. Richter also stated that the child would be "expected to present with additional sequalae [sic], such as" pain and discomfort, scarring, vaginal discharge, and vaginal itching, yet according to Dr. Lee's report, JB "reported no complaint of any 'Genitourinary' and 'no vaginal discharge per patient.'" Dr. Richter further stated:

> Given the scenario presented, that a "*turkey baster*" was inserted deep into the 6-year-old child's vagina, from a medical standpoint, it is difficult to imagine any series of events involving a vaginal insertion of an instrument the circumference of a "*turkey baster*" (approx. 7/16 of 1 inch increasing to a 1" diameter) into the small vaginal canal of a 6 year old child (maximum approx. ½") without application of oil based lubrication, and accomplish an absence of scarring, tearing, or damage or rupture of the child's Hymen, that would present a complete absence of evidence of injury upon clinical examination.
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> As a practicing physician, I conclude that there is such a major disconnect from a medical standpoint between the report/testimony of the child reporting a deep, vaginal insertion with a "*turkey baster*" of increasing diameter and the medical report and testimony of the examining physician, Dr. Lee, providing a complete absence of symptoms of sequalae [sic] of a vaginal insertion (Hymen damage or rupture [especially where it commented that the Hymen border is

"thin"], tearing, scarring, discharge, etc.) that, presuming the medical report and testimony are accurate, the version provided by the child is medically impossible.

Accepting these averments as true, they do not establish a significant possibility of defendant's innocence. First, Dr. Richter stated only that insertion of an object into JB's vagina was "likely" to have ruptured her hymen, not that it would necessarily have been ruptured. Thus, absence of a rupture would not preclude a finding of penetration. This is consistent with Dr. Lee's trial testimony that insertion of an object may or may not cause injury and thus sexual abuse could not be ruled out despite the absence of any injury. Second, the averments in Dr. Richter's affidavit are based on the factual premise that the baster penetrated deep into JB's vagina to the point of the abdomen, a premise not supported by the record. JB never testified how much of the baster entered her genital area and never testified that it actually entered her vagina. She testified only that it "felt like" it was in her stomach. A child of six is not likely familiar with the sensation of an object in her genital area or with the anatomical structures that lie between the labia majora and the stomach, and thus JB's testimony was more likely a figurative description of the sensation rather than a literal description of the extent of penetration. Her testimony established only that some part of the baster entered some part of her genital area, not that the full length of the baster was inserted into the vagina and beyond. Because even the former is sufficient to sustain a conviction, *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981), Dr. Richter's affidavit is insufficient to create an issue of fact warranting an evidentiary hearing regarding the possibility of innocence.

Defendant also submitted an affidavit from Dr. Lee, who stated that at the time he testified at trial, he did not know that the object alleged to have been used was a turkey baster or exactly how it had been inserted. He further stated:

> After observing an identical plastic *turkey baster*, and reviewing the testimony of the child, and my own dictation of the medical report, I have come to the following conclusions:
>
> a. vaginal insertion with an instrument of the size and composition of a plastic "turkey baster" in a way described by the victim would have caused severe damage of the delicate structures of the vagina in a six year old child with an average hymenal orifice diameter of only 4 to 6 mm.
>
> b. such damage would include tear of the hymen, fossa navicularis and posterior fourchette. As well, such tear if at all had existed, would cause permanent scarring of tissues easily recognizable by the trained eyes. I did not appreciate any of those findings.
>
> I conclude that the testimony of the child is medically impossible.

Dr. Lee's affidavit, like Dr. Richter's, appears to be premised on the assumption that the baster extensively penetrated JB's vagina, which simply is not supported by the record. Therefore, we similarly conclude that Dr. Lee's affidavit is insufficient to create an issue of fact warranting an evidentiary hearing regarding the possibility of innocence.

Defendant also submitted an affidavit from Alan Friedman, a forensic scientist, who stated that the baster could be tested for genetic evidence, the presence or absence of which could support or rebut JB's testimony. The affidavit is based primarily on speculation: (1) that the baster penetrated JB's vagina, (2) the baster had not been used or thoroughly washed between the date of the offense and the date it was taken into evidence, and (3) that genetic evidence might have adhered to the baster and not significantly degraded over time. Given that the testing has not even been done, we cannot conclude that Friedman's affidavit is sufficient to create an issue of fact warranting an evidentiary hearing regarding the possibility of innocence.

The third question we have been directed to answer is "whether the defendant is entitled to an evidentiary hearing on the ineffective assistance of trial counsel for the alleged failures to investigate and procure the favorable medical testimony referenced in the affidavits."

To establish a claim of ineffective assistance of counsel, a "defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).

In light of our analysis of the first two questions, we cannot conclude that the affidavits warrant an evidentiary hearing regarding ineffective assistance of counsel. The doctors' affidavits are based on assumptions that are at odds with the evidence presented at trial and Friedman's affidavit is based on speculation regarding testing that has not been completed. Accordingly, there is no basis for concluding that the failure to present the witnesses' proposed testimony deprived defendant of a substantial defense. See *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Patrick M. Meter