

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD GERARD JOHN BELANGER,

Defendant-Appellant.

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UNPUBLISHED

June 19, 2007

No. 270440

Wayne Circuit Court

LC No. 06-001798-01

Before: Fitzgerald, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of six counts of criminal sexual conduct in the first degree (CSC I), the victim being under 13 years of age, MCL 750.520b(1)(a), and two counts of criminal sexual conduct in the second degree (CSC II), the victim being under 13 years of age, MCL 750.520c(1)(a). The trial court sentenced defendant to serve concurrent terms of imprisonment of 15 to 30 years for each conviction of CSC I, and 7 to 15 years for each conviction of CSC II. Defendant appeals as of right. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

Complainant, defendant’s daughter, testified to a pattern of defendant’s digital and penile penetrations of her vagina, among other sexual contacts, taking place when she was between five and 15 years old. Complainant added that, when she was 21 years old, defendant openly explained that he had lacked for attention and affection from her mother that complainant readily provided in her youth, so “he finally couldn’t control himself around me . . . .” Complainant testified that defendant repeatedly admitted the behavior in meetings with various members of the family. Complainant admitted to being a “cutter,” having intentionally cut her arms and legs with knives, razors, and scalpels, stating, “it is my biggest definitely unhealthiest ways [sic] to relieve my emotional pain that I just cannot deal with.” Complainant also admitted that at age 23 she was institutionalized for a time as a psychiatric patient. Complainant testified that defendant visited her and apologized for molesting her during her childhood.

When complainant finished her testimony on direct examination, defense counsel elected not to cross-examine her.

Instead, the defense called defendant to testify. Defendant testified that once, when complainant was about 15 years old, while sitting on a couch with her, his arm touched her breast as he was dozing off, adding that this induced protests from her, but that it was an accident

and was the only time he ever touched her inappropriately. Defendant stated that complainant knew about a prolonged adulterous relationship he was maintaining and was upset about it. Defense counsel also elicited testimony from defendant's wife that, contrary to her daughter's testimony, she never heard any unusual noises at night and had no independent reason to think that the conduct occurred. Defense counsel presented several additional witnesses who all testified to defendant's character and the improbability of the abuse.

After trial, but before sentencing, defendant discharged his trial attorney and engaged substitute counsel, who moved for a new trial on the grounds that trial counsel was ineffective for failing to investigate and cross-examine complainant. The trial court denied the motion at sentencing, explaining that defense counsel was in the precarious position of disproving an alleged fiction. The trial court reasoned that, without a supporting alibi or other factual backdrop to work with, defense counsel would risk reinforcing the prosecutor's case or deepening the jury's sympathy if counsel fished for inconsistencies in the daughter's recollection of events. The trial court recognized that the case came down to a credibility contest between defendant and complainant, and the jury had every opportunity to weigh the credibility of them both.

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), citations omitted.]

Trial strategy generally includes counsel's decisions concerning the presentation of witnesses or theories. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). Although cross-examination is an important tool for testing the veracity of the prosecution's case, see *Maryland v Craig*, 497 US 836, 845-846; 110 S Ct 3157; 111 L Ed 2d 666 (1990), it is not the only tool and is not always beneficial, predictable, or advisable to employ it. In this case, the trial court indicated that complainant had presented herself in such a way during her testimony that the danger existed that the jurors could start to sympathize with her.<sup>1</sup> Defense counsel apparently recognized that he risked aggravating such sympathies if he asked the witness adversarial questions. Further, defense counsel could have determined that the effect of cross-examination on this witness would more likely underscore her adverse testimony than to expose reasons to doubt it. Moreover, defense counsel elicited from defendant that complainant had demonstrated emotional problems as a young adult, and that she had a possible motive for accusing him with exaggerated claims. That counsel elected to rely on his own witnesses, to the exclusion of complainant, to raise these issues of doubt, was the product of sound strategic

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<sup>1</sup> We stand ever mindful that the trial court was in a better position to note what took place at trial, where events actually unfolded, than an appellate court relying on a cold record. See *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995).

reasoning. Therefore, defendant has failed to demonstrate that he was deprived of his right to effective assistance of counsel on this basis.

Defendant also cursorily argues that defense counsel was ineffective for failing to establish at trial that the physical layout of the house precluded defendant from visiting complainant's bedroom without awakening his wife or other members of the household. We disagree. Defense counsel did raise the issue of the witnesses' failure to detect a problem in the house when sound carried through it so readily. Moreover, the argument regarding the home's layout contradicts defendant's own testimony that he appropriately visited complainant's bedroom on occasion. This testimony throws into doubt the theory that presupposes that he could not leave his bed, or detour on his way to it, without alerting his sleeping wife to something amiss. Nor is there any suggestion that light-sleeping houseguests were so commonly about the place that their presence would certainly have exposed defendant's nocturnal lurking. Defendant additionally argues that defense counsel was ineffective for failing to interview several defense witnesses, citing affidavits to that effect. However, "the failure to interview witnesses does not itself establish inadequate preparation." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). In this case, defendant offers no indication how any additional pretrial preparation in this regard would have improved counsel's performance or defendant's position. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Because defendant fails to show that defense counsel's performance fell below an objective standard of reasonableness or otherwise included errors that likely affected the result of the proceedings or rendered them unfair or unreliable, *Riley, supra*, we reject his arguments.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Peter D. O'Connell