

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 28, 2012

V

DANNY DEAN SIMMONS,

Defendant-Appellant.

No. 301445
Wexford Circuit Court
LC No. 2010-009331-FC

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of four counts of first-degree criminal sexual conduct (CSC), MCL 750.520b. He was sentenced to concurrent terms of 135 to 360 months' imprisonment for the first two counts of CSC and 180 to 360 months' imprisonment for the remaining two CSC counts. Defendant appeals by right, and we affirm.

Defendant's convictions arise from his sexual relationship with the complainant. The complainant, then in her early teens, became acquainted with defendant and his wife when she attended their daycare facility. The complainant did not have family stability with her mother and asked the couple if she could live with them. The couple agreed and obtained guardianship over the teenager. This guardianship included mentoring and counseling. The complainant testified that defendant began touching her at approximately age fourteen, and this contact escalated to oral and anal sex. She also testified that the sexual relationship continued as she aged into her early twenties and that she admittedly initiated sexual relations with defendant. On the contrary, defendant denied that any inappropriate sexual relations occurred when the complainant was a minor. Rather, defendant asserted that he had committed no illegal act, but rather, the immoral act of having an affair with the complainant after she was over the age of eighteen.

When the complainant was a teenager, she assisted the couple with their child care business. However, after she finished home schooling, the complainant worked in an assisted living facility. Ultimately, the family started a second business, an assisted senior facility, and the complainant worked in that business. Defendant and his wife testified that senior residents of the facility raised concerns about the complainant's conduct. Defendant's theory of the case was that the complainant falsely accused him of sexual impropriety as a minor because they

confronted her with the residents' concerns. The jury convicted defendant of four counts of first-degree CSC and acquitted him of one count of third-degree CSC. Defendant appeals by right.

Defendant first alleges that he was deprived of the effective assistance of counsel. We disagree. When a *Ginther*¹ hearing is not held, our review is limited to errors apparent on the record. *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009). Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The trial court's factual findings are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.* at 484-485.

A defendant must meet two requirements to warrant a new trial because of the ineffective assistance of trial counsel. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. [*People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011) (footnotes omitted).]

“Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases.” *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Decisions regarding the evidence to be presented and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Meissner*, 294 Mich App 438, 460; 812 NW2d 37 (2011); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Furthermore, decisions regarding whether to present an opening statement, the focus of closing argument, and the failure to object to evidence, procedure, or argument also can be classified as sound trial strategy. *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008); *Unger*, 278 Mich App at 242-243; *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). “In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant.” *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). The appellate court will not substitute its judgment for that of defense counsel on matters of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Additionally, we do not use the benefit of hindsight when evaluating defense counsel's performance. *Id.* To prevail on a claim of ineffective assistance of counsel, defendant must establish the factual predicate for his claim. *People v Matuszak*, 263 Mich App 42, 60; 687 NW2d 342 (2004). “A particular strategy does not constitute ineffective assistance of counsel simply because it does not work.” *Id.* at 61. Counsel may not harbor error as an appellate parachute by failing to object to an issue at trial, and thereby, deprive the trial court of

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

the opportunity to correct the error at the time of its occurrence. *People v Vaughn*, ___ Mich ___; ___ NW2d ___ (2012), slip op p 31.

Defendant contends that trial counsel was constitutionally ineffective for introducing a recorded interview between the complainant and police, for calling defendant's wife to testify, for his handling of the defense lay and expert witnesses, and for focusing the defense on a particular statement. We disagree.

First, defendant contends that it was erroneous for defense counsel to admit the recorded interview between the complainant and the police because the statement was inadmissible, the interview was highly prejudicial because it contained prior consistent statements, the interview contained inadmissible statements regarding penalty and vouching, and other prejudicial material. A review of the record reveals that defense counsel sought to admit portions of the recording, and the prosecutor requested that the entire recording be played. The defense agreed to allow the entire recording into evidence. After the recording was played, the trial court noted that there were statements by the police officer regarding penalty. Defense counsel acknowledged that he was aware of the content of the recording, but nonetheless wanted the entire recording played. In closing argument, defense counsel elaborated on the reason the recording was played. He noted the comfort level with which the complainant discussed the sexual acts with the officer and how she giggled when she discussed oral sex. It is clear that defense counsel was aware of the content of the recording, but made a calculated determination to play it in its entirety. This issue involves the decision regarding the evidence to be presented and clearly involved a matter of trial strategy. *Meissner*, 294 Mich App at 460. We will not substitute our judgment for that of counsel regarding matters of trial strategy and do not assess it with the benefit of hindsight. *Payne*, 285 Mich App at 190. Accordingly, defendant failed to meet his burden of demonstrating ineffective assistance of counsel. *Armstrong*, 490 Mich at 289-290.

Additionally, we reject defendant's remaining issues of ineffective assistance with regard to the testimony of defendant's wife, lay and expert witnesses, and the focus of the defense. Although the complainant testified that defendant was controlling and isolated her from other relationships by his conduct, the witnesses in dispute were called to refute that testimony. Defendant's wife testified regarding the family businesses, family activities, and privileges given to both the complainant and her biological son. She discussed the context of the complainant's entry into their home and refuted allegations of isolation. Our review of the record does not support the assertion that the wife's testimony was merely cumulative to that of other witnesses or that her cross-examination was particularly damaging. Similarly, it was a matter of trial strategy involving the decision to call lay and expert witnesses and the preparation involved. *Payne*, 285 Mich App at 190. Finally, we reject the contention that the defense erroneously focused on one statement. The defense utilized the statement at issue to merely explain the impetus for the reporting of the alleged consensual sexual relationship as abuse. However, the defense presented evidence that the complainant was provided a vehicle, attended modeling school, and provided other opportunities consistent with those given to the couple's biological son. Accordingly, defendant failed to meet his burden regarding ineffective assistance. *Armstrong*, 490 Mich at 289-290.

Next, defendant alleges that the trial court abused its discretion by admitting expert testimony that did not satisfy the standards for admission and that trial counsel was ineffective for failing to object to this testimony. We disagree. “The decision whether to admit evidence is within the trial court’s discretion, which will be reversed only where there is an abuse of discretion.” *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). When a decision to admit evidence involves a preliminary question of law, the question of law is reviewed de novo, and it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id.* “Because an abuse of discretion standard contemplates that there may be more than a single correct outcome, there is no abuse of discretion where the evidentiary question is a close one.” *People v Smith (On Remand)*, 282 Mich App 191, 194; 772 NW2d 428 (2009). “A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes.” *People Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). “Unpreserved claims of evidentiary error are reviewed for plain error affecting the defendant’s substantial rights.” *People v Benton*, 294 Mich App 191, 202; ___ NW2d ___ (2011).

Admission of expert testimony is governed by MRE 702:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

“[E]ven proposed expert testimony that is offered by a qualified expert and based on reliable scientific data and methods may be properly excluded if it is not relevant to the facts of the case or is offered for a proposition that does not require the aid of expert interpretation.” *People v Kowalski*, ___ Mich ___; ___ NW2d ___ (2012), slip op p 14. Expert testimony is admissible to explain “human behavior that is contrary to the average person’s commonsense assumptions” and is necessary when actions or responses by the witness are incomprehensible to the average person. *Id.* at slip op p 16. “In these instances, an expert’s specialized testimony may enlighten the jury so that it can intelligently evaluate an experience that is otherwise foreign.” *Id.* at 17. In sexual abuse cases, psychologists may testify regarding behaviors such as delayed reporting of abuse or retraction of accusations because it is common among abuse victims, but jurors might interpret it as inconsistent with abuse. *Id.* at 16.

Defendant alleges that the prosecutor’s expert did not provide knowledge that would assist the trier of fact because it was “so muddled and contradictory.” The defense further faults the expert correlating all aspects of the family’s life to characteristics of abuse. However, a review of the record reveals that defense counsel did not object to the admission of this evidence and utilized the expert opinion in the defense closing argument. Specifically, defense counsel noted that, although the expert testified to characteristics of abuse, those characteristics evidenced the mere possibility of abuse and did not equate to proof of abuse. Moreover, it was noted that there was also behaviors inconsistent with abuse. In light of the fact that the trial court admitted this evidence without objection and the questions and closing argument by the defense

indicate that this absence of objection was purposeful trial strategy, defendant failed to demonstrate plain error affecting substantial rights.

Defendant's third claim of error asserts that evidence regarding defendant's marital relations was irrelevant, more prejudicial than probative, and deprived him of the right to a fair trial. He also asserts that trial counsel was ineffective for failing to object. We disagree.

Generally, relevant evidence is admissible. *People v Yost*, 278 Mich App 341, 355; 759 NW2d 196 (2008). If evidence is precluded for one purpose, it may be admissible for another, proper purpose. *Id.* Evidence is admissible if it sheds light on any material point in issue. *People v Murphy (On Remand)*, 282 Mich App 571, 580; 766 NW2d 303 (2009). "Generally, evidence of other acts is admissible under MRE 404(b) if offered for a proper purpose, the evidence is relevant and its probative value is not substantially outweighed by its prejudicial effect." *People v Orr*, 275 Mich App 587, 589; 739 NW2d 385 (2007). The burden of establishing the relevance of other acts evidence rests with the prosecution, and the trial court must closely examine the logical relationship between the other-acts evidence and the fact at issue. *Id.*

A review of the record reveals that the prosecutor called defendant's wife to testify regarding the sexual control in the couple's relationship and the abnormality of certain sex acts that would be explained by the prosecutor's expert. The trial court sustained defense counsel's relevancy objection at that time because the expert had not yet testified. The next day, the prosecutor's expert testified regarding the grooming of a sexual assault victim and explained delayed disclosure by a victim. He also testified that specific painful sex acts such as anal intercourse may be designed to subjugate the victim, demonstrate dominance, and are not mutual. When defendant's wife was recalled, the prosecutor on cross-examination elicited testimony that the couple engaged in oral and anal intercourse. However, the prosecutor failed to substantiate the expert's testimony with the wife that the sex acts were for domination purposes. Rather, she testified that the couple engaged in sexual acts for mutual benefit and also engaged in other sexual activities. Contrary to the defense assertion, the prosecutor did not seek to admit improper MRE 404(b) evidence, but rather sought to support his expert's opinion in accordance with MRE 702. The record does not support defendant's assertion that the prosecutor simply sought to elicit improper MRE 404(b) evidence and that the admission was more prejudicial than probative. Accordingly, this claim of error does not entitle defendant to appellate relief.

Lastly, defendant contends that a remand is necessary to determine the propriety of the seizure of his attorney-client mail and whether defense counsel was ineffective for failing to protect the attorney-client privilege. We disagree. The government has a legitimate interest in the security of its prisons and jails. *People v Oliver*, 63 Mich App 509, 515; 234 NW2d 679 (1975). Consequently, it is reasonable and necessary that "jail authorities have the right to search an inmate both immediately prior to and immediately after allowing him to meet with someone who comes into the jail from outside the jail enclosure and who will leave the jail enclosure" to prevent the smuggling of weapons, drugs, or other contraband. *Id.* Additionally, jail authorities have the right to confiscate, open, and read a defendant's mail. *Id.* at 515-516. A letter seized from a person awaiting trial is admissible as evidence. *Id.* at 517. However, "[p]ersonal papers, attorney-client correspondence, and personal diaries are not subject to scrutiny or search or seizure by prison officials absent a clear showing that papers or documents

seized contain information concerning ‘imminent danger to inmate safety or prison security’.” *People v Paul Williams*, 118 Mich App 117, 122; 325 NW2d 4 (1982).

Here, defendant failed to establish the factual predicate for his claim, and therefore, we cannot conclude that a remand is warranted. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). There is no evidence of record to establish that a letter to counsel was confiscated and read by the prosecutor. Moreover, defendant did not obtain an affidavit from his initial trial counsel or submit his own affidavit outlining the factual support for his claim. *Id.* However, the record does contain evidence that letters were sent by defendant to other witnesses that sought to dissuade the complainant from testifying. On the record, the prosecutor indicated that a claim of witness intimidation was being investigated in light of defendant’s letters. Accordingly, defendant failed to demonstrate entitlement to a remand. *Id.*

Affirmed.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly