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STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK EDWARD LEE, SR.,

Defendant-Appellant.

UNPUBLISHED

November 17, 2022

No. 352309

Genesee Circuit Court

LC No. 19-044543-FC

ON REMAND

Before: SWARTZLE, P.J., and SAWYER and LETICA, JJ.

PER CURIAM.

This case is again before us, now on remand by the Supreme Court. In our original opinion, we affirmed defendant’s convictions of first-degree criminal sexual conduct, MCL 750.520b(2)(b), and second-degree criminal sexual conduct, MCL 750.520c(2)(b). *People v Lee*, unpublished opinion per curiam (Docket No. 352309, issued 11/18/2021). Thereafter, the Supreme Court, in lieu of granting defendant’s application for leave to appeal, vacated “that part of the judgment of the Court of Appeals concluding that no prejudice resulted from trial counsel’s deficient performance in failing to object when the defendant’s son impermissibly opined on the defendant’s credibility” and remanded the case to us “for reconsideration of that ineffective assistance of counsel claim.”¹ *People v Lee*, ___ Mich ___; ___ NW2d ___ (Docket No. 163945, decided 9/21/2022). The Court is apparently of the belief that we failed to apply the correct standard for determining prejudice, stating as follows:

Although the Court of Appeals cited the correct stand for assessing prejudice under *Strickland v Washington*, 466 US 668 (1984), it failed to apply that standard. The defendant was not required to show that, but for counsel’s deficient performance, there was insufficient evidence to sustain his convictions. Rather, prejudice is

¹ Defendant had raised additional claims of ineffective assistance of counsel, but only this particular claim is before us on remand.

established where a defendant shows that “but for counsel’s deficient performance, there is a *reasonable probability* that the outcome would have been different.” *People v Trakhtenberg*, 493 Mich 38, 51 (2012) (emphasis added). On remand, the Court of Appeals shall resolve the defendant’s claim of ineffective assistance of counsel under this standard.

Admittedly, we could have been more explicit in stating that we concluded that there was no reasonable possibility that, even absent the deficient performance, there was no reasonable probability that a different outcome would have resulted. But we never concluded, nor stated, that defendant was required to show that there was insufficient evidence to support the conviction. Rather, after reviewing the victims’ testimony, we concluded that that evidence, even in the absence of defendant’s son’s testimony, would have resulted in conviction. Or, to be more precise, we now explicitly state that, given the other evidence against defendant, even had defense counsel objected at trial to the son’s testimony and had received a favorable ruling on that objection, in light of the remaining evidence, there is no reasonable probability that a different result, i.e., acquittal, would have resulted.

We again affirm defendant’s conviction.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Anica Letica