STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2008
v	No. 272945 Bay Circuit Court
THOMAS ROBERT KOZAK and THOMAS SYLVESTER KOZAK, Defendants-Appellants.	LC No. 05-003753-AV

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendants appeal from a jury verdict finding them guilty of illegally draining wetlands protected by the Wetland Protection Act, MCL 281.701 *et seq*, now the Natural Resources Environmental Protection Act, MCL 324.30301 *et seq*. Defendants also appeal from the restoration order entered by the trial court. We affirm.

Defendants are a father and son. The elder Kozak owns a 26-acre parcel of property in Kawkawlin Township, Bay County. The property is bounded to the north by Jose Road, to the east by railroad tracks, and to the west by a strip of houses and businesses on M-13; directly across the railroad tracks is the Tobico Marsh State Game Area, but Tobico Marsh itself is further to the east. Beaver Road lies south of the property. At issue in this case is a roughly triangular area in the northeastern portion of the property. Specifically, the area was alleged to consist of protected wetlands, and defendants are alleged to have illegally drained those wetlands without a permit. Defendants contended that to the extent, if any, there were wetlands on their property, they were the result of a ditch culvert being crushed when a water main was installed in recent history.

The evidence presented at trial provided overwhelming evidence that the area at issue was, in fact, a wetland, and it had been a wetland for a very long time. Experts testified that whether a particular area constituted a "wetland" depended on the kind of vegetation present, the kind of soil present, and the kind of hydrology present. The evidence clearly showed that: (1) the vegetation in the area was the kind almost always found in wetlands and almost never found elsewhere, and much of it was sufficiently established and grown to show that it had been present for a long time; (2) the soil was "textbook" wetlands soil consisting of a sufficiently thick layer of "muck" to demonstrate that the wetlands had been there for a long time; and (3) there was a persistent drainage of water to the site from elsewhere, resulting in naturally waterlogged

soil irrespective of whether any ditches that had been in the area prior to defendants' construction work were being well-maintained. Furthermore, when the water main was installed, the company seeking to do so initially planned to run it down the western side of the railroad tracks – in other words, defendants' side – but upon concluding that there were wetlands in that area, shifted a portion of their pipe to the east side, at considerable effort. It was apparently the installation of that line that defendants contended resulted in the culvert being crushed.

Defendants contend, however, that their property does not meet the *statutory* definition of a "wetland," and that the statutory definition is unconstitutionally vague in any event. MCL 324.30301(p) defines "wetland" in relevant part as follows:

> "Wetland" means land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh and which is any of the following [criteria not relevant to this issue].

Defendants argue that the statutory definition is limited to "marshes," "swamps," and "bogs," and that their property is "commonly referred to" as none of these things. Defendants also contend that the "normal circumstances" of the property do not include water, because the water is a consequence of recent artificial clogging of ditches and culverts. As discussed, the evidence overwhelmingly showed that the scientifically-defined wetland conditions had been present on, and were normal for, defendants' property even *prior to* the alleged clogging of any ditches or culverts.

No published case has analyzed MCL 324.30301(p) in depth because it was undisputed that "wetlands" existed in those cases. *Frericks v Highland Twp*, 228 Mich App 575, 587-588; 579 NW2d 441 (1998); *City of Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 68 n 11; 678 NW2d 444 (2003). However, the predecessor statute, MCL 281.702(g), contained an identical definition of "wetland." Under that statute, a "wetland" existed where "[t]he area in question was described as holding water sufficient to support wetland vegetation and aquatic life. It is contiguous to a pond and a stream and is situated near a larger wetland area. The latter area, which is submerged throughout the year, supports a variety of aquatic plants and animals that rely on wetlands for their survival." *Citizens Disposal, Inc v Dep't of Natural Resources*, 172 Mich App 541, 549-550; 432 NW2d 315 (1988).

Therefore, it is immaterial that the words "bog," "swamp," or "marsh" were not explicitly used to describe the property. Furthermore, this is the only rational conclusion that can be drawn from the statute. The phrase "commonly referred to as a bog, swamp, or marsh" as used in the statute to refer back to "land" is clearly intended to facilitate the ordinary reader's understanding of the *kind of* land involved. The Legislature did not intend it to mandate an inquiry into how a particular parcel of property is generally referred to in the community. According to common definitions from the Random House Webster's College Dictionary (2001 ed), a "bog" is "wet, spongy ground with soil composed mainly of decayed vegetable matter." A "swamp" is "a tract of wet, spongy land, usu. with abundant vegetation." And a "marsh" is "a tract of waterlogged soil, typically treeless and covered with emersed rushes, cattails, and other tall grasses." The testimony at trial from people who had been to the area of land in question all provided testimony that overwhelmingly described property meeting all three of these common

definitions. We find that the area in question was a "wetland" within the meaning of the statute; for the same reasons, we reject defendants' contention that the statute is unconstitutionally vague.

Defendants next contend that the trial court denied them a fair trial and was biased against them. We disagree. To the contrary, our review of the record shows that the trial court exercised remarkable and admirable patience with defendants. Some of defendants' contentions that their trial was unfair actually refer to post-trial commentary. Many of defendants' complaints refer to remarks by the trial court that are taken out of context. The trial court attempted on a few occasions to introduce levity, but most of defendants' complained-of remarks were the trial judge's attempts to move proceedings along in an expeditious manner, notwithstanding the younger Kozak's inexperience at cross-examination and focus on irrelevant topics. We note also that the trial judge upheld defense objections and overruled prosecution objections as often, if not more often, than he upheld prosecution objections or overruled defense objections. The trial court occasionally even attempted to *help* with the younger Kozak's inexpert cross-examination, which frequently resulted in defendant and the witness becoming clearly frustrated and confused. The trial court's admonitions to proceed more expeditiously or to desist from further inquiry into irrelevant or already established matter were proper and part of the trial court's responsibilities. We agree completely with the circuit court's review of this issue, and again observe that, far from being biased or denying defendants a fair trial, the trial court demonstrated patience and lenity with defendants.

Defendants next contend that the trial court's restoration order exceeded its authority under MCL 324.30316(4). We disagree. Defendants contend that they were improperly ordered to refill a ditch within the right-of-way of a railroad and to replant vegetation on the site. Defendants point out that the railroad ditch was not part of the charge against them, and they further point out that there was never any dispute that removal of vegetation was not a violation of the wetland statute. However, MCL 324.30316(4) authorizes the trial court to "order a person who violates this part to restore as nearly as possible the wetland that was affected by the violation to its original condition immediately before the violation. The restoration may include the removal of fill material deposited in the wetland or the replacement of soil, sand, or minerals." Furthermore, defendants' complaints are taken out of context: the order requires defendants to move material that they took out of the ditch and placed onto the site back into the ditch as part of a requirement to restore the site to its predisturbance condition, and the trial court explicitly declined to order a full restoration of wetlands vegetation. Given the overwhelming evidence that drainage and vegetation are critical to wetlands, we find the trial court's order properly tailored to effectuate a restoration of the wetlands at issue here. We further find that it lacks the ambiguity of which defendants also complain.

Defendants next contend that the jury was improperly instructed. We disagree. Defendants point out that it was undisputed that they did not obtain a permit to perform work on wetlands, so the trial court should not have instructed the jury that it needed to find that defendants did not obtain a permit. We do not perceive any way in which inclusion of this element in the jury's instructions, even if it was not seriously in dispute, could have prejudiced defendants or confused the jury. The instructions given by the trial court correctly and completely included all elements of the charged offense, and they fairly protected defendants' rights. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003).

Defendants also argue that they were entitled to a mistrial because the jury was accidentally given a document that they indisputably should not have received: a copy of one page of instructions on which the prosecutor had handwritten notes. The notes consisted of the initials "SDZ" written in the margin next to the definition of a "wetland," and three names (including Thomas S. Kozak) written next to the "draining surface water" charge. The jury notified the trial court that the document was clearly not intended for them after less than an hour of deliberation. The trial court concluded that there was nothing of significance in the document, thanked the jury for its attentiveness and concern, explained to the jury that it would have ordered a mistrial had there been anything of value in the document, and instructed the jury to disregard it anyway. Juries are presumed to follow their instructions to disregard inadmissible evidence unless there is an overwhelming likelihood that the jury could not do so and that the evidence would be strongly prejudicial to defendants. *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001). We agree with the trial court that the document erroneously given to the jury was insignificant. And equally importantly, it is clear that the jury – which even asked of its own volition to see the site and was permitted to do so – gave the matter, and its instructions, careful consideration. No mistrial was warranted.

Finally, defendant Kozak, Sr., argues that he was denied effective assistance of counsel. We disagree. Effective assistance is presumed, and to overcome that presumption defendant must show that counsel's performance was objectively deficient and that the deficient performance affected the outcome of the proceedings. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). We do not perceive that counsel drew any significant "ire" of the trial court; to the extent the defense failed to proceed smoothly, that was largely due to the younger Kozak's decision – over which trial counsel had no control – to represent himself, notwithstanding his clear inexpertise at efficient cross-examination. To the extent trial counsel failed to pursue the statutory argument discussed above, counsel cannot be ineffective for failing to pursue a futile theory. *Id.*, 130. Defendant has not shown deficient performance or prejudice.

Affirmed.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering