

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARRISON LEE WIGGINS,

Defendant-Appellant.

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UNPUBLISHED

May 20, 2010

No. 290006

Kalamazoo Circuit Court

LC No. 2007-001804-FC

Before: MARKEY, C.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of four counts of criminal sexual conduct in the third degree, MCL 750.520d(1)(d), and one count of criminal sexual conduct in the second-degree, MCL 750.520c(1)(b). The trial court found defendant not guilty of child sexually abusive activity, MCL 750.145c(2). The trial court sentenced defendant to 5 to 15 years' imprisonment on the four counts of third-degree criminal sexual conduct and to 3 to 15 years' imprisonment on the count of second-degree criminal sexual conduct, to be served consecutively. Defendant appeals as of right. We affirm.

**I. BASIC FACTS AND PROCEEDINGS**

This case arose after defendant's stepdaughter alleged that defendant had engaged her in sexual conduct. The victim testified that her stepfather first began touching her in a sexual manner when she was 13, and that the acts continued and escalated until she left home for college. She testified that when she once objected to the sexual behavior, defendant apologized and said he was not doing it for "sick pleasure," but because "he was just trying to take care [of her.]"

In regard to the specific charged offenses, the victim testified that when she was 15 defendant kissed her vaginal area. She testified that when she was 15 or 16, defendant, on multiple occasions, trimmed her pubic hair, penetrated her vagina using a sexual device and tampon, and engaged in acts of digital penetration. She also described various instances when defendant photographed her nude or scantily clothed.

The prosecution also presented various witnesses, including friends and neighbors of defendant, who testified they observed things over the years that made them uncomfortable about the relationship between defendant and the victim. There was testimony that defendant would

give the victim body massages, place his head in her lap, and kiss her on the lips. Defendant's next-door-neighbor testified that on three separate occasions she specifically asked the victim whether there was anything "wrong" inside the house. Defendant's biological daughters from a previous marriage testified to visiting the home on weekends and observing a "boyfriend-girlfriend" relationship between their father and the victim.

Police executed a search warrant at defendant's home, recovering many items, including sexual devices and nude photos stored on a computer disk. The police found photographs of the victim wearing little and no clothes. Defendant however presented testimony that the photographs were taken when the victim was over the age of eighteen.

Numerous defense witnesses testified that defendant was an honest and trustworthy man. They testified that they never observed inappropriate behavior between defendant and the victims. Defendant's wife testified that she had not witnessed anything inappropriate. She also testified that she owned the sexual devices.

After closing arguments, the trial court rendered its verdict from the bench. The trial court explained that count I was based on an allegation of mouth to genital sexual penetration; count II was based on an allegation of digital-vaginal penetration; count III was based on the allegation of sexual penetration by insertion of a tampon into her vagina; count IV was based on the allegation of the insertion of a sexual device into her vagina, all of which occurred when the victim was 17. Count V was based on allegations of sexual contact occurring when she was 14, and count VI was based on the allegation that defendant took sexually explicit photographs of the victim when she was 17. The trial court found that the prosecutor had failed to prove that Counts I, II and III and IV occurred before the victim turned 16, but found defendant guilty of the lesser offenses of criminal sexual conduct in the third-degree. On count V, the court found defendant guilty of criminal sexual conduct in the second-degree, and on count VI, the court found defendant not guilty. This appeal ensued.

## II. OTHER ACTS EVIDENCE

Defendant argues the trial court abused its discretion when it allowed the prosecution to admit the photographs of the victim pursuant to MRE 404(b)(1). We disagree.

### A. STANDARD OF REVIEW

Admission of evidence under MRE 401(b) is reviewed for an abuse of discretion. *People v Catanzarit*, 211 Mich App 573, 579; 536 NW2d 570 (1995). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW 2d 231 (2003).

### B. ANALYSIS

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible, evidence of other crimes, wrongs, or acts evidence must satisfy the following three requirements: “(1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice.” *People v Magyar*, 250 Mich App 408, 413; 648 NW2d 215 (2002), citing *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). “A proper purpose is one other than establishing the defendant’s character to show his propensity to commit the offense.” *Id.*, citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205; 520 NW2d 338 (1994). “The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized.” *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Further, “to ensure the defendant’s right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else.” *Id.* “Mechanical recitation of ‘knowledge, intent, absence of mistake, etc.,’ without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b).” *Id.*, at 387.

Before trial, the defense moved to suppress photographs depicting the victim in underwear, nude, and wearing her mother’s lingerie. In regard to the nude photographs, the trial court held they were relevant to establish count VI, sexually abusive activity, and were thus admissible. In regard to the remaining photographs, defense counsel argued the prosecution’s true motive in publishing the photographs was to depict defendant as a “pervert.” The prosecutor maintained that the photographs showed a “propensity” and a common scheme or plan to commit the criminal sexual conduct offenses. The trial court ruled that these photographs were admissible as other acts evidence as to the remaining five counts. Specifically, the trial court held:

It is argued that the evidence does explain—or help explain the sexual interest of the defendant in the alleged victim. The [c]ourt concludes that that is a purpose other than propensity to commit a crime. Taking photographs of someone without clothing while—or with limited types of clothing can certainly have innocent reasons. It can also reflect an interest of a sexual nature in the person being photographed.

And having looked at these photographs, that could be a fair conclusion. This applies whether or not she was underage or overage when the photographs were taken. Case law doesn’t limit this type of evidence to what happened before alleged events; what happened later can be used.

Defendant specifically argues that “[w]hen the trial [court] stated on the record that the photos reflected an “ongoing interest of a sexual nature as it relates to [the victim,] [it] revealed that [the trial court] had considered this evidence for an improper purpose.” Defendant specifically argues the trial court’s statement reflects that “[e]vidence that defendant took photos of [the victim] did serve the *improper* prosecutorial purpose of demonstrating [defendant]’s bad

character or propensity for sexual involvement with his stepdaughter in conformity with his alleged longstanding sexual attraction to her.” (Emphasis in original.)

Here, “evidence in the instant case that defendant had a sexual interest specifically in his stepdaughter would show more than simply his sexually deviant character—it would show his motive for sexually assaulting his stepdaughter.” *People v Watson*, 245 Mich App 572, 579, 629 NW2d 411 (2001). And while “[a] motive is the inducement for doing some act; it gives birth to a purpose,” there is no reason that the photographs in this case, which were perhaps taken after the alleged offenses, nonetheless reflected defendant’s inducement for having sexual relations with his stepdaughter. *Id.* (citations omitted). “Thus, the other acts evidence showed more than defendant’s propensity toward sexual deviancy; it showed that he had a specific sexual interest in his stepdaughter.” *Id.*, at 580. The trial court did not abuse its discretion in admitting the photographs.

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues his counsel was ineffective for failing to present additional witnesses at trial. We disagree.

#### A. STANDARD OF REVIEW

Where no evidentiary hearing has been held on a claim of ineffective assistance of counsel, appellate review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

#### B. ANALYSIS

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Where the issue involves counsel’s performance, a defendant must show that (1) counsel’s performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel’s errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994). Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be taken in difficult cases. *Id.*, at 325. There is therefore a strong presumption of effective counsel when it comes to issues of trial strategy. *People v Mitchell*, 454 Mich 145, 155; 560 NW2d 600 (1997). An appellate court will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel’s competence. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Decisions regarding whether to call witnesses are presumed to be matters of trial strategy, and the failure to call witnesses can constitute ineffective assistance of counsel only when it deprives the 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 902 (1996); .

On appeal, defendant identifies the purported witnesses as “Jim Mentor; Dan Verburg; Shelby Wiggins; Marina Wiggins, and Jeffrey Ring.” Defendant represents that each of these individuals “could have given a considerable amount of testimony to the defendant’s benefit.”

Defendant fails to demonstrate that he was denied the effective assistance of counsel. Nowhere in defendant’s supplemental brief does he provide the content of the witnesses’ proposed testimony. Rather, defendant only vaguely asserts “that each of the foresaid persons could have given a considerable amount of testimony to the defendant’s benefit.” There is no basis to indicate the content of the witnesses’ testimony, and thus it cannot be determined that whether their testimony would have altered the result of trial. *Strickland*, 466 US at 687-688. Further, defendant has failed to provide any evidence that the witnesses’ were willing and able to testify at trial. In addition, since there is no basis to indicate the content of the witnesses’ testimony, defendant cannot overcome the presumption of effective assistance of counsel. Defendant is not entitled to relief on the basis of ineffective assistance of counsel.

We affirm.

/s/ Jane E. Markey  
/s/ Brian K. Zahra  
/s/ Elizabeth L. Gleicher