

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
June 23, 2011

v

SY KHUE XIONG,

No. 297285  
Oakland Circuit Court  
LC No. 2009-227445-FC

Defendant-Appellant.

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Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520b. He was sentenced to concurrent terms of 15 to 35 years in prison. Defendant appeals as of right. We affirm.

I

The charges in this case pertain to defendant's sexual abuse of his two stepdaughters while they were members of his household and between the ages of 13 and 16 years. At trial, the younger stepdaughter testified that defendant began fondling her when she was in the fourth grade. Over the next several years, the incidents continued and included digital penetration and cunnilingus. She explained that when she pushed defendant away or would not let him proceed, he hit her with his hands, metal and plastic hangers, and electrical cords. He used his hands when he hit her face and apparently used the other items when he hit her arms and legs.

The older stepdaughter testified that defendant began fondling her when she was in the sixth grade. Defendant forced her to perform oral sex on him when she was in middle school, and he began having sexual intercourse with her when she was in the ninth grade. She testified that defendant continued to force her to engage in these acts until she ran away from home at age 18. She protested many times. She described being hit with hangers and extension cords for a variety of things, including fighting back during the sexual assaults.

Pontiac Police Detective Paul McDougal, who interviewed defendant after the allegations of sexual abuse came to light, testified that defendant told him, through an interpreter,<sup>1</sup> that he only touched the younger stepdaughter's bare breast inadvertently during horseplay. Defendant acknowledged digitally penetrating her, but explained that he did so only "to see why she had not started her period." He admitted having oral sex and vaginal intercourse with the older stepdaughter, but claimed that the incidents were consensual. He also acknowledged that he had hit both girls with an electrical cord, but only because they had stolen something.

Defendant testified at trial and denied any inappropriate touching or oral sex with the younger stepdaughter. He testified that he only inserted his finger into her vaginal area to check why her menstrual cycle had not yet started and not for any sexual purpose. Defendant admitted having sexual intercourse with his older stepdaughter, but contended that it was consensual.

## II

Defendant first argues that he was denied the effective assistance of counsel. We find that counsel erred in some respects, but hold that the errors did not result in prejudice.

The issue is preserved only to the extent that mistakes are apparent from the record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).<sup>2</sup> In reviewing a claim of ineffective assistance of counsel, we may not substitute our judgment for that of counsel regarding matters of trial strategy, or assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). We review de novo the ultimate question whether counsel's ineffective assistance deprived a defendant of his constitutional right to counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

"Generally, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009), citing *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "Defense counsel is given wide discretion in matters of trial strategy because many

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<sup>1</sup> Defendant, who is originally from Laos and has lived in the United States for 30 years, required the services of a Hmong interpreter throughout the proceedings. Kia Ly, the interpreter who translated for defendant during the initial interview with Detective McDougal, testified at trial that she reviewed the detective's notes of the interview and found that they fairly and accurately depicted the conversation that took place.

<sup>2</sup> This Court denied defendant's motion to remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

calculated risks may be necessary in order to win difficult cases.” *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). “A failed strategy does not constitute deficient performance.” *Petri*, 279 Mich App at 412.

Defendant argues that counsel had him waive a jury trial. However, defendant clearly indicated on the record that he wished to waive the jury. The concept of the jury was thoroughly explained and defendant was advised that only the court, as opposed to 12 jurors, would have to be convinced of his guilt. Moreover, the court facilitated defendant consulting with his daughter (not one of the victims) confidentially, in his native language, before making a final decision. Defendant then reiterated that he wished to waive the jury and confirmed that he was neither forced nor threatened to do so, nor promised anything. Defendant also signed a waiver of jury form and verified that he did so freely. Defendant has not established that counsel made this decision for him or coerced him into making it.

Defendant next asserts that counsel could have called witnesses other than himself. Defendant does not, however, identify any other potential defense witnesses or indicate how any other witnesses would have testified.

Defendant argues that counsel could have questioned the victims’ motives and suggests that corporal punishment might have been a basis for their accusations. However, defendant admitted the facts establishing two of the crimes. Challenging the victims’ motives for making additional accusations would not likely have led to a different result. Moreover, counsel might have believed that such a strategy would be ill advised. That defendant engaged in corporal punishment was already on the record, and there is no reason to believe that additional questioning would have served any greater benefit.

Defendant argues that counsel failed to move to suppress his admissions to Detective McDougal. However, counsel conducted a voir dire examination of Detective McDougal and cross-examined Ly relative to the voluntariness of defendant’s statements. The questioning revealed that Detective McDougal wore plain clothes when interacting with defendant and drove an unmarked car with no interior cage or other markings of it being a police vehicle, that defendant was not handcuffed and was voluntarily escorted to the police station and taken immediately to an interview room, that he was cooperative, and that he was affirmatively told he was free to leave and was not under arrest. Ly testified that defendant did not indicate at any time that he wanted to leave or that he felt uncomfortable. A confession is admissible if it “is made freely, voluntarily, and without compulsion or inducement of any sort.” *People v Daoud*, 462 Mich 621, 631; 614 NW2d 152 (2000) (citation omitted). There being no evidence of compulsion or inducement, a motion to suppress likely would have been futile.

Defendant takes issue with the fact that counsel did not challenge the admission of evidence under MCL 768.27a. However, he does not identify any basis for challenging the admission of evidence of uncharged conduct under this statute.

Defendant next asserts that counsel failed to cross-examine any witnesses. However, counsel cross-examined the older stepdaughter, Detective McDougal, and Ly. Counsel did not cross-examine the younger stepdaughter due to a trial strategy he explained on the record, stating:

there were some things said that could be argued in closing argument with regard to [the younger stepdaughter's] statements, and if I were to cross-examine her, I believe that would have opened up other lines of questions for rehabilitation with the prosecution.

Presumably, the “statements” referred to by counsel was the younger stepdaughter’s testimony that defendant’s tongue was on, not in, her vagina. Counsel’s trial strategy was not sound, as discussed below. Defendant has not established, however that cross-examining the younger stepdaughter would have brought any additional evidence to light or been effective.

Further, contrary to defendant’s claim, counsel made short opening and closing statements. During closing, counsel sought to refocus the court on the actual charges. He argued that the digital penetration of the younger stepdaughter was not for sexual purposes; however, the court correctly noted that this was not an element with regard to a charge of penetration. See *People v Szalma*, 487 Mich 708, 725-726; 790 NW2d 662 (2010); MCL 750.520b; MCL 750.520a(r). Counsel noted defendant’s denial of oral sex with the younger stepdaughter and argued that, based on her testimony that defendant’s tongue was on but not in her vagina, there was no evidence of penetration. However, defendant needed only to penetrate the labia, not the vagina. See *People v Bristol*, 115 Mich App 236, 237-238; 320 NW2d 229 (1981). There was evidence supporting penetration of the labia. Further, counsel asserted, erroneously, that the older stepdaughter had not testified regarding digital penetration.

Counsel erred in devising a strategy and argument based on mistakes of law and fact. However, defendant cannot establish a reasonable probability that, but for counsel’s errors, the result would have been different. Before counsel became involved in the case, defendant admitted to two of the crimes, apparently thinking they were defensible. Given these admissions, in addition to the testimony of the stepdaughters, it is highly unlikely that defendant would have been acquitted but for counsel’s errors.

### III

Defendant next argues that his motion to remove counsel and implicit motion for a continuance to obtain new counsel should have been granted. We disagree.

At the beginning of the second day of the two-day trial, defendant requested that his attorney, whom he had privately retained, be removed as his counsel. By way of explanation, defendant tendered a letter that is not in the record, which he had asked a person who was incarcerated with him to write on his behalf. However, the letter apparently mirrored accusations made in a grievance defendant filed against counsel, adding only the concern that counsel had not cross-examined the younger stepdaughter. Counsel noted that the grievance would have given him grounds to withdraw, but he did not think doing so would be in his client’s best interests. He advised that he had received letters written on defendant’s behalf by the same person who had written the letter tendered to the court. He said that after receiving such letters he spoke with defendant and was assured everything was fine, only to receive more letters. Counsel’s impression was that the person writing the letters for defendant was giving defendant

very bad advice. Counsel noted that the case was difficult, that he had negotiated strongly for defendant, that he had made some “shrewd moves procedurally,”<sup>3</sup> and that he had protected defendant’s interests to the best of his ability. The trial court indicated that defendant’s “jailhouse attorney” was not giving good advice and concluded that it was not “going to require [counsel] to withdraw . . . at this late date.”

We review a trial court’s decision affecting a defendant’s right to counsel of his choice for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). We also review a trial court’s decision on a motion for a continuance for an abuse of discretion. *People v Steele*, 283 Mich App 472, 484; 769 NW2d 256 (2009). “A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.” *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

The Sixth Amendment of the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . the assistance of counsel for his defense.” See also Const 1963, art 1, § 20. The United States Supreme Court has held that “an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him.” *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006). But this right is not absolute. See *id.* at 151-152. A trial court has “wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar.” *Id.* at 152 (citations omitted).

“When reviewing a trial court’s decision to deny a defense attorney’s motion to withdraw and a defendant’s motion for a continuance to obtain another attorney, we consider the following factors: (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court’s decision.” [*Akins*, 259 Mich App at 556, quoting *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).]

Here, defendant raised a constitutional right—his right to the counsel of his choice. But the trial court indicated that defendant’s request for new counsel was premised on bad advice from a “jailhouse attorney,” suggesting there was no bona fide dispute between defendant and counsel. Even if there were a bona fide dispute, however, defendant was negligent in asserting the right mid-trial. All of the reasons defendant gave for requesting new counsel, but for counsel’s failure to cross-examine the younger stepdaughter, had been previously identified by

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<sup>3</sup> Apparently, counsel was referring to the decision to waive the preliminary examination so that additional charges would not be lodged against defendant. The prosecutor indicated, and defense counsel confirmed, that at the district court level the prosecutor informed defense counsel that if a preliminary exam were held, the prosecutor could add “a great deal more charges based upon information” provided by the victims.

defendant, yet he waited until the second day of trial to make the request. Moreover, defendant has not established that any prejudice resulted from the trial court's decision. Under these circumstances, the trial court did not abuse its discretion in denying defendant's request to remove counsel.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Jane M. Beckering