

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HONDRA SMITH,

Defendant-Appellant.

UNPUBLISHED

December 28, 2001

No. 221688

Oakland Circuit Court

LC No. 98-161260-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

HONDRA SMITH,

Defendant-Appellee.

No. 233420

Oakland Circuit Court

LC No. 98-161260-FC

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct MCL 750.520b(1)(a) (sexual penetration with a person under the age of thirteen), and was sentenced to three concurrent terms of twelve to thirty years' imprisonment. Defendant appeals as of right in Docket No. 221688. After defendant's appeal was filed, this Court, while retaining jurisdiction, remanded for a *Ginther*¹ hearing. Following an evidentiary hearing, the trial court determined that trial counsel was ineffective and granted defendant a new trial. The prosecutor sought leave to appeal that decision, but this Court denied the prosecutor's application in Docket No. 233420. Upon further appeal, our Supreme Court vacated the portion of the trial court's order granting defendant a new trial, because it exceeded the scope of this Court's remand order, and remanded the prosecutor's appeal to this Court "for consideration as part of defendant's

¹ *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

appeal in . . . Docket No. 221668.” See 464 Mich 876 (2001). We reverse defendant’s convictions and remand for a new trial.

The sole question presented on appeal is whether defendant is entitled to a new trial because trial counsel was ineffective.

To establish ineffective assistance of counsel, defendant must show that counsel’s performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he has been prejudiced by the error in question. *Id.* at 312, 314. That is, defendant must show that there is a reasonable probability that the error might have made a difference in the outcome at trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first argues that trial counsel was ineffective for eliciting testimony that the victim’s father may have contracted genital warts from his new wife, who was defendant’s former sexual partner. We disagree. The information came out as part of an exchange in which counsel was questioning the victim about whether she was angry at defendant. Counsel was legitimately attempting to undermine the victim’s credibility by showing that she had a motive to lie. The fact that this strategy was not successful is not grounds for finding ineffective assistance of counsel. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

Further, once the victim testified that her new stepmother may have infected her father, it was a matter of trial strategy whether to downplay that information, or whether to possibly highlight its significance by requesting to have it stricken and ask for a curative instruction. See *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Additionally, having opened the door to this evidence, counsel could not have successfully objected when the prosecutor pursued the matter further, or when the prosecutor referred to the information during her closing argument. See *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Counsel was not ineffective in failing to make a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant also argues that counsel was ineffective for failing to call defendant’s other recent sexual partners to testify that they did not have the HPV virus or genital warts, and in failing to call the victim’s friends to testify. We disagree. The decision whether to call a witness to testify is a matter of trial strategy and will not support a finding of ineffective assistance of counsel unless it deprives the accused of a substantial defense. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). There is no indication in the record that the victim’s friends could have provided any testimony favorable to the defense. Thus, defendant has not shown that counsel’s failure to call these witnesses deprived him of a substantial defense.

Regarding defendant’s sexual partners, trial counsel testified that, after learning that a person could be a carrier of the HPV virus without having symptoms, he decided not to call the women because he did not believe their testimony would be helpful. This was a legitimate tactical decision. While it may have been possible to narrow the probabilities that defendant had the disease, the mechanics and validity of appellate counsel’s statistical calculations are not

supported by any record evidence and were not raised below. Further, additional discussion of defendant's prolific sexual history may have prejudiced him by portraying him in a bad light. Therefore, we are not convinced that trial counsel's decision not to call defendant's other sexual partners as witnesses deprived defendant of a substantial defense.

However, we agree with the trial court that defense counsel was ineffective in failing to adequately research the HPV virus and genital warts prior to trial.

Counsel knew that HPV and genital warts were an issue as early as September 1998, when he stipulated to an order requiring defendant to be tested. Nevertheless, eight months later, defense counsel appeared for trial without having researched the issue, and without having investigated the victim's medical records. Counsel stipulated to admitting the medical records and failed to object to the expert's testimony concerning HPV because, in his voluntary ignorance, he erroneously believed that a negative HPV test meant that defendant did not have the disease and could not have infected the victim. Had he researched the issue, he would have known that was not true.

Defense counsel's decision not to object to these two items of evidence opened the door to a sordid discussion of defendant's sexual history, which both parties explored at length. The prosecution argued that defendant's sexual prowess made it more likely that he had the disease and/or was a carrier, whereas trial counsel attempted to show that defendant did not have the disease by showing that he had not infected anyone else.

It is highly questionable whether defendant's sexual history would not have been admissible but for counsel's ignorance-driven strategy. The prosecution had never argued that defendant's sexual history was relevant to any element of the crime, or to matters such as motive or modus operandi, which are legitimate issues under MRE 404. Further, the evidence of defendant's sexual history portrayed him as an insatiable, amoral person—making it more likely that the jury would draw the impermissible character inference. See *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

Further, because the prosecutor could not show that defendant had the disease or infected the victim, the victim's positive HPV status and the expert's testimony were both minimally irrelevant to the issue of whether defendant committed the charged crimes. The fact that an eleven-year-old child was found to have an incurable sexually transmitted disease, while obviously inflammatory, showed that she probably had sexual relations with someone. However, the prosecutor could not prove that defendant infected her with this disease. Instead, the prosecutor was allowed to use defendant's sexual history to argue that defendant must either have the disease or be a carrier. Because there is no test that can definitively show whether someone has the disease, defendant was left with no way to rebut the prosecutor's innuendo.

Counsel made a serious error in failing to adequately research the disease because, in his ignorance, he opened the door to irrelevant, highly prejudicial evidence. Failing to investigate cannot be considered sound trial strategy. Our confidence in the outcome is undermined by the irrelevant and unfairly prejudicial evidence that pervaded this trial. Because this case was a credibility contest between defendant and the victim, we conclude that there is a reasonable

probability that, but for counsel's error, the result might have been different. Defendant was therefore prejudiced by counsel's deficient representation and is entitled to a new trial.

Defendant's convictions are reversed and the case is remanded for a new trial. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Peter D. O'Connell