STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2014
v	No. 313121 Washtenaw Circuit Court
KYLE KEITH CLARK, Defendant-Appellant.	LC No. 11-001541-FC

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a jury trial of criminal sexual conduct, third degree (CSC III), MCL 750.520b(1)(b) (use of force), and domestic violence, MCL 750.81(2). He was sentenced to serve concurrent jail terms of 10 to 15 years for the CSC III conviction and 93 days for the domestic violence conviction. We affirm.

I. BACKGROUND

Complainant and defendant met when defendant was a teenager and complainant was fifteen plus years older than him. Complainant testified however, that she and defendant did not become intimate until he was of adult age. At the time of complainant's assault, complainant and defendant had lived together for approximately four years and defendant was then living with complainant for what complainant termed a "trial basis." The day before the assault, complainant had given defendant money for gas to drive back a vehicle he intended to purchase that night. Defendant instead bought crack with the money and stayed overnight in a crack house. Complainant texted and called defendant numerous times to determine his whereabouts, but he did not answer. According to the complainant, defendant showed up at their home early the next day banging on the front door. Complainant indicated that she did not want defendant there and that she told him to go away. Defendant did not leave, but instead pushed the door open, breaking the lock. The two argued and defendant went upstairs to sleep in the bed they shared. Complainant left to take her son to school and upon returning got in the shower to get ready for work. After complainant had finished her shower, and was still in the bathroom, defendant entered and ordered her to perform fellatio on him. Complainant told him she was "done with him" and basically that their relationship was over. Defendant had also testified to the waning of their relationship and to his plans of moving out. According to the complainant,

when she refused to perform oral sex on defendant he grabbed her by her hair and pushed her up the stairs to their bedroom.

Once upstairs, defendant pushed complainant face first onto their bed, spit on her anus and proceeded to anally rape her. Complainant told defendant to stop and defendant choked her until she passed out. When complainant awoke defendant had his arm around her and would not let her go. Defendant's employer called and complainant reached for the phone. Defendant responded by choking her again, but let go when complainant apologized. Defendant and complainant eventually went downstairs. Complainant began to brush her hair for work while defendant heated food. Once defendant's back was turned complainant grabbed her robe and ran out of the house to the vehicle where she had left her keys. She drove to her work and informed her employer of what had happened. Her employer instructed another employee to return home with her. When complainant returned home, defendant was gone. She dressed, called the police and followed a deputy to a hospital where a sexual assault exam was performed. The nurse who performed the exam testified that she did not see any physical injury to complainant's body, including no injury to her genitalia or anus.

While complainant was gone, defendant left for work. He told his employer of his plans to move out and his employer was supportive of that move. Defendant's theory at trial was that he and complainant had engaged in consensual sex that morning, initiated by complainant. Defendant returned to the home later that morning to gather his belongings and the police were there. Defendant voluntarily spoke with a detective for what he thought were only charges of domestic violence. He explained that he and complainant had an unhealthy relationship that involved a repeated pattern of fighting and then making up. When defendant guessed that he was being interviewed for charges of rape, he declined to further speak with the detective.

After having heard both complainant and defendant testify, the jury chose to believe complainant and found defendant guilty of both third-degree criminal sexual conduct and domestic violence.

II. *BRADY* VIOLATION

Defendant first argues that his constitutional right to due process was violated when images of the complainant's exterior genitalia and anus taken during a colposcope examination by a sexual assault nurse examiner (SANE) were not produced. We disagree. Defendant argues the evidence demonstrated that the complainant had no signs of traumatic injury, and thus would have proven that defendant did not forcibly assault her. The nurse testified that she was trained to use the colposcope to take pictures, but not trained to evaluate the images it produced. The nurse explained that the colposcope images went onto a disk and that she gave the disk to her SANE coordinator. Further, that after she turned the disk over to her coordinator, she no longer had access to it and did not know whether the disk was sent to law enforcement. Her testimony was that she visually examined the complainant's entire genital area as well as the body and observed no physical injury. During a sidebar conference, the prosecutor indicated that she did not know about the colposcope images.

Defendant bases his constitutional argument on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Under *Brady*, the suppression by the prosecution of evidence

favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Id*. at 87. "[T]he components of a 'true *Brady* violation,' are that: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142; ___ NW2d ___ (2014) citing *Brady*, 373 US at 87.[1]

Where evidence is suppressed, the proper considerations are whether (1) suppression was deliberate, (2) the evidence was requested, and (3) in retrospect, the defense could have significantly used the evidence. *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993), overruled on other grounds by *People v Grissom*, 492 Mich 296, 319; 821 NW2d 50 (2012). At trial, the prosecution denied the suppression of the colposcope images. There is no evidence that the colposcope images were suppressed by plaintiff. There was no evidence presented to demonstrate the images were in the possession of plaintiff or law enforcement. The nurse testified that she turned the images over to her coordinator. Defendant filed an initial discovery demand requesting all photographs and scientific evidence. The focus of discovery is whether fundamental fairness to the defendant, in preparing his defense, required that he have access to the requested information. *People v Walton*, 71 Mich App 478, 481-482; 247 NW2d 378 (1976). While both parties were surprised that the nurse would not be able to testify to the images nor had them with her, the trial court reminded that the nurse's report did indicate that there were images, that defendant received the report without the images and there was no further request for discovery. Even so, defendant has not presented evidence as to how he could have used the images. He has also not offered proof that the prosecutor concealed or destroyed the images. Thus absent speculation, we cannot find that the images were material. Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, i.e., "if the undiscovered evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *People v Harris*, 261 Mich App 44, 49-50; 680 NW2d 17 (2004) (citations and internal quotation marks omitted). Given the nurse's testimony that she did not observe any external injury to the anus or genitalia, it appears the images were cumulative in that they would have only confirmed that the nurse did not see any injuries during her examination of the complainant. Thus, admission of the images would not have put the whole case in such a different light as to undermine confidence in the verdict. *Harris*, 261 Mich App at 49-50.

III. MRE 702

Next, defendant argues that the testimony of the SANE who examined the complainant was improper expert testimony as it was not subjected to scrutiny required of scientific data. Again, we disagree. This Court reviews a trial court's determinations concerning the

[1] In *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998), this Court added the requirement that defendant demonstrate reasonable diligence in producing the evidence at trial. Most recently in *People v Chenault*, 495 Mich 142; ___ NW2d ___ (2014), our Supreme Court struck down this added requirement of defendant diligence, and overruled *Lester* holding "that a due diligence requirement [was] not supported by *Brady* or its progeny." *Chenault*, 495 Mich at 146.

qualifications of a proposed expert witness to testify for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). An abuse of discretion occurs when the decision results in an outcome outside the range of principled outcomes. *Id.* The admission of expert testimony is also reviewed for an abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

MRE 702 provides for the admission of expert opinion that results from "scientific, technical, or other specialized knowledge," and must assist the trier of fact. Specifically, MRE 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In order to determine whether expert testimony is admissible under MRE 702, a searching inquiry is mandated. The inquiry is not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from the data. *Gilbert v DaimlerChrysler Co*, 470 Mich 749, 782; 685 NW2d 391 (2004). An expert's opinion testimony is limited to the expert's area of expertise. *People v Jones*, 95 Mich App 390, 394; 290 NW2d 154 (1980) (citations omitted). Testimony is inadmissible under MRE 702 where the subject of the proffered testimony is far beyond the scope of an individual's expertise because an expert who lacks "knowledge" in the field at issue cannot assist the trier of fact. *Gilbert*, 470 Mich at 789.

Defendant objected when plaintiff asked the nurse, "Based on your training and experience as a sexual assault nurse is it typical for a victim of sexual assault to present with injuries?" Defendant argued that the witness was not qualified to speak as to the specifics of the facts of the case. The trial court overruled the objection, stating that the nurse "conducted thirty to forty of these. That certainly gives her (indiscernible) in which she can make those kinds of (indiscernible)." Plaintiff then asked the nurse, "Based on your training and experience as a sexual assault nurse examiner . . . do you need injuries for a sexual assault?" She responded, "there does not need to be visible injury present to say that a sexual assault did not occur." She explained that bodies are pliable and different force is used on different body parts.

Although it is not clear on the record before us that the trial court did not explicitly state that the nurse was an expert in sexual assault examination, the trial court did consider the nurse's credentials as the basis to give the requested opinion. The trial court had heard testimony that the nurse's experience included working 12 and a half years as an RN at a hospital, the past 10 years in the emergency room. She was certified for five years as a sexual assault nurse examiner after receiving 40 hours of didactic training, experiencing a ride along with police, and having been supervised during speculum examinations with evidence collection. She performed 30 to 40 examinations in five years.

MRE 702 provides that an expert may be qualified "by knowledge, skill, experience, training, or education." In light of the nurse's experience and training as a certified SANE, the trial court allowing her to give an expert opinion was not an abuse of discretion.

IV. THE RIGHT TO COUNSEL

Next, defendant argues that he was deprived of his right to counsel during his competency hearing. After a review of the record, we conclude otherwise. The Sixth Amendment of the United States Constitution[2] guarantees a criminal defendant facing incarceration the right to counsel at all critical stages of the criminal process. *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Williams*, 470 Mich 634, 641-642; 683 NW2d 597 (2004), citing *Maine v Moulton*, 474 US 159, 170; 106 S Ct 477; 88 L Ed 2d 481 (1985). *US v Ross*, 703 F3d 856, 873-874 (CA 6, 2012) explained that every federal court that has considered the issue has found that a competency hearing is a critical stage of the criminal process. A trial is unfair if the accused is denied counsel at a critical stage of his trial. The Supreme Court has found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. *Cronic*, 466 US at n 25.

Here, defendant was granted a competency evaluation prior to trial due to his history of mental health issues, mental state in jail, and self-harming behavior in jail. At an August 1, 2012 hearing, the trial court noted that defendant's counsel was not present likely due to a "mix-up in your attorney's office with regard to which attorney would be here or not, given the fact that the court moved up the court date in light of the report that the Court received from the Michigan Department of Community Mental Health." However, the trial court stated that defendant's attorney had communicated with the court "that they had no objection to accepting the July 2nd, 2012, report where the defendant was deemed to be competent . . . and proceed with this matter pending the trial." Plaintiff objected to accepting the competency report until defendant responded that he went over the competency report with both of his attorneys and spoke about it at length before deciding to proceed to trial. The trial court accepted defendant's representation that he considered the competency report with his attorneys and accepted the stipulation that defendant was competent. It is evident that defendant was not deprived of his right of counsel during this critical stage of the proceedings.

V. EFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that his trial counsel was deficient in not requesting that the jury hear a recording of a police officer interviewing defendant that would have contradicted the officer's trial testimony, and in failing to exclude two possibly biased jurors from the jury. We disagree. 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

[2] US Const, Am VI.

effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To establish a claim of ineffective assistance of counsel a defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *Taylor*, 275 Mich App at 186. See also *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Defendant must also show that the resultant proceedings were fundamentally unfair or unreliable. *Odom*, 276 Mich App at 415. The effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Defense counsel's decisions are presumed to be sound trial strategy, *Taylor*, 275 Mich App at 186, and a reviewing court is not to substitute its judgment of what is good trial strategy with the benefit of hindsight, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Regarding the taped interview of defendant, Detective Sinks testified that defendant acknowledged having anal sex with the complainant. Defendant questioned why the detective only noted vaginal and oral sex in his police report with no mention of anal sex. The detective stated that his report was just a brief synopsis of his interview and that he would defer to the recording of the interview for "100% accuracy." Neither party requested a playing of the recording. Defendant's counsel did not object or motion the trial court for not having the opportunity to hear or receive a copy of the recording. For purposes of this appeal, we granted defendant's request to expand the record to include the unplayed recording of defendant's interview with Detective Sinks. During the interview, defendant was asked when the last time was that he and the complainant had sex and defendant responded that they had sex the morning of the incident. The police then began to ask "do you guys have traditional sex, vaginal sex or -" and was cut off by the defendant who answered "yeah, everything." Defendant was then asked for an explanation of what 'everything' meant and responded "oral sex, you know vaginal, you know everything." The police then directly asked "you've ever had anal sex" and defendant responded "yes, we had." When the police asked defendant to tell when the last time he and complainant had anal sex, defendant asked whether he needed an attorney and then whether he was being accused of rape.

Here, it was plausible that defendant's trial counsel did not wish to risk that the jury would hear defendant's comments about anal sex given that, while somewhat ambiguous, they could be understood as confirming the officer's trial testimony. Trial counsel may have also been concerned that the jury would impute guilt to defendant when he questioned the need for an attorney directly after being asked the last time he and the complainant had anal sex. Defendant's trial counsel called into question the officer's credibility by exposing the differences between his testimony that complainant told him she was anally raped, and the police report which stated complainant only reported oral and vaginal sex. Here, defendant also testified in his own defense and denied the act of anal rape before the jury. Unless defendant's trial counsel knew that the recording unequivocally refuted the officer's testimony, which it does not, defendant has not demonstrated that failure to request that the recording be played was not sound trial strategy.

Defendant also argues that his trial counsel's performance was deficient for failing to excuse two jurors, who we will refer to as "juror S" and "juror H." We disagree. Juror S stated that she lived across the street from the police officer who interviewed defendant on the audiotape just considered. Juror S testified to various personal and professional contacts with the

officer, but also told the trial court that there was nothing about her relationship with the officer that would affect her ability to be fair and impartial. Defendant's trial attorney asked whether juror S could find defendant not guilty with the officer living across the street, and the juror stated that she could. Defendant's counsel could have reasonably determined that juror S would approach the trial with an open mind, as the juror said she could.

Juror H stated that she recognized a name on the witness list and disclosed that the witness's daughter was a patient that she had not seen in years. Juror H stated that she would not be comfortable as a juror if her patient was involved in the trial. However, the daughter was not involved with trial in any fashion; she was not a witness, nor was there any evidence of her involvement in any way with the events at issue. In light of this, defendant's counsel could have reasonably determined that juror H would be able to approach trial with an open mind, and decide the case based on the evidence presented.

VI. OV 3

Finally, defendant argues that the trial court erred in scoring offense variable (OV) 3 at ten points because the complainant had no injury requiring medical treatment. We agree. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

OV 3 considers physical injury to a victim and is scored ten points when the victim of the crime incurred a bodily injury requiring medical treatment, regardless of whether the victim was successful in obtaining treatment. MCL 777.33(1)(d); MCL 777.33(3). OV 3 is scored at five points for bodily injury not requiring treatment, MCL 777.33(1)(e), and zero points when no physical injury occurred to the victim, MCL 777.31(1)(f). *People v Cathey*, 261 Mich App 506, 514; 681 NW2d 661 (2004), defines bodily injury as "physical damage to a person's body." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011) instructs that bodily injury includes "anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." Here, the complainant testified that following the assault, her anus "hurt" and her throat hurt "a little." She did not seek immediate medical attention, but instead followed a deputy to the hospital. Complainant was examined by a sexual assault nurse who testified that complainant had no injuries. Complainant also did not complain of any injuries. There was insufficient evidence to support the finding that the complainant was physically injured by the assault and required medical treatment. We order correction of defendant's presentence investigation report to reflect an OV 3 scoring of zero. The correction however, does not warrant a resentencing when defendant's guidelines remain the same.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Cynthia Diane Stephens