STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2014
v	No. 315355 Jackson Circuit Court
DANIEL RAY MIX, Defendant-Appellant.	LC No. 11-004297-FC

Before: MURRAY, P.J., and O'CONNELL and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) (victim under 13); two counts of second-degree CSC, MCL 750.520c(1)(a) (victim under 13); and assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g. We affirm.

The victim testified to multiple acts of penetration and sexual contact committed by defendant, who was her stepfather. According to the victim, defendant began with inappropriate touching of her buttocks and breasts and progressed to acts involving penetration while she was under the age of 13. At trial, HM and ST, defendant's half-sisters, testified as other acts witnesses. HM and ST both testified that defendant inappropriately touched them at a young age and thereafter progressed to sexual acts involving penetration.

Defendant argues that the use of a witness screen during the victim's testimony denied him the right to be presumed innocent and denied him of his right to confront the victim. Defendant did not present these issues to the trial court; therefore, we review the issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Here, exactly as in *People v Rose*, 289 Mich App 499, 517; 808 NW2d 301 (2010), "the record in this case does not support the conclusion that the screen actually prejudiced [defendant's] trial." *Id.* at 521. "There is no evidence in the record that discloses the screen's appearance—we do not know its size, shape, or color or the nature of the materials used." *Id.* "[T]his Court also has no record evidence concerning how the screen was stored in the courtroom or placed before [the victim] testified." *Id.* Accordingly, like the defendant in *Rose*, we conclude that defendant in this case has not met his burden of showing that the use of the screen prejudiced the presumption of innocence. *Id.* (citation omitted).

Next, "[t]he Confrontation Clause . . . provides that '[i]n all criminal prosecutions, the

accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .' " *People v Fackelman*, 489 Mich 515, 524-525; 802 NW2d 552 (2011). However, "trial courts may limit a defendant's right to face his or her accuser in person and in the same courtroom." *Rose*, 289 Mich App at 515 (citation omitted). "In order to warrant the use of a procedure that limits a defendant's right to confront his accusers face to face, the trial court must first determine that the procedure is necessary to further an important state interest." *Id.* at 516 (citation omitted). "The trial court must then hear evidence and determine whether the use of the procedure is necessary to protect the witness." *Id.* (citation omitted). Moreover, the procedure must also "adequately protect[] the other elements of the Confrontation Clause: the oath, the cross-examination, and the ability of the trier of fact to view the demeanor of the witness." *People v Buie*, 285 Mich App 401, 409-415; 775 NW2d 817 (2009).

In this case, the record does not contain any finding by the trial court that the use of a screen was necessary to further an important state interest or to protect the victim from emotional distress. We thus conclude that the trial court erred by allowing the use of the witness screen without making a record of the reasons for the use of the screen. Nevertheless, defendant has not shown that the error affected his substantial rights. *Carines*, 460 Mich at 763. The remaining elements of confrontation were still present: the victim was physically present in the courtroom, testified under oath, and was subject to cross-examination. *Buie*, 285 Mich App at 409-415. Moreover, there was evidence to corroborate the victim's testimony against defendant, such as the other acts testimony offered by HM and ST. Additionally, the testimony that the victim's hymen was unusually thin corroborated the victim's allegations. Thus, we find that the error did not affect defendant's substantial rights. *Carines*, 460 Mich at 763.

Defendant next argues that he was denied his right to effective assistance of counsel. In establishing ineffective assistance of counsel, a defendant bears a "heavy burden" to justify reversal. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). First, defendant must show that "counsel's performance fell below an objective standard of reasonableness." *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Second, "the defendant must show that the deficient performance prejudiced the defense," and "[t]o demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463 Mich at 600.

Defendant first contends that defense counsel was ineffective for failing to object to the admission of the testimony of HM and ST. Under MCL 768.27a, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." However, evidence admitted under MCL 786.27a is still subject to MRE 403. *People v Watkins*, 491 Mich 450, 486; 818 NW2d 296 (2012). "[W]hen applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Id.* at 487. Considerations include: (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. *Id.* at 487-488. In this case, the testimony was relevant to show defendant's propensity to commit sexual assault. *Watkins*, 491

Mich at 470. "Although the evidence was highly prejudicial, it was also highly probative of defendant's propensity for sexually assaulting young girls." *People v Buie (On Remand)*, 298 Mich App 50, 73; 825 NW2d 361 (2012).

We also conclude that the evidence was admissible under MRE 403. *Buie (On Remand)*, 298 Mich App at 486-488. Both the prior acts and the charged crime involved defendant sexually assaulting family members while they were under the age of 13. Moreover, each act involved defendant beginning with touching the breasts and buttocks of the victims and then proceeding to acts involving penetration. Thus, the similarity between the other acts and the charged crime weighs in favor of admission. *Id.* While the other acts occurred in the late 1980s and the early 1990s and the charged conduct occurred in the early 2000s, "[t]he remoteness of the other act affects the weight of the evidence rather than its admissibility." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011). Also, HM and ST testified that defendant touched and assaulted them frequently. Both HM and ST previously testified against defendant at a trial in relation to his conduct towards them, thus lending reliability in their testimony. Finally, defendant did not testify, but his main argument was that the abuse did not occur and that the victim was not credible. The evidence lent credibility to the victim's testimony. Because the evidence was admissible, we find that defense counsel was not objectively unreasonable for failing to object. *Pickens*, 446 Mich at 338. Defendant's claim that counsel was ineffective in this regard is without merit.

Defendant next argues that defense counsel was ineffective for failing to cross-examine the prosecution's expert more effectively. It is objectively reasonable to limit cross-examination when counsel seeks to "avoid elaboration on damaging points of testimony." *People v Gioglio*, 296 Mich App 12, 26; 815 NW2d 589 (2012), sentence vacated on other grounds, 493 Mich 864; 820 NW2d 922 (2012). Here, defense counsel may have well wanted to avoid further elaboration on the expert's evidence regarding grooming and how children often delay reporting, which was evidence that favored the prosecution. *Id.* "As such, in the absence of evidence to the contrary, we . . . presume that [defense counsel's] decision was founded on considerations of reasonable professional judgment and end the inquiry there." *Id.*

Defendant next argues that defense counsel was ineffective for failing to call an expert to rebut the prosecution expert's testimony regarding delayed reporting. "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Nothing in the record indicates what an expert might have stated to rebut the prosecution's expert testimony. Even so, defense counsel elicited the fact from the prosecution's expert that although delayed reporting is common, there were always exceptions. Defense counsel used this testimony to argue that the victim was not credible. Moreover, even if an expert would have testified, the jury would have been entitled to believe the testimony given by the victim, HM, and ST, and to find that defendant committed the charged crimes. *Carbin*, 463 Mich at 600. Defendant was not denied a substantial defense.

Defendant next argues that defense counsel was ineffective for failing to object to the use of a witness screen during the victim's testimony. As discussed, the trial court failed to make the necessary findings regarding the use of a witness screen; therefore, defendant has established that defense counsel was objectively unreasonable. *Pickens*, 446 Mich at 338. Defendant, however,

has not established the existence of a reasonable probability that "but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463 Mich at 600. As discussed, the victim was physically present in the courtroom, testified under oath, and was subject to cross-examination, and the record suggests that the screen allowed the jury to see the victim. Further, there was other acts evidence to corroborate the victim's testimony, and her testimony was corroborated by physical evidence of her unusually thin hymen. Defendant's claim is without merit.

Defendant next argues that defense counsel was ineffective for failing to object to the use of the victim's support person during trial. "Defendant's claim of improper influence by the victim's support person is not supported by the record and we find no basis for relief on this ground." *People v Rockey*, 237 Mich App 74, 78; 601 NW2d 887 (1999).

Defendant also argues that defense counsel was ineffective for failing to cross-examine the victim more effectively. Here, defense counsel may have well wanted to avoid elaboration on the victim's testimony regarding defendant's acts and may have wanted to avoid the appearance of bullying the victim, who was age 12 at trial. *Gioglio*, 296 Mich App at 26. "As such, in the absence of evidence to the contrary, we [] normally presume that [defense counsel's] decision was founded on considerations of reasonable professional judgment and end the inquiry there." *Id.* Moreover, the record shows that defense counsel thoroughly cross-examined the victim regarding the alleged acts and the timing of the acts.

Defendant next argues that the trial court erred in scoring OVs 3, 10, and 19. A trial court's factual determinations during sentencing 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).

Under MCL 777.33(1), a trial court must score OV 3, physical injury to a victim, at five points when "[b]odily injury not requiring medical treatment occurred to a victim." Here, the victim testified that it hurt when defendant performed the charged acts, and she suffered from thin marginal hymen tissue due to defendant's acts. We thus find that a preponderance of the evidence supports a finding that the victim suffered from a bodily injury. MCL 777.33(1). Five points was properly scored.

Next, in relevant part, a court should score OV 10, exploitation of a vulnerable victim, at 15 points when "[p]redatory conduct was involved." MCL 777.40. " 'Predatory conduct' means preoffense conduct directed at a victim for the primary purpose of victimization." *Id.* In this case, we find that defendant's grooming of the victim constituted predatory conduct. "Grooming refers to less intrusive and less highly sexualized forms of sexual touching, done for the purpose of desensitizing the victim to future sexual contact." *People v Steele*, 283 Mich App 472, 491-492; 769 NW2d 256 (2009). Here, defendant was the victim's stepfather; therefore, he was an authority figure to her, which made her susceptible and vulnerable to defendant. Defendant began with inappropriate touching and then progressed to more egregious sexual acts involving penetration. "By beginning with milder forms of sexual contact, and then progressing to more intense sexual contact and penetration, defendant demonstrated that his intent and purpose [was] to victimize [the victim]." *Steele*, 283 Mich App at 492 (finding that grooming supported a score of 15 points for OV 10). We thus find that a

preponderance of the evidence supports a finding that defendant's actions constituted predatory conduct such that the 15 point score is affirmed. MCL 777.40.

Additionally, a court should score OV 19, interference with administration of justice, at 10 points when "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49. Here, defendant informed the victim that the sexual acts were their "little secret." Defendant's act of so instructing the victim was an affirmative act to prevent investigation and prosecution of his crimes and was interference with administration of justice. Ten points was properly scored.

In his standard four brief on appeal, defendant presents additional arguments. He first argues that defense counsel was ineffective for failing to move to dismiss seven jurors. The record does not support defendant's argument pertaining to four of the jurors because the trial court in fact dismissed them. Regarding the remaining jurors, defendant has failed to show that the jurors could not "lay aside [their] impression or opinion and render a verdict based on the evidence presented in court." *Irvin v Dowd*, 366 US 717, 723; 81 S Ct 1639; 6 L Ed 2d 751 (1961). On this record, we cannot find that defense counsel was ineffective regarding jury selection.

Defendant next argues that defense counsel was ineffective for failing to object to the closure of the courtroom during the victim's testimony. Because the circuit court failed to consider the relevant interests before closing the courtroom, an error occurred. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012). Therefore, defendant has established that defense counsel was objectively unreasonable for failing to object. *Pickens*, 446 Mich at 338. Defendant, however, has not shown that if counsel had objected, and if the trial court had not closed the courtroom, that the victim's testimony would have changed in a way that would have undermined confidence in the outcome of trial. *Carbin*, 463 Mich at 600.

Defendant finally argues that defense counsel was ineffective for failing to investigate and call various witnesses. Nothing in the record supports defendant's assertion that the witnesses would have testified favorably at trial. Thus, defendant has not shown that the failure to interview the witnesses "resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990).

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Stephen L. Borrello