STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 6, 2007
v	No. 271063 Wayne Circuit Court
DAHOOD ALI, Defendant-Appellant.	LC No. 06-001505-01

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(b)(iii) (sexual contact by an actor with position of authority over a minor between the ages of 13 and 16), and one count of accosting a child for immoral purposes, MCL 750.145a. Defendant was acquitted of two additional counts of second-degree CSC. Defendant was sentenced to 2 ½ to 15 years' imprisonment for the CSC convictions and one to four years' imprisonment for the accosting a child for immoral purposes conviction. We affirm.

Defendant, a former Detroit police officer, contends that he received ineffective assistance of counsel. Specifically, defendant contends that his trial counsel failed to call four proposed witnesses to establish his habit and routine, pursuant to MRE 406, of giving his business card and cellular telephone number to people in need of assistance. According to defendant, this evidence was necessary to rebut the prosecution's argument that he gave his cellular telephone number to the complainant, a 13-year-old girl, with the intention of engaging in an inappropriate relationship. Defendant requests a new trial or, in the alternative, a remand for an evidentiary hearing.

A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). This Court previously denied defendant's motion to remand for a *Ginther* hearing. *People v Ali*, unpublished order of the Court of Appeals, entered April 6, 2007 (Docket No. 271063). Therefore, our review of this issue is limited to the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness

and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*.

Defense counsel's failure to investigate and call a witness does not amount to ineffective assistance of counsel unless the defendant shows prejudice as a result. *People v Caballero*, 184 Mich App 636, 640-642; 459 NW2d 80 (1990). In other words, defense counsel's failure to call the proposed witnesses in this case can only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 900 (1996). A substantial defense is one which might have made a difference in the outcome of the trial. *Id*. at 710. Moreover, the decision whether to call a witness is presumed to be a matter of trial strategy, *Dixon, supra* at 398, and we will not substitute our judgment for that of counsel regarding matters of trial strategy, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Evidence of habit and routine is admissible pursuant to MRE 406, which provides:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

In *Laszko v Cooper Laboratories, Inc*, 114 Mich App 253, 255; 318 NW2d 639 (1982), this Court held that "evidence of habit or routine practice is admissible to show like conduct on the occasion in question." The proffered evidence "must establish a set pattern or show that something is done routinely or has been performed on countless occasions." *Id.* at 256. Before a witness may testify to a defendant's habit or routine, the defendant must make an offer of proof establishing that the witness has sufficient knowledge to testify to the routine nature of the practice. *Id.*

"Character" and "habit" are similar concepts. Pursuant to MRE 404(a), evidence of a defendant's character is generally not admissible to establish "action in conformity therewith on a particular occasion." A defendant may, however, offer "[e]vidence of a pertinent trait of character" and the prosecution may offer rebuttal character evidence when the defendant "opens the door." MRE 404(a)(1). In general, a defendant may offer character evidence only by testimony regarding the defendant's reputation or by opinion testimony. On cross-examination, however, the prosecution may inquire into specific instances of conduct. MRE 405(a). The defense may only present evidence of specific instances of conduct to establish a defendant's character when the character trait is "an essential element" of the charged offense. MRE 405(b).

Black's Law Dictionary (6th ed) defines "character" using the term "habit."

> The aggregate of the moral qualities which belong to and distinguish an individual person; the general result of the [sic] one's distinguishing attributes. That moral predisposition or habit, or aggregate of ethical qualities, which is

> believed to attach to a person, on the strength of the common opinion and report concerning him. A person's fixed disposition or tendency, as evidenced to others by his habits of life, through the manifestation of which his general reputation for the possession of a character, good or otherwise, is obtained. . . .

In turn, Black's Law Dictionary (6th ed) defines "habit" as follows:

> A disposition or condition of the body or mind acquired by custom or a usual repetition of the same act or function. The customary conduct, to pursue which one has acquired a tendency, from frequent repetition of the same acts. . . . A regular practice of meeting a particular kind of situation with a certain type of conduct, or a reflex behavior in a specific set of circumstances. . . .

There is no relevant, published Michigan case law describing the relationship between "character" and "habit" evidence. However, we find the following reasoning of the Arkansas Supreme Court to be persuasive:

> The state urges that evidence of a person's good habits naturally leads to an assumption of good character, but that does not preclude its introduction. As stated in McCormick on Evidence § 195 (2nd Ed. 1972):
>
> "Character and habits are close [sic] akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation . . . A habit . . . is the person's regular practice of meeting a particular kind of situation with a specific type of conduct . . .
>
> Character may be thought of as the sum of one's habits though doubtless it is more than this." [*Derring v State*, 273 Ark 347, 352; 619 SW2d 644 (1981).]

The commentary accompanying MRE 406 notes that the Michigan rule is identical to its federal counterpart. MRE 406 Comments. The commentary accompanying FRE 406 states that:

> Courts have generally proceeded cautiously in permitting the admission of a pattern of conduct as habit, "because it necessarily engenders the very real possibility that such evidence will be used to establish a party's propensity to act in conformity with its general character, thereby thwarting Rule 404's prohibition against the use of character evidence except for narrowly prescribed purposes." *Simplex, Inc v Diversified Energy Sys*, 847 F2d 1290, 1293 ([CA 7], 1988). That is, Courts are concerned that the rule admitting evidence as habit will swallow the rule that excludes character evidence. . . . [FRE 406, Commentary, Character Distinguished.]

In determining whether evidence establishes an individual's character or habit, the commentary reasons:

> "[H]abit refers to the type of non-volitional activity that occurs with invariable regularity. It is the non-volitional character of habit evidence that makes it probative." *Weil v Seltzer*, 873 F2d 1453, 1460 (DC Cir[,] 1989). Thus, activity that is extremely complicated is unlikely to be considered habit, since such activity would ordinarily be dependent on a significant thought process, as well as a number of contingencies, and all of this is inconsistent with the notion of habit as reflexive and semiautomatic. . . . [FRE 406, Commentary, Character Distinguished.]

At trial, before opening statements, defense counsel moved to admit testimony from four witnesses regarding defendant's "reputation in the community with respect to truth and honesty" and his "good moral character." Defense counsel admitted that the prosecution would be free to rebut the witnesses' proposed testimony during cross-examination. The trial court postponed its ruling on the motion. Defense counsel did not, however, attempt to call the witnesses later in the proceedings. On appeal, defendant submitted an offer of proof regarding defense counsel's trial strategy and the affidavits of four proposed defense witnesses.[1] In their affidavits, the witnesses averred that defendant frequently gave his time and money to help youth in need of assistance. Generally, we do not review documents that are not part of the lower court record. MCR 7.210(A)(1); *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004). We will, however, review the documents for the purpose of deciding defendant's request for a remand. See MCR 7.211(C)(1)(a)(ii).

According to defendant, his trial counsel should have introduced the witnesses' proposed testimony because it was relevant to establish his habit and routine, pursuant to MRE 406, of giving his business card and cellular telephone number to people in need of assistance. We note, however, that the majority of the statements in the witnesses' affidavits relate to defendant's caring and generous behavior toward youth in general. In fact, only one of the proposed witnesses stated that she personally observed defendant give his business card and cellular telephone number to people he considered "needy." We find that the proposed testimony does not describe the type of simple conduct that could be defined as "reflexive" or "non-volitional" as anticipated in the commentary to FRE 406. Thus, it is unlikely that the trial court would have admitted the testimony as evidence of routine or habit under MRE 406. It is more likely that the testimony falls into the category of general character evidence under MRE 404, the admission of which would open the door to rebuttal character evidence. Bearing this in mind, we cannot find that defense counsel's failure to call the four proposed witnesses, and to keep the door closed to potential rebuttal evidence, was anything but sound trial strategy. *Dixon*, *supra* at 398; *Henry*, *supra* at 146.

Moreover, defendant has not shown that he was denied a substantial defense by defense counsel's failure to call the proposed witnesses. *Dixon*, *supra* at 398; *Hyland*, *supra* at 710. Defendant claims that the witnesses' proposed testimony was necessary to rebut the prosecution's argument that he gave his cellular telephone number to the complainant in order to

[1] It is unclear whether any of the four proposed witnesses are the same as the four witnesses defense counsel attempted to introduce at trial.

engage in an inappropriate relationship. But, evidence of defendant's alleged habit of helping youth in need and handing out his cellular telephone number does not counter the allegations of his particular conduct toward the complainant. The complainant testified that defendant "fondled" her breasts and that she masturbated defendant when he asked her to do so. Additional testimony at trial established that there were at least 48 telephone calls between the complainant and defendant over several months, 34 of which were initiated from defendant's telephone. In light of this evidence, we cannot conclude that the jury would have acquitted defendant if presented with the proposed testimony. *Henry*, *supra* at 146; *Hyland*, *supra* at 710. A new trial is not warranted. Moreover, because defendant has failed to demonstrate that facts elicited during an evidentiary hearing would support his claim, we decline to order a remand. See MCR 7.211(C)(1)(a)(ii).

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane M. Beckering