# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 23, 2011 |
| v | No. 297577<br>Genesee Circuit Court |
| GREGORY ALLEN ROSEBUD,<br><br>Defendant-Appellant. | LC No. 08-024092-FC |

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

PER CURIAM.

Defendant was charged with four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c); breaking and entering a building with the intent to commit first-degree CSC, MCL 750.110; and possession with intent to deliver an imitation controlled substance, MCL 333.7341(3). After a jury trial, defendant was acquitted of all four counts of first-degree CSC. He was convicted of the lesser offense of entering without permission, MCL 750.115(1), and possession with intent to deliver an imitation controlled substance. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to prison terms of 93 days for the illegal entry conviction and 34 months to 15 years for the possession with intent to deliver an imitation controlled substance conviction. Defendant appeals as of right. We affirm.

Defendant asserts that defense counsel was ineffective for failing to object, failing to move to strike, or failing to move for a mistrial following the testimony of Trooper Stokes wherein he indicated that he believed defendant was being dishonest with him at times during his conversation with defendant. A defendant must "make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes reasonable hypotheses consistent with the view that his trial lawyer represented him adequately." *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), quoting *People v Jelks*, 33 Mich App 425, 431; 190 NW2d 291 (1971). When there is no evidentiary hearing or motion for a new trial at the trial level, review is limited to the errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). In this case, defendant did not move for a new trial or seek an evidentiary hearing at the trial court level. Therefore, review is limited to errors apparent on the record.

To establish a claim for ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that

but for counsel's ineffective assistance, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687–688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Moreover, this Court will not substitute our judgment for counsel's regarding matters of trial strategy. *People v. Kevorkian*, 248 Mich App 373, 414; 639 NW2d 291 (2001). Additionally, counsel is not ineffective for failing to make a futile motion. *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008).

Defendant objects to the following colloquy between the prosecutor and Trooper Stokes after the prosecutor asked about defendant's general demeanor as he was talking with Trooper Stokes:

> A: I don't know if I would use the term calm, but he was lucid. I mean, he could tell what was going on, he understood everything. We had conversation where he responded to my questions normally. At times, you could tell he was being dishonest with me when he was talking to me.
>
> Q. What are you saying – basing that statement on?
>
> A. I've been sent to school such as what they call Reid and interviewing and interrogation schools where they teach you some of the body language that people use when they lie or when they are dishonest.
>
> Q. What body language was he displaying?
>
> A. From memory, his eyes would flash either up and to the right, which is a sign that they are looking back into the creative part of their brain. It sounds a little funny but. Looking away from me when answering questions. Hesitation in their voice.

During cross-examination of Trooper Stokes, defense counsel clearly attempted to discredit Stokes' testimony that defendant's demeanor suggested that he was being dishonest:

> Q. All right. And then you also mention that when you were talking to him [defendant], and I – if I took this in my notes down correctly, that when you talked to him you could tell he was being dishonest, so that – that's what you testified to, right?
>
> A. That's what I believed, yes.
>
> Q. And you mention that – if I took my notes correctly, that based on his body language –
>
> A. Correct.
>
> Q. And that memory –

A. That's part of it.

Q. And that memory, his eyes would flash?

A. Right.

Q. And that he was looking away?

A. Correct.

Q. And that there was hesitation?

A. Correct.

Q. All right. That information, in your report when you talked to – when you're talking about interviewing Mr. Rosebud, is that information in your report?

A. No.

Q. You're just remembering that as you sit here today?

A. Correct.

Q. All right. You also mentioned, that I had noted, something called the Reid technique?

A. That's – yes.

Q. And we're talking about the John E. Reid and Associates?

A. I believe so, yeah.

Q. And did you attend any of their seminars?

A. I have – I have received some of the Red training, yes.

Q. And which ones have you received?

A. Ah, through – well, he's now a Captain, Dan Miller, from the Michigan State Police.

Q. So when you did it, was this something done by actual John E. Reid and Associates their self, themselves, or someone who actually got their training from John E. Reid?

A. No, this is someone who had – would have gotten their training from the Reid Association.

Q. Reid's. So you didn't attend any of the 3 day interview interrogation program offer by John E. Reid and Associates?

A. No, sir.

Q. Didn't attend the one day advance program?

A. No, sir.

Q. Didn't attend the 4 day combined program?

A. No, sir.

Q. All right. So when we're talking about the Reid technique, it involves 3 different components, correct?

A. Correct.

Q. And what are the components?

A. Well, you have to – the body language, the eye movement, the voice fluctuation.

Q. So when you're analyzing that, well why don't you let me put the question to you this way then. So the Reid technique, as far as interrogation, you know what the 9 steps of it are, correct?

A. Not specifically. I know that I've been trained in recognition of persons being deceitful by using some of the Reid technique.

Q. All right. And you're being trained by that person, you didn't take the course yourself, this is by someone's training?

A. That's correct.

Q. So as far as the actual steps of the Reid technique, if you were taking a test you couldn't sit down and write down on a piece of paper what steps one through nine were?

A. No sir, I couldn't.

Q. You couldn't sit there and say that, oh well, the actual components are factual analysis interviewing the interrogation, you just know what someone else had told you?

A. Correct.

Q. All right. And other than what you had received from Captain – I'm sorry, the name one more time?

A. Daniel Miller.

Q. Other than Captain Dan Miller, have you received any other training?

A. Ah, I've been to interview schools, yes, given through the Michigan State Police.

Q. And how many of those have you attended?

A. Ah, a couple.

Q. More than 3?

A. 2 or 3.

Q. And when's the last time you attended one?

A. It's been several years.

Although defense counsel did not object to Trooper Stokes' testimony on direct examination, defense counsel's strategy was clearly to cross-examine Trooper Stokes regarding his lack of qualification for forming an opinion that defendant was not being honest "at times" during his conversation with Trooper Stokes. Contrary to defendant's suggestion, defense counsel's performance did not fall below an objective standard of reasonableness.

Defendant also contends that defense counsel was ineffective for failing to object to the following remark during the prosecutor's rebuttal closing argument:

> Trooper Stokes did not say that the only reason he's saying that Mr. Cook – excuse me – Mr. Rosebud was not being truthful was because he got trained by somebody who went to the Reid School. He said he conducted thousands of interviews – excuse me, hundreds of interviews of both victims and defendants. And he's familiar with body language

This remark was made in response to defense counsel's closing remarks regarding Trooper Stokes' opinion that defendant was lying:

> And that's how Trooper Stokes knows that he was lying. Well, let me rephrase that. Trooper Stokes also knows that he was lying because body language, eyes flashing, hesitation, because he's been training by somebody who's been trained in observing body language. And I asked him about that. I go, where's that in your report? Well, it's not in there.
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> ***
>
> But yet the most important event that we're talking about, I'm gonna testify to you from memory about that. Trooper Stokes, as I said, his memory, let's think about this for a second. One month after the event he can't remember the most

> important detail he has to testify down at District Court, under oath. He can't remember that. But sixteen months later he can come into court and tell you I remember this very clearly.

Taken in context, the prosecutor's comment was not improper and required no objection by defense counsel. The allegedly improper comment was made during rebuttal, and was in response to defense counsel's closing statement regarding the absence in Stokes' police report of any mention that defendant was being dishonest while talking with Stokes. The prosecutor's remark was a legitimate comment on the evidence, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Defense counsel was not ineffective in failing to object to this remark. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

Even assuming that defense counsel's assistance fell below an objective standard of professional reasonableness, the result of the proceeding would not have been different had counsel raised an objection. Defendant was only convicted of illegal entry and possessing with intent to deliver an imitation controlled substance. Overwhelming evidence was presented to support each conviction. Indeed, defendant did not dispute that he supplied what turned out to be imitation crack cocaine to Cook. Additionally, defendant admitted to the police that he had been in the house, and evidence was presented that the shoe print on the door that had been kicked in matched defendant's shoe print and that the home owner did not give anyone permission to enter the house.

Defendant next argues that he is entitled to have unproven criminal sexual conduct allegations stricken from his presentence information report. The trial court's response to a claim of inaccuracies in the presentence report is reviewed for an abuse of discretion. *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008).

Defendant objected at sentencing to the inclusion, in the section entitled, "Evaluation and Plan" in the PSIR, to the statement that

> In July of 2008 CSC First allegations surfaced after it was reported that the defendant physically assaulted the mother of his children and forcibly raped her. The case was brought before the Prosecutor's Office and the warrant was denied.

Defendant asked that this sentence be stricken on the ground that the warrant was denied and defendant never faced any charges on the matter. The prosecutor responded that the sentence was factually accurate, and defense counsel then asked that it be placed on the record that "the prosecutor's office thought it was so weak a case that they didn't even bother bringing a warrant on the matter." The prosecutor then stated that "[defense counsel] has no idea why we denied it. And it's because DNA is still pending." The court stated that it would "leave it just like it is. Warrant denied."[1]

[1] This arrest is also listed in the PSIR under "Criminal History." Defendant did not raise an objection to this entry in the criminal history.

Defendant also objected to a paragraph under "Agent's Description of the Offense" that described the victim's version of the events on the ground that "the jury found out that that was not what happened. They determined that's not what happened." The following colloquy then occurred

> PROSECUTOR: That's not correct. The jury did not determine that didn't happen.
>
> THE COURT: That wasn't – I wouldn't go that far. I think I'll leave that in there.
>
> DEFENSE COUNSEL: Well, as far as the sexual –
>
> THE COURT: The defendant was found not guilty but that doesn't mean that they determined none of this in this paragraph happened –
>
> DEFENSE COUNSEL: Well, then we'll go through and go to the point where it stated that as far as that Kelly told him she had no money at which time she started giving him some head and he'll let you leave, that's one of the allegations that he was charged with in the sexual assault and the jury found him not guilty on that charge.
>
> PROSECUTOR: There's a big difference between not guilty and innocent. The jury did not find him innocent of anything.
>
> DEFENSE COUNSEL: Well, your Honor, the last time I checked, it's impossible for a jury to find anyone innocent of any charge whatsoever. He's presumed innocent.
>
> PROSECUTOR: And you are allowed to keep things that even if the jury finds him not guilty, you are allowed to consider that in sentencing the defendant.
>
> DEFENSE COUNSEL: We would just note for the record, your Honor, that the jury found him not guilty on the CSC charges.
>
> THE COURT: All right. All right. I think we have that established. There's no charge before the Court relating to criminal sexual conduct here today.

With regard to each of these offenses, defendant now maintains that the information should have been stricken from the Evaluation and Plan and the Agent's Description of the Offense, respectively, because defendant was not convicted of the offenses.[2]

[2] Information regarding these offenses is also included in the "Criminal History" portion of the PSIR. The defendant's criminal history may include arrests without convictions. *People v Cross*, 186 Mich App 216, 218; 463 NW2d 229 (1990).

When the accuracy of the presentence report is challenged, the trial court must allow the parties to be heard and must make a finding as to the challenge or determine that the finding is unnecessary because the court will not consider it during sentencing. MCR 6.425(E)(2); *People v Waclawski*, 286 Mich App 634, 689-690; 780 NW2d 321 (2009).

A PSIR must, depending on the circumstances of the particular case, include various components, including a "complete description of the offense and the circumstances surrounding it[.]" MCR 6.425(A)(s). At the time of sentencing, the court must give each party an opportunity to challenge the accuracy or relevancy of any information contained in the PSIR. MCR 6.425(E)(1)(b). While defendant argues that he was not convicted of the relevant CSC offenses, defendant has not shown that the actual information in the report is inaccurate. Rather, he objects to its inclusion simply because a warrant was not issued with regard to the rape arrest, and because he was acquitted of the 4 CSC charges. Defendant's objection is without merit. The evaluation and plan merely states that defendant allegedly raped the mother of his children but that a warrant was denied. The agent's description of the offense does not relate Cook's statements as established facts, but sets forth the facts underlying the officers' response to the scene, as well as Cook's statement of what occurred as required by MCR 6.425(A)(2). The information was not irrelevant or inaccurate. It was supported by the victim's trial testimony as well as that of the investigating officers and formed the basis for the charges on which defendant was tried. Consequently, the PSIR accurately reflects that defendant was arrested in July 2008 for first-degree CSC but that a warrant was not issued. The PSIR also accurately reflects that defendant was charged with, but acquitted of, four counts of CSC with regard to the present case. The trial court duly noted that the PSIR indicated that defendant was not convicted of any of these offenses, and there is no indication in the record that the trial court relied on conduct by defendant for which he was not convicted in sentencing defendant.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering