S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 26, 2010
v DENNIS LEE TOMASIK, Defendant-Appellant.	No. 279161 Kent Circuit Court LC No. 06-003485-FC

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). This appeal follows a remand for a *Ginther*[1] hearing. We conclude that defendant was not denied effective assistance of counsel and that the trial court did not abuse its discretion in denying defendant's request for an in camera review of the victim's counseling records. Because we also find no merit to defendant's other claims, we affirm.

I. Basic Facts

The victim, T.J., testified that his family lived seven houses down from defendant's house, and that he was a friend of defendant's son, E.T. According to T.J., he played with E.T. inside defendant's house about four times a week. They often played Nintendo in the basement. One day, when T.J. was six years old, defendant called T.J. away from E.T. He led T.J. to E.T.'s bedroom. Defendant closed the bedroom door, and took off his pants and T.J.'s pants. Defendant told T.J. that his penis was like a Popsicle but that T.J. should not bite. Defendant's penis went into T.J.'s mouth, defendant ejaculated, and told T.J. to swallow. Defendant threatened T.J. that he would kill T.J. and his family if T.J. told anybody. T.J. returned to the basement to play with E.T.

T.J. continued to play with E.T. at defendant's house because E.T. was his best friend. According to T.J., defendant continued to sexually abuse him. He remembered one time "really well" where defendant penetrated his anus. After T.J. abandoned a bike ride with his dad to play with E.T, defendant asked T.J. to come inside with him. In E.T.'s bedroom, defendant took off

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

T.J.'s pants and his pants. He then flipped T.J., so that T.J.'s face was on the bed, and defendant pushed his penis into T.J.'s anus.

In February 1997, when T.J. was six years old, T.J. saw blood in the toilet and on toilet paper after wiping himself after having a bowel movement. T.J.'s mother took him to the family doctor, Dr. Randall Clark. Clark discovered an anal fissure, and he did not suspect that it was caused by anything other than constipation. However, he testified that, had he known that T.J. was being anally penetrated, his diagnosis would have changed because the fissure was compatible with sexual abuse. Dr. Debra Simms, an expert in child sexual abuse, testified that an anal fissure can be the result of forcible penile entry.

T.J. did not know how often defendant abused him, but testified that it continued during "[t]he whole course of the whole time [he] was hangin' out" with E.T." When T.J. was "about eight," he realized that what defendant was doing to him was wrong, and he stopped playing with E.T.

During his freshman year in high school, T.J. was caught stealing money from purses belonging to his school's cheerleaders. T.J. admitted his involvement in the theft, and because the offense was his first offense, he was not prosecuted in juvenile court. He was suspended from school for ten days, ordered to repay the money he stole, and was required to meet with a probation officer. After he received his punishment, T.J. decided that he did not want to "live in a jail cell for the rest of [his] life," so he disclosed the sexual abuse by defendant to his counselor, Julie Schaefer-Space. Schaefer-Space reported the abuse using a "3200 form" to the local sheriff's department.

According to T.J., he was "messed up," "a demon child" before he disclosed the sexual abuse to Schaefer-Space. His mom described him as "very angry, almost hate-filled." T.J. kept weapons, such as knives and bats, in his room, because he was scared that defendant would kill his family. He fondled his younger cousin. He often talked of dying, and attempted suicide on several occasions. He used drugs. He often got into trouble at school. At different times, as his parents tried to figure out the cause of his problems, T.J. was asked if he had been sexually abused. T.J. never admitted the abuse to his parents, telling them that he had a secret that he could not tell anyone. According to his parents and Schaefer-Space, after T.J. disclosed the abuse, he became a different person. He was no longer angry.

In August 2006, while the present case was pending, T.J. went to see Clark with a complaint of anal bleeding. According to Clark, T.J. refused to allow Clark to examine his anal area. After performing an abdominal examination, Clark gave a presumptive diagnosis of internal hemorrhoids. Simms testified that anal bleeding ten years after the anal fissure would not make the fissure inconsistent with sexual abuse, explaining that there could be "totally different diagnoses" for the fissure and the subsequent bleeding.

II. Expert Testimony

Defendant claims that the trial court erred in admitting the expert testimony of Thomas Cottrell regarding the characteristics of victims and offenders of child sexual abuse. We disagree.

A. Standard of Review

Defendant did not object to Cottrell's testimony at trial. Accordingly, we review the admission of Cottrell's testimony for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[T]hree requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* Error affects a defendant's substantial rights when it affects the outcome of the lower court proceedings. *Id.*

B. Analysis

In *People v Lukity*, 460 Mich 484, 500-501; 596 NW2d 607 (1999), our Supreme Court summarized the general rules of expert testimony concerning child sexual abuse:

> In *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), this Court reiterated general principles regarding child sexual abuse expert testimony:
>
> > (1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty.
>
> It also clarified aspects of such testimony:
>
> > (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse 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 actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. [*Id.* at 352-353.]
>
> The *Peterson* Court specified two situations in which an expert may testify that a victim's behavior was consistent with that of a sexual abuse victim:
>
> > Unless a defendant raises the issue of the particular child victim's post-incident behavior *or* attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child. Such testimony would be improper because it comes too close to testifying that the particular child is a victim of sexual abuse. [*Id.* at 373-374 (emphasis added).]

Cottrell, the vice-president of counseling services at the YWCA counseling center, testified that it was "very common" and "a relatively normative pattern" for children to delay in disclosing sexual abuse. He also testified that behavior exhibited by T.J. after the abuse, such as immediately returning to play with E.T. after being abused by defendant, continually returning to defendant's house to play with E.T., performing a sexual act with a younger cousin, and

engaging in self-destructive behaviors, i.e., drug abuse and suicide attempts, was behavior consistent with that of a sexually abused child.

In his opening argument, defendant informed the jury that the case involved "a false allegation" by "a desperate young man attempting to get out of trouble." Defendant noted that, immediately before T.J. disclosed the abuse, he was caught stealing money from classmates and heard that defendant had sexually abused J.B., another teenager from the neighborhood, when J.B. was a child. During his cross-examination of T.J., defendant questioned T.J. about his statements that he immediately returned to play, including riding his bike, with E.T. after the abuse, and asked him why he continued to return to defendant's house to play with E.T after the abuse started. Defendant also questioned T.J. about his counselors and why he had not disclosed the abuse to his counselors or even to his parents, after his parents specifically asked him if he had been sexually abused. In addition, defendant asked T.J. whether his theft of the cheerleaders' money was not prosecuted in juvenile court because of the disclosure. In light of defendant's attacks on T.J.'s credibility and post-incident behavior, the admission of Cottrell's expert testimony regarding the characteristics of child sexual abuse victims was not plainly erroneous.

Cottrell also briefly testified concerning "offender dynamics." In response to the prosecutor's question whether a "perpetrator would be perpetrating on his own children and all the other children that are coming to the home," Cottrell testified that sexual offenders "carefully select their victims." He explained that an offender's selection of a victim is based on a variety of factors, including whether the offender would like to be sexual with the victim and whether the victim can be influenced not to disclose the abuse. The Supreme Court in *Peterson* did not address the admissibility of expert testimony concerning patterns of behavior by sexual offenders. *People v Ackerman*, 257 Mich App 434, 444; 669 NW2d 818 (2003). However, in *Ackerman*, this Court held that an expert's testimony regarding common practices of sexual offenders was admissible under MRE 702 because the testimony would aid the jury in reaching a verdict. *Id.* at 444-445. The Court explained that "most of our citizen-jurors lack direct knowledge of or experience with the typical forms of conduct engaged in by adults who sexually abuse children." *Id.* at 445. Here, defendant offered the testimony of Harold and Christine Hadden, neighbors of defendant, that they had never observed defendant engage in any inappropriate behavior and that, even after T.J. disclosed the abuse, they have no concern about their two young children going over to defendant's house. J.B., a teenager who lived in defendant's neighborhood, testified that he was E.T.'s best friend, and that defendant never engaged in any inappropriate behavior with him. J.B.'s father testified that he never found defendant's behavior to be unusual. In light of the fact that defendant presented testimony from other neighborhood residents that they never observed defendant engage in any inappropriate behavior, the admission of Cottrell's testimony concerning offender characteristics was not plainly erroneous.

III. Motion for Adjournment

Defendant claims that the trial court erred in denying his motion to adjourn trial in order to allow him time to locate an expert witness to address the expected testimony of the prosecution's expert witnesses.

A. Standard of Review

We review a trial court's decision on a motion to adjourn for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

B. Analysis

To invoke a trial court's discretion to grant an adjournment, a defendant must show good cause and diligence. *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003). "Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion." *Id.* at 18-19.

Defendant's trial was scheduled to begin on April 17, 2007. On March 16, 2007, defendant moved to adjourn his trial. He stated that he had just received the transcript of Clark's preliminary examination testimony and learned that the prosecutor would be calling Simms as an expert witness. Defendant claimed that he needed additional time to receive the opinion and advice of an independent expert "relative to the injuries complained about in the case." At the end of the hearing, the trial court decided to delay a decision on the motion to adjourn, until after defendant received the information, including a summary of Simms's testimony, that he had requested from the prosecutor. The trial court scheduled a status conference for April 9, 2007.

The trial court readdressed defendant's motion to adjourn on April 9, 2007, but it did so in chambers. The record contains no transcript of the status conference, and it contains no order denying the motion to adjourn. According to the register of actions, defense counsel was "to get back with judge." Defendant's trial began on April 17, 2007.

At the *Ginther* hearing, defendant's trial counsel was asked about the circumstances surrounding the April 9, 2007 status conference. Trial counsel testified that, as of April 9, 2007, he had not heard from Dr. Stephen Guertin. He subsequently spoke with Guertin, who informed him that an adult male's penis could cause an anal fissure, and that based on this conversation, he decided not to call Guertin as a witness. Trial counsel testified that, after speaking with Guertin, he "may have" informed the trial court that he was ready to proceed with trial and that he "may have" abandoned his request for an adjournment. Accordingly, defendant has failed to demonstrate that the trial court made an adverse ruling on his motion to adjourn.[2]

[2] To establish the prejudice prong, defendant claims that, because the "prosecution presented a wealth of testimony from expert witnesses who stated that [T.J.] exhibited the traits of a sexual-abuse victim and [defendant] acted in a manner consistent with a sexual abuser," had he "been able to offer expert testimony to contradict those assertions, the case would have been reduced to an assessment of [T.J.'s] credibility, as opposed to the one-sided battle of experts." Defendant did not, however, request the adjournment to allow him to obtain a child sexual abuse expert. As is clear from the motion to adjourn and the transcript of the motion hearing, along with trial counsel's testimony at the *Ginther* hearing, defendant wanted an expert who could testify regarding the causes of anal bleeding.

IV. The Information

Defendant claims that the ending date for the criminal offenses in the information should be modified to conform to the evidence at trial. According to defendant, if the information is modified to reflect that the criminal offenses occurred only through May 5, 1998, rather than December 31, 1998, he would not be subject to the Truth-In-Sentencing legislation, which became effective on December 15, 1998.

A. Standard of Review

Because defendant did not request amendment of the information below, the issue is unpreserved. We review the unpreserved claim for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

B. Analysis

A court may amend an information before, during, or after trial to conform to the evidence. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). According to the information, the criminal offenses occurred "on or about 06/01/1996 – 12/13/1998." T.J. testified that he stopped going to defendant's house to play with E.T. when he learned what defendant was doing to him was wrong. He stated that he was "about eight then." T.J. was born on March 5, 1990.

Defendant claims that the evidence establishes that the abuse stopped two months after T.J.'s eighth birthday, which would be May 5, 1998. He points to the following question the prosecutor asked Detective Heather Martin:

> And in the same report [the original police report], just in two paragraphs down, he talks about how it stopped two months after his eighth birthday. It was three times a week in a two year period. Again, does he tell you it only happened two times or that it happened multiple times when you look at your entire report? In other words, did you get the impression that there were only two episodes of abuse[?]

Martin replied, "Oh, no. Certainly not. No." Questions asked by attorneys during trial are not evidence. See CJI2d 2.7. Accordingly, defendant has not shown that the evidence admitted at trial established that the criminal offenses occurred on or before May 5, 1998. Defendant is not entitled to an amendment of the information.

V. Defendant's Recorded Interview with Detective Martin

A recording of Martin's February 2006 interview with defendant was played for the jury. On appeal, defendant argues that the admission of numerous statements by Martin on the recording, including that she had "investigated the heck out of the case and knows everything that has gone on" and that she "kn[e]w things happen[ed] when [T.J.] came over to your house years ago," denied him a fair trial. According to defendant, Martin's statements demonstrated Martin's belief that T.J. was credible and that the sexual abuse had occurred. Defendant also argues that the inadmissibility and prejudicial value of Martin's statements were "so obvious"

that the prosecutor engaged in misconduct when she played the recording. Finally, defendant argues that, even if Martin's statements were admissible, the trial court should have given the jury "a strong limiting instruction" that the statements were not evidence and could not be considered in determining his guilt.

A. Standard of Review.

Defendant did not object when the prosecutor played the recording of Martin's interview with defendant. We review these unpreserved claims of evidentiary error and prosecutorial misconduct for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

B. Analysis

A witness may not express an opinion regarding the guilt or innocence of a defendant. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985); *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). Defendant does not claim that Martin, while testifying at trial, expressed an opinion regarding T.J.'s credibility or defendant's guilt. Rather, he argues that statements Martin made to him during the February 2006 interview, and replayed for the jury, expressed Martin's opinion regarding his guilt. Defendant does not claim that the interview recording, as a whole was inadmissible, but only that certain of Martin's statements were inadmissible. Martin's statements during the interview were not offered at trial for the truth of the matter asserted. In fact, Martin testified that when she told defendant that she had "investigate[d] the heck out of [the] case[]," it was "pretty much a figure of speech." Martin's statements were necessary to provide the full context of defendant's statements. Because the statements were necessary to provide the context of defendant's statements, we reject defendant's claim that the probative value of the "unedited" recording of the February 2006 interview was substantially outweighed by the danger of unfair prejudice. MRE 403. Accordingly, defendant has not shown that plain error occurred in the admission of the recording of the February 2006 interview. In addition, because defendant has not shown that the inadmissibility of the "unedited" recoding of the interview was "so obvious," we reject defendant's claim of prosecutorial misconduct.

When evidence is admitted for one purpose but is not admissible for another purpose, a trial court, "upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." MRE 105. However, in the absence of a request or an objection, a trial court is not required to give sua sponte a limiting instruction. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). The only legal authority defendant cites in support of his argument that the trial court erred in failing to sua sponte instruct the jury that Martin's statements were not evidence is *People v Moorer*, 262 Mich App 64; 683 NW2d 736 (2004). The main issue in *Moorer* was whether the trial court erred in admitting various statements of the victim pursuant to MRE 803(3). In explaining the scope of statements admissible under MRE 803(3), the Court stated, quoting 2 McCormick, Evidence (5th ed), that when "'[t]he truth of those assertions may coincide with other issues in the case . . . the normal practice is to admit the statement and direct the jury to consider it only as proof of the state of mind and to disregard it as evidence of the other issues.'" *Id.* at 69. Because the hearsay issue in *Moorer* did not concern whether the trial court, after admitting hearsay pursuant to MRE 803(3), erred in failing to sua sponte give a limiting instruction, we do not find *Moorer* instructive. Accordingly, defendant

has not shown that the trial court plainly erred in failing to instruct the jury that Martin's statements to defendant during the February 2006 interview were not evidence.

VI. Ineffective Assistance of Counsel

Defendant argues that he was denied effective assistance of counsel at trial. He claims that trial counsel's performance was deficient when (1) counsel failed to investigate expert witnesses, interview witnesses from defendant's neighborhood, and obtain defendant's work records and T.J.'s counseling records, (2) failed to adequately cross-examine T.J. about inconsistencies in his testimony; and (3) failed to object to the admission of the recording of the February 2006 interview and failed to object when the prosecutor mischaracterized the record regarding the interview during closing arguments. Defendant also claims that he was denied effective assistance of appellate counsel when original appellate counsel failed to move for a new trial and *Ginther* hearing.

A. Standards of Review

Defendant moved this Court for a remand for a *Ginther* hearing on all of his claims of ineffective assistance of counsel. This Court granted the motion on defendant's claim that trial counsel was ineffective for failing to produce a child sexual abuse expert to counter the prosecutor's experts. *People v Tomasik*, unpublished order of the Court of Appeals, entered November 6, 2008 (Docket No. 279161).[3] The Court denied the motion for a remand on defendant's other claims for ineffective assistance of counsel. *Id.*

The determination whether a defendant was denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v McMullan*, 284 Mich App 149, 155; 771 NW2d 810 (2009). A court must first find the facts and then determine whether the facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* We review a trial court's findings of fact for clear error and conclusions of law de novo. *Id.* Because a *Ginther* hearing was only held on defendant's claim that counsel was ineffective for failing to call a child sexual abuse expert witness, our review of defendant's other claims for ineffective assistance is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

B. Failure to Produce a Child Sexual Abuse Expert

Defendant argues that trial counsel's testimony at the *Ginther* hearing that he did not consult with a psychological expert clearly established that defendant was denied the effective assistance of counsel. We disagree.

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[3] The Court also granted a remand to determine whether trial counsel was ineffective for failing to call defendant as a witness. Defendant chose not to testify at the *Ginther* hearing, and the trial court found that trial counsel's decision not to call defendant as a witness did not fall below objective standards of reasonableness. In his supplemental brief filed after the *Ginther* hearing, defendant does not challenge the trial court's conclusion. Accordingly, we consider the issue whether trial counsel was ineffective for failing to call defendant as a witness to be abandoned.

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). The defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). To establish ineffective assistance of counsel, a defendant must show (1) that his counsel's performance fell below objective standards of reasonableness and (2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). This Court will not substitute its judgment for that of counsel in matters of trial strategy, *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007), nor will it assess counsel's performance with the benefit of hindsight, *People v Hill*, 257 Mich App 126, 139; 667 NW2d 78 (2003). That counsel's chosen strategy did not work does not render counsel's assistance ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

The decision whether to present expert testimony is presumed to be a matter of trial strategy. *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). In this case, however, defendant maintains that trial counsel did not just decide not to call an expert witness, he did not even investigate the possibility of using an expert at trial. Counsel has a duty to make a reasonable investigation, "and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The reasonableness of counsel's actions must be judged "as of the time of counsel's conduct." *Id.* at 690.

At the *Ginther* hearing, defendant presented an expert, Dr. Jeffrey Kieliszewski, who testified that he saw in the testimony of Schaefer-Space, especially when she stated that she saw in T.J. "all the marks of . . . a child who was sexually abused," evidence of confirmatory bias and clinician's illusion.[4] Kieliszewski also testified that he disagreed with, and the literature did not support, several of the statements made by Cottrell and Schaefer-Space.

Trial counsel testified at the *Ginther* hearing that he wanted Schaefer-Space to testify at trial because he believed that her testimony was beneficial to the defense. He believed that he could impeach T.J.'s credibility with Schaefer-Space's testimony because Schaefer-Space made no mention of oral sex or anal penetration when she reported T.J.'s disclosure to the sheriff's department. Trial counsel testified that he asked the prosecutor to make Schaefer-Space available as a witness and that the prosecutor commonly called a witness to the stand when she knew that the defendant planned to call the witness. Although the prosecutor sent notices to trial counsel that it intended to call Cottrell and Simms as expert witnesses, a notice was never sent listing Schaefer-Space as an expert witness. Thus, when trial counsel made his decision not to

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[4] Confirmatory bias, according to Kieliszewski, occurs when a therapist focuses on collecting evidence or data to support the therapist's initial "hunch" and disregards evidence that is contraindicative of the hunch. Clinician's illusion occurs when a therapist, who spends the majority of his or her time working with a particular type of disorder or patient, has notions about the disorder that do not necessarily comport with the empirical research.

consult with a child sexual abuse expert, he made that decision on the premise that Cottrell would be the only expert witness called by the prosecutor to testify about the behavior of child sexual abuse victims. Further, Schaefer-Space was not qualified as an expert witness at trial. At the *Ginther* hearing, both trial counsel and Kieliszewski recognized that Schaefer-Space did not testify as an expert witness. The issue before us then is whether reasonable professional judgment supports the decision by trial counsel, knowing that Cottrell would be the prosecutor's child sexual abuse expert, not to consult with an expert.

Trial counsel testified that, because had he had consulted with Cottrell on a number of cases and had cross-examined him more than a dozen times, he was familiar with Cottrell's testimony concerning victim dynamics, delayed reporting, and offender dynamics. He testified that he did not consult with a child sexual abuse expert because he believed that any expert would have benefited the prosecution, explaining that any expert would have agreed with the testimony of Cottrell. Trial counsel did not want the prosecutor to be able to argue to the jury that the defense's expert agreed with Cottrell. And, we note that although Kieliszewski disagreed with substantial portions of Cottrell's testimony, he did agree with several of Cottrell's statements regarding victims of child sexual abuse. He affirmed that victims of child sexual abuse often delay reporting the abuse, and in summarizing a five-factor model, he explained that boys often take longer than girls to disclose sexual abuse and that children who fear negative consequences delay reporting. Kieliszewski also affirmed that victims of child sexual abuse can engage in destructive behavior and have suicide ideation. He testified that it would not be inconsistent for a victim of child sexual abuse to act out sexually on another child. Thus, trial counsel's belief that a defense expert on child sexual abuse could benefit the prosecution was not unfounded.

In addition, trial counsel testified that he had a specific theory to the case—that T.J. made up the allegations against defendant in order to get out of trouble after he was caught stealing money from the cheerleaders' purses—and he explained that there were at least two pieces of evidence that undermined T.J.'s testimony. Trial counsel explained that, in addition to Schaefer-Space's report of T.J.'s disclosure which did not mention either oral sex or anal penetration, there was "physical evidence," the anal fissures in 1997 and 2006, that contradicted T.J.'s testimony. Trial counsel consulted with Guertin about the anal fissures and received advice on how to cross-examine Clark and Simms.

We conclude that reasonable professional judgment supports trial counsel's decision not to consult with a child sexual abuse expert. He made the decision not to consult with an expert based on the strategic choice that it would not be beneficial to the defense to have an expert agree with the testimony of Cottrell. That counsel's chosen strategy—to attack T.J.'s credibility by arguing that he made the disclosure only after being caught stealing, supported by evidence that Schaefer-Space's report of T.J.'s disclosure did not mention oral sex or anal penetration and that T.J. suffered an anal fissure in 2006—failed does not mean that counsel's assistance was ineffective. *Kevorkian*, 248 Mich App at 414-415. Accordingly, we affirm the trial court's holding that defendant's actions in not consulting with a child sexual abuse expert did not fall below objective standards of reasonableness.

C. Failure to Investigate, Interview, and Call Witnesses

Defendant argues that trial counsel failed to investigate, interview, and call witnesses who would testify that T.J. and E.T. were not good friends, that T.J. was rarely at defendant's house, that defendant worked long hours as a tool technician, that defendant had a good reputation, and T.J. had a reputation for dishonesty and lying. Defendant also argues that counsel failed to obtain his work records. The failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, when claiming that counsel was ineffective because counsel was unprepared for trial, a defendant must show prejudice resulting from counsel's lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

The jury had before it evidence that T.J. and E.T. were not good friends and that T.J. did not spend much time at defendant's house. E.T. testified that T.J. was not his best friend; he was not even good friends with T.J. E.T. also testified that T.J. was only at defendant's house "[e]very so often." Similarly, Kim Tomasik, defendant's wife, testified that T.J. was not E.T.'s best friend, and while T.J. "came around occasionally," T.J. was only in defendant's house approximately six times. She testified that T.J. and E.T. played alone only "[a] couple times." In addition, J.B. testified that, when growing up, he and E.T. were best friends, and that he did not remember T.J. ever playing with him and E.T. inside defendant's house.[5] The jury also had before it evidence that defendant worked long hours. Kim Tomasik testified that defendant worked 10 to 12 hours a day, explaining that defendant would leave for work between 9:00 and 10:00 a.m. and return between 8:00 and 11:00 p.m. She stated that when defendant returned from work he would eat supper and either work on his "toys" in the garage or go to bed.

Evidence regarding the characters of defendant and T.J. was presented to the jury. Mary Jones, a neighbor of defendant, testified that nothing about defendant's behavior caused her any concern. She described defendant as a hard worker and committed to his family, friends, and neighbors. The Haddens testified that they never observed any inappropriate or unusual behavior by defendant. They stated that, despite T.J.'s disclosure, they have continued to bring their two young children over to defendant's house. E.T. testified that he stopped playing with T.J. when he was about eight years old because T.J. got into a lot of trouble. E.T. also testified that T.J.'s reputation was "[n]ot very good" and that most people stayed away from T.J., as he continued to get into trouble. A.E., a friend of T.J., also testified that T.J. was often in trouble. E.T., as well as Jones, had seen police cars at T.J.'s house.

Evidence supporting the defenses that defendant claims trial counsel could have raised at trial had he obtained defendant's work records and investigated and interviewed those witnesses whose names were given to him by defendant were presented to the jury. Accordingly, defendant has not shown that he was prejudiced by counsel's failure to investigate.

D. Failure to Investigate T.J.'s Counseling Records

Defendant argues that trial counsel was ineffective for failing to request an in camera review of T.J.'s counseling records. In December 2006, trial counsel moved for the disclosure of

[5] J.B.'s father also testified that he considered J.B. and E.T. to be best friends.

"any and all" of T.J.'s counseling records. The motion indicated that T.J. had been in counseling since the age of 5 and that T.J. had testified at the preliminary examination that he had seen approximately eight counselors. The motion also indicated that T.J., at the age of 11, had acted out sexually against a cousin. Trial counsel asserted that there was a reasonable probability that T.J.'s counseling records would contain material helpful to the defense. At the hearing on the motion, it appears that trial counsel limited his request to T.J.'s counseling records to those corresponding to the time that T.J. acted out sexually against his cousin. The trial court granted the request, and it subsequently reviewed in camera T.J.'s counseling records from when T.J. was 11 years old. Thus, the record does not support the inferences in defendant's supplemental brief that trial counsel was unaware of T.J.'s past therapy. In addition, defendant has not established that, had trial counsel not limited his request for an in camera review of T.J.'s counseling records to those records corresponding to when T.J. was 11 years old, trial counsel could have obtained a review of all of T.J.'s counseling records. Defendant has not shown that a request for all of T.J.'s counseling records from 1995 forward would be anything but a "fishing expedition." See Section VII, *infra*.

E. Failure to Adequately Cross-Examine T.J.

Defendant claims that trial counsel was ineffective for failing to cross-examine T.J. about the inconsistencies between his trial testimony, preliminary examination testimony, and statements given during his interview with Martin. According to defendant, T.J. was inconsistent regarding whether the first instance of abuse involved anal penetration or oral sex, the number of times defendant abused him, and whether the incident T.J. remembered "really well" involved anal penetration or oral sex.

In his cross-examination of T.J., trial counsel did not ask T.J. about his preliminary examination testimony which was inconsistent with his trial testimony that the first instance of abuse involved oral sex and that the incident he remembered "really well" involved anal penetration. Trial counsel did briefly examine T.J. about his preliminary examination testimony concerning how many times the abuse occurred, and during trial counsel's cross-examination of Martin, Martin testified that T.J. told her that defendant anally penetrated him on two occasions. Trial counsel highlighted T.J.'s changing testimony regarding the number of times defendant anally penetrated him during closing arguments, saying, "But then [after T.J. told Martin it occurred twice] the story grew. By the time he [T.J.] gets to prelim, it's ten to 20 times, and then you heard him testify 50 to 60 times."

Decisions regarding how to cross-examine a witness involve matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). Although trial counsel did not cross-examine T.J. regarding all of T.J.'s inconsistencies about the abuse, trial counsel did cross-examine T.J. on numerous other subjects to impeach T.J.'s credibility. For example, trial counsel questioned T.J. about why he continued to return to defendant's house if defendant sexually abused him each time he played with E.T. He asked T.J. whether and why he continued to wear bloodstained underwear. He asked T.J. whether his mom, after watching Oprah on television, asked him if he had been sexually abused. He also questioned T.J. regarding whether the disclosure of the abuse was an attempt to get out of trouble after being caught stealing money from the schools' cheerleaders. We will not second-guess trial counsel's decisions on what subjects to cross-examine T.J. See *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557

(2007). Trial counsel's cross-examination of T.J. did not fall below an objective standard of reasonableness.

F. Failure to Object to the Playing of the Recording of the February 2006 Interview

Defendant argues that counsel was ineffective for failing to object to the playing of the "highly prejudicial and inadmissible" recording of the February 2006 interview. Defendant's argument is based on his belief that the jury, by listening to the recording of the interview, heard Martin vouch for T.J.'s credibility. However, as discussed in Section V, *supra*, defendant has not established that Martin's statements to defendant in the interview were inadmissible as opinions of defendant's guilt or T.J.'s credibility. Because counsel is not ineffective for failing to make a futile objection, *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998), trial counsel was not ineffective for failing to object to the playing of the "unedited" recording of the February 2006 interview.

Defendant also argues that counsel was ineffective for failing to object when the prosecutor, in her closing arguments, stated that defendant, while being interviewed by Martin, came up with the fact that he was being accused of sexually abusing T.J. We disagree.

More than half way through the interview with Martin, defendant stated that she was accusing him of something he had not done. When Martin asked him what crime she was accusing him of having committed, defendant replied, "Child molestation or something." Martin had not previously informed defendant that T.J. had accused him of sexual abuse. We agree with defendant that the questions asked by Martin, who confirmed to defendant that she worked in the Family Services Unit, may have inferred that T.J. had accused defendant of sexual abuse. In her questions to defendant, Martin stated that she knew things had happened between defendant and T.J. when T.J. would come over to play with E.T. and that she needed to know how things had started between defendant and T.J. However, trial counsel was not ineffective for failing to object during the prosecutor's closing argument. It was the prosecutor's theory that defendant, because he had never been told that T.J. had accused him of sexual abuse, would not have thought he was being accused of child molestation unless he had actually abused T.J. A prosecutor may argue the evidence and all reasonable inferences arising therefrom as they relate to her theory of the case. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Accordingly, any objection during the prosecutor's argument regarding the interview would have been futile, and counsel was not ineffective for failing to make the objection. *Fike*, 228 Mich App at 182. Moreover, trial counsel, during his closing argument, claimed that the prosecutor's argument that defendant came up with the idea that he was being accused of sexual abuse was "disingenuous" based on Martin's statements to defendant. It was up to the jury, having heard the recording of the interview and the opposing interpretations of defendant's statement that he was being accused of child molestation, to determine whether defendant's conclusion that he was being accused of sexually abusing T.J. was reasonable.

G. Failure of Appellate Counsel to Move for a New Trial

Defendant also claims that he was denied effective assistance of counsel when his original appellate counsel failed to move for a new trial and a *Ginther* hearing. Defendant has not been prejudiced by original appellate counsel's failure. This Court granted in part current appellate counsel's motion for a remand, and a *Ginther* hearing was held on defendant's claim

that trial counsel was ineffective for failing to present an expert witness to rebut the testimony of the prosecutor's expert. In addition, we have analyzed defendant's remaining ineffective assistance of counsel claims and have found no support for them in the record.

VII. Counseling Records

Defendant argues that the trial court erred in refusing to conduct an in camera review of all of T.J.'s counseling records. According to defendant, because of T.J.'s troubled past, his delayed disclosure of the sexual abuse, and the likely presence of confirmatory bias and clinician's illusion in Schaefer-Space, a review of all of T.J.'s counseling records was necessary to determine if there was evidence suggesting a false allegation.

A. Standard of Review.

We review a trial court's decision to deny a request to conduct in camera review of privileged records for an abuse of discretion. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996).

B. Analysis

Following this Court's remand order, defendant moved for the disclosure or an in camera review of T.J.'s counseling records. The trial court granted the motion "as stated on the record on February 12, 2009," the second day of the *Ginther* hearing. On the record, the trial court stated that it "[did not] see any reason not to go through this exercise," and requested that defendant supply it with the contact information for the persons from whom T.J.'s counseling records could be obtained. The next day, defendant provided the trial court with a letter that contained the names of T.J.'s counselors that were known to him. He urged the trial court to obtain and review all of T.J.'s counseling records from March 1995 forward. Defendant requested the trial court to disclose any evidence that would make it more probable that T.J. made a false allegation.

The prosecutor moved to strike the February 13, 2009 letter from the record. At the motion hearing, the trial court stated that it would remove the letter from the lower court file and place it in his correspondence file. Also at the hearing, the trial court received word that the counseling records it had reviewed in camera before trial had been reobtained by the court. It stated that the question then became whether it needed to obtain and review additional counseling records. The hearing ended after defendant explained to the trial court that his February 13, 2009 letter was an attempt to inform the trial court about what other counseling records existed.

In a July 6, 2009 order, the trial court informed the parties that it had conducted a second in camera review of the counseling records from when T.J. was 11 years old. It stated that there was nothing in those records relevant to the defense, and affirmed its previous order denying disclosure of the records. The trial court also informed the parties that it had reviewed defendant's February 13, 2009 letter, and stated that the request in the letter for a review of additional counseling records was nothing more than a fishing expedition.

In *People v Stanaway*, 446 Mich 643, 677; 521 NW2d 557 (1994), our Supreme Court stated when privileged records are discoverable:

> [I]n an appropriate case there should be available the option of an in camera inspection by the trial judge of the privileged record on a showing that the defendant has a good faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense.

See also MCR 6.201(C)(2). A defendant seeking an in camera review may not simply be on a "fishing expedition to see what may turn up." *Stanaway*, 446 Mich at 680 (quotation omitted). Only after the trial court has conducted an in camera review of the privileged records and is satisfied that the records contain evidence necessary to the defense will the records be supplied to the defendant. *Id.* at 679.

The trial court did not abuse its discretion in concluding that defendant's request for an in camera review of all of T.J.'s counseling records was nothing more than a fishing expedition. In his brief in support of the motion to disclose counseling records, defendant requested an in camera review of "the complete counseling history of [T.J.], including any counseling records, notes, and reports kept by any doctor, social worker, psychologist, school counselor, or other care provider who examined or interviewed [T.J.]." As evidenced in the February 13, 2009 letter, defendant wanted the trial court, upon receiving the counseling records, to turn over any evidence suggesting that T.J. made a false allegation, including evidence of deceit, lying, manipulation, previous false accusations, previous denials of sexual abuse, problematic behavior before the abuse occurred, and consistency in which counselors described T.J.'s behavioral problems. Given that defendant wanted the trial court to review all of T.J.'s counseling records and to disclose any evidence which could possibly suggest a false allegation by T.J., the trial court's decision that defendant was on a "fishing expedition" fell within the range of reasonable and principled outcomes.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck