STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 16, 2013
v	No. 304393 Oakland Circuit Court
THOMAS PATRICK CUPPLES, Defendant-Appellant.	LC No. 2010-233457-FC

Before: BORRELLO, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of second-degree criminal sexual conduct (CSC), for engaging in sexual contact with a person at least 13 but less than 16 years of age who is a member of the same household, MCL 750.520c(1)(b), and engaging in sexual contact with a person less than 13 years of age, MCL 750.520c(1)(a). Both convictions involve the same victim. Defendant was sentenced to 71 months to 15 years' imprisonment. Finding no error warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The victim in this case is defendant's stepdaughter. The victim, her mother (Reito), and her brother (Michael), lived with defendant until August 2010, at which time the victim told Reito that defendant had been sexually assaulting her. The victim, who turned 13 years old in April 2010, said that on "[m]ore than five, but . . . less than 20" occasions beginning "[a]round the summer of fifth grade," defendant "would touch [her] when [she] was sleeping." The assaults would occur in her bedroom at night. The victim would awake to defendant "pulling [her] shorts aside," and defendant "would move [her] legs apart if they weren't apart," and "take [her] ankles and stretch them to the side." Defendant would expose the victim's "vaginal area," and he "touche[d her]" with "his fingers" and "rub[bed] them around on the outside of the skin, . . . and then he would rub them on the inside" of her vagina for "[p]robably about five minutes." In the time leading up to when the victim revealed the abuse to Reito, she noticed that the touching had progressed and that defendant "would start rubbing [her] butt. She pretended to be sleeping during the assaults because she was "afraid [defendant] might . . . attack [her,] . . . or tell [her] to not . . . tell anyone[,] or . . . rape" her, so she "just lay there and tr[ied] not to move." When defendant stopped touching her each time, he would stand in the doorway for several

minutes before leaving. The following day, the victim would "try to act as normal [sic] as possible" around defendant.

The victim was not aware of every occasion on which defendant assaulted her because defendant gave her "sleeping pills some days[,] and he would give [her] hot chocolate with white powder," and she did not know what the powder was. When she took the pills, which she estimated happened about three times, she would "feel drowsy," "fall asleep right away," "sle[ep] really deep," and "didn't wake up during the night." During the winter months, defendant would give the victim hot chocolate at night, about "once a week," "[m]ost of [the] time" without the victim having asked for it. The victim began to discard the hot chocolate defendant gave her when she noticed the white residue and odd taste, "[b]ut then [defendant] would always tell [her] the rule was [she] had to drink the hot chocolate no matter what[,] and [she] had to finish it. . . . He never told [her] a reason[;] . . . she had to drink it." When she drank defendant's hot chocolate, the victim "felt sleepy . . . and [would] go to sleep."

The victim also testified that defendant once gave her a "miniature bottle[]" of wine, telling her to drink it, and "gave [her] a shot of something" afterward. The victim did not want to drink the wine or the shot, but did anyway, "[b]ecause [defendant] told [her] to and [she] was kind of scared of him." On another occasion, when the victim was 13 years of age, defendant spoke to the victim about masturbation. The conversation took place in her bedroom, with the door closed, and lasted about 20 minutes. Defendant did not touch the victim, but "showed [her] how to rub your vaginal area to make you feel better."

The victim testified that prior to the abuse she and defendant shared a close relationship. She admitted that her relationship with Reito and defendant was strained in the summer of 2010 when she revealed the abuse. They fought about the victim's misbehavior, the clothes she wore, and the fact that the victim seemed to have withdrawn. The victim hesitated to tell anyone about the assaults "[b]ecause [her] house has been good, like nothing bad has happened," and they "had a pretty good life." She initially doubted that Reito would believe her, and "knew [her] life was going to be a lot different" after she reported defendant.

On August 6, 2010, the morning after the victim and Reito had a fight about the victim's reluctance to talk to Reito and how she had been "wanting to hang out with friends more often," the victim told Reito about defendant's having assaulted her.

Reito testified that the victim approached her on the patio and told her, "I hate Tom." After their discussion wherein the victim revealed the abuse, Reito gathered the victim and Michael and left the house. Reito returned to the home two days later with a police escort to take "as much as [she] could." She returned to the house a second time on August 13, 2010, accompanied by friends and police, to collect more personal belongings. She found that the locks had been changed. With police supervision, Reito's friend replaced the lock on the front door, and they went inside. Reito saw that the victim's bedroom had been "completely cleaned out," "[l]ike she never existed." The victim's belongings had been placed in garbage bags and moved to the garage. The family computer, which they called "[defendant's] computer," was missing, as was its monitor, and the second computer, which had previously been upstairs, was on the first floor.

A police search of the victim's room included use of an ultraviolet light, revealing bodily fluids on a section of carpet. Testing revealed the presence of semen matching a buccal swab provided by defendant.

Two jailhouse calls defendant made to his daughter from a previous marriage, Colleen Fox, as well as his sister, Candy Shinabarger were played for the jury. The first call was placed on August 12, 2010, to the marital home where Fox and Shinabarger had arrived to help defendant. Defendant repeatedly referred to "assignments," "homework that you and Tommy [Thomas Patrick Cupples, Jr., defendant's son] and [Shinabarger] have to accomplish tonight," and a "list of things to do," which Fox and Shinabarger were to discuss with defendant's attorney. He asked Shinabarger if she was "clear that they have to be done tonight," and she said, "Yes, the first thing we're going to do is move the comput[—,]" and defendant interrupted, saying, "Don't, you can't, this is all recorded." He then said, "I just need to know that you [two] understand what your homework is." She said, "We do, we do."

The second call was placed on the morning of August 13, 2010, to the same location as the first. The conversation provided, in pertinent part:

> *Shinabarger*: . . . I've done a lot of laundry and washed [the] quilts [t]hat I found in that back closet.
>
> *The Defendant*: Did you get the other assignments completed?
>
> *Shinabarger*: Oh, yeah, and[,] ah.
>
> *The Defendant*: I mean like every square inch of . . .
>
> *Shinabarger*: Yep.
>
> *The Defendant*: Cleaning done?
>
> *Shinabarger*: Yep, everything's done[,] and ah, it's all prepared for our company this weekend and it's also prepared for [Tommy] when he comes out here to be with you.
>
> *The Defendant*: Oh, outstanding.
>
> *Shinabarger*: Yeah, yep, so I've taken[,] ah, you know[,] things to the basement again, you know[,] bagged up[,] so . . .

Jerry DeRosia, a forensic computer investigator with the Oakland County Sheriff's Office, testified that he received the computer that was taken from the den in the marital home. He noticed that the hard drive was "very clean," meaning that "most of the unallocated space [on the hard drive] seemed to be zeroed out." DeRosia expected to find more data in "temporary internet files" than he actually did, considering that the computer had been used regularly by four people, each of whom used the internet. DeRosia uncovered "a lot of pornography," including duplicates, comprising "close to half" of all of the images on the computer. DeRosia noticed several "Flash cookies" on the computer, which are small files associated with Adobe Flash

Player that are routinely placed on a computer without the user's knowledge when the user visits webpages that feature Flash software. DeRosia found Flash cookies for sleepassault.com, depicting "teens being . . . sexually assaulted while they sleep and don't wake up," as well as mystepdadmademe.com, depicting "girls having sex with their stepdads," featuring images of a "[y]oung adult" female and an "older" male.

Defendant testified at trial and strenuously denied the allegations against him. He testified that the victim was upset with him and with Reito after being told she could not date until she turned 16 years old, and that, aside from the rule pertaining to dating, there were no problems between defendant and the victim. His relationship with Reito in the months leading up to his arrest, however, "wasn't as good as the previous years." They discussed the possibility of divorce, and fought over finances shortly before defendant was arrested. Reito withdrew money several times from a retirement account in his name without his permission, amounting to "over a hundred thousand dollars," and placed the money in two checking accounts that Reito and defendant shared.

Defendant explained that "homework and assignments" alluded to in the jailhouse phone conversation "was basically to . . . conduct research into financial matters," because "[b]efore [defendant] was arrested, [he] had cause to believe that this was somehow related to . . . financial matters." He interrupted Shinabarger when she began to say the word "computer" because defendant "wanted to try to have [Shinabarger and Fox] research and get their hands on . . . financial information from . . . all of the accounts that Reito and [defendant] had together," and "there was information on the computers that [defendant] felt sensitive enough that [he] did not want the whole world to know about." Defendant denied tampering with or erasing data on the family computers, having had "nothing" to do with either of the computers after he was arrested.

Defendant further explained that he used the words "every square inch [of] cleaning done" in the conversation with Shinabarger because "the situation of the house was not fit for company to be arriving[, so he] wanted to make sure that . . . the house was cleaned." He also said that "it was [his] intent, too, that when [he] arrived back at the house [from jail] under the conditions that [he] was experiencing, [he] did not want to see the house in the same shape that it was in before [he] left."

Defendant also presented his own computer forensics expert, Larry Dalman. Dalman, a licensed private investigator, conducted his own analysis of the family computer found in the den. Dalman had been told that defendant, an ordinance enforcement officer for Orion Township, had been undertaking a criminal investigation into a person named Patrick Damon, and Dalman found a folder labeled "Pat" that contained "quite a bit of pornography." As part of the investigation, according to Dalman, defendant "took a [CD] home with him to make a copy" and "loaded it onto his hard drive." Dalman testified that, as part of that process, cookies on the CD may have been placed on defendant's computer, even if no person in defendant's household had visited a website associated with those cookies.

Defendant attempted to discredit the victim's allegations through forensic psychologist Terrence Campbell. Campbell reviewed the Felony Information, the reports of the Oakland County Sheriff's Office and Oxford Township Police Department, the victim's recorded interview with Care House, and the transcript of the August 27, 2010, preliminary examination.

He opined that the victim may have "report[ed] a false memory, and genuinely . . . believe[d] in the accuracy of the false memory that she reported." He "found no evidence . . . of the [Care House] interviewer attempting to rule out these allegations," noting that, for example, the interviewer did not ask the victim a question to the effect of, "Sometimes people get mixed up about these kinds of situations, and . . . report erroneously[;] could this have happened to you?" He said that Reito "should have been interviewed . . . [with] a hypothesis-testing approach, attempting to . . . rule out the allegations."

Reading to the jury one of the cards the victim gave defendant for Father's Day, Campbell opined that "these are not the kinds of thoughts and sentiments that a daughter sexually abused by her step[]father expresses." The victim included language such as "You understand me; you are warm; you are supportive, and I appreciate you so much for these things."

Several other witnesses testified on defendant's behalf, including two friends, his ex-wife Leslie Lawson, Fox, and Shinabarger.

The jury acquitted defendant of first-degree CSC, but convicted defendant of two counts of CSC. He was sentenced to 71 months to 15 years' imprisonment. Defendant filed his claim of appeal with this Court on June 6, 2011.

On October 31, 2011, defendant filed a motion for a new trial, arguing that his trial counsel was ineffective for failing to object to the prosecution's expert witness in computer forensics, for failing to shield his own computer forensics expert from impermissible impeachment, and for failing to enter into the record proper evidence of defendant's good character. The trial court denied the motion on January 9, 2012, finding that, even if counsel's performance was unreasonable, defendant could not show that he was prejudiced by any of the errors, and it was therefore "not necessary for the Court to determine whether defense counsel was negligent . . . , or to conduct an evidentiary hearing into why defense counsel did not make certain objections." We denied defendant's motion to remand for a *Ginther*[1] hearing "for failure to persuade the Court of the necessity of a remand at this time." *People v Cupples*, unpublished order of the Court of Appeals, entered February 9, 2012 (Docket No. 304393). We now address the merits of defendant's appeal.

II. 404(B)

Defendant first argues that evidence that defendant possessed over one million pornographic images on a shared computer should have been excluded by MRE 404(b) and MRE 403. We disagree.

"A trial court's discretionary decisions concerning whether to admit or exclude evidence will not be disturbed absent an abuse of that discretion. When the decision involves a preliminary question of law[,] however, such as whether a rule of evidence precludes admission,

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973)

we review the question de novo." *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010) (internal quotations and footnote omitted).

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.

This is a "rule of inclusion rather than exclusion," *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). "Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity." *Mardlin*, 487 Mich at 615-616 (emphasis in original). Other-acts evidence must satisfy a four-prong standard: (1) the evidence must be offered for a proper purpose under MRE 404(b), (2) it must be relevant under MRE 402 as enforced through MRE 104(b), (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, and (4) the trial court may, upon request, provide a limiting instruction to the jury. *Starr*, 457 Mich at 496. Evidence that is otherwise relevant "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *People v Mann*, 288 Mich App 114, 119 n 12; 792 NW2d 53 (2010).

At the hearing on defendant's motion in limine, the trial court found:

> First, the evidence is not offered simply to show the defendant was sexually attracted to young girls in general[,] but, rather, to show that [] defendant was sexually attracted to [the victim]. Thus, the admission of the photos and the [F]lash cookies would not violate the lustful disposition rule as articulated in [*People v Sabin*, 463 Mich 43; 614 NW2d 888 (2000)].
>
> Second, while defendant has suggested that his defense will focus on the credibility of the prosecution's witnesses and not on his own intent, defendant has not credibly rebutted the prosecution's argument [that] the evidence is relevant to rebut a claim of fabrication.
>
> Rather, the Court agrees with the prosecution, that the probative value of this evidence is not outweighed by its prejudicial effect at all nor to a substantial extent, particularly with respect to the issues of intent and fabrication.

Defendant argues that evidence that defendant possessed over one million pornographic images was irrelevant and "led the jury to conclude that [defendant] was a pervert who acted in conformity with his deviant propensities." He maintains that the evidence did not reveal a specific sexual interest in, or intention toward, the victim in particular.

While defendant argues that the computer-related evidence was not admissible to establish defendant's intent, a guilty verdict for second-degree CSC requires "sexual contact," which is defined as "the *intentional* touching of the victim's or actor's intimate parts[,] . . . if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification," among other reasons. MCL 750.520c(1); MCL 750.520a(q) (emphasis added). Thus, evidence that tended to show that defendant had visited websites depicting young women being assaulted in their sleep, and young women engaging in intercourse with older men meant to be their stepfathers, was relevant to prove defendant's intent to touch the victim, his teenaged stepdaughter, while he thought she was asleep, for sexual gratification.[2]

Defendant argues that, even if the computer-related evidence was proper under MRE 404(b)(1), its probative value was substantially outweighed by the danger of unfair prejudice, and it should have been excluded under MRE 403. The trial court provided a limiting instruction before deliberations began, admonishing the jury to consider the computer-related evidence only to the extent:

> That the defendant specifically meant to contact . . . [the victim's] genital area[, t]hat defendant acted purposely—that is, not by accident, mistake, or that he misjudged the situation[, t]hat [the victim] and/or [Reito] did not fabricate the alleged acts. You must not consider this evidence for any other purpose. For example, you must not decide that it shows [] defendant is a bad person or that he's likely to commit crimes.

Jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Of the theories of admissibility offered by the prosecution for other-acts evidence, "only one needs to be a proper, noncharacter reason that compels admission," *Starr*, 457 Mich at 501, and the computer-related evidence in this case was admissible to demonstrate defendant's intent to obtain sexual gratification from touching the complainant's intimate parts.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel provided him with ineffective assistance because counsel failed to object to DeRosia's testimony linking defendant to the most deviant websites, and failed to protect his own computer forensics expert, Larry Dalman, from improper questioning. We disagree.

---

[2] Defendant's claim that intent was not at issue lacks merit, because every element of each charged offense is "at issue," *Sabin*, 463 Mich at 60, including the second-degree CSC element of "sexual contact," which requires the "intentional touching of the victim's . . . intimate parts." MCL 750.520c(1); MCL 750.520a(q).

The trial court denied defendant's motion for new trial and also denied defendant's request for a *Ginther* hearing. Instead, the trial court ruled that, even if counsel's performance fell below an objective standard of reasonableness, defendant could not show that he was prejudiced by any of the errors. "Whether [a] defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. We review for clear error a circuit court's findings of fact. We review de novo questions of constitutional law." *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012).

The United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). "To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Defense counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 674 (1984), and is given "wide discretion in matters of trial strategy," *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

1. DEROSIA

Defendant first argues that DeRosia was not qualified to opine that the presence of Flash cookies associated with pornographic websites necessarily meant that one of the computer's users had visited those websites. As did the trial court, we conclude that, even if DeRosia was not qualified to render such an opinion, defendant has failed to show that he was prejudiced.

MRE 702 provides:

> 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.

"MRE 702 incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 113 S Ct. 2786, 125 L Ed 2d 469 (1993)." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

DeRosia was undoubtedly an experienced computer forensic investigator. He testified that he is certified by the International Association of Computer Investigator Specialists, which requires about one year of training and examinations for recertification every three years, and was mentored by another forensic computer examiner as part of that training. He is certified, by the International Association of Computer Investigative Specialists, as a specialist in electronic

evidence collection, cellular phone forensics, and intrusion detection, and teaches computer forensics at Oakland Community College. He had, on "10 or 11" occasions, been qualified as an expert in computer forensics in Oakland Circuit Court, district courts, and federal district court. Significantly, he was experienced with EnCase, the forensic software that revealed the Flash cookies. However, he admitted to having no specific knowledge of Flash cookies before this case.

In denying defendant's motion for new trial, the trial court noted:

> Defendant takes issue with DeRosia's testimony that the presence of the flash cookies necessarily "means" that "somebody went to that site and viewed something that required a flash player to make." This testimony, Defendant argues, was incorrect, as Defendant's computer could have acquired the flash cookies by visiting another site that included content, such as banner advertisements using the flash system, from the "mystepdadandme.com" and "sleepassault.com." Thus, the testimony could have been excluded if a proper objection had been made.
>
> Defendant's objections to the testimony about what the presence of the flash cookies "means" appears to be legitimate, as it appears that the presence of the flash cookies does not necessarily imply that somebody went to "that site" and viewed its contents. This error also calls into question Detective DeRosia's qualifications to testify on this issue.

However, the trial court went on to conclude:

> But evidence regarding the flash cookies was only a small part of the prosecution's case. In addition, the prosecution provided testimony from the victim describing the assaults, as well as credible objective evidence (such as the semen recovered from the victim's bedroom) corroborating the victim's version of events and evidence of highly incriminating statements made by Defendant during his telephone calls from jail. Moreover, there is no claim that Detective DeRosia was not qualified to testify regarding other aspects of Defendant's computer, including indication that it had been "cleaned" to remove indications of how it had been used before it was turned over to authorities. Finally, the absence of evidence regarding flash cookies would not have undermined the credibility of any of the prosecution's other evidence.
>
> In this context, the Court does not see even a remote possibility that the jury would have acquitted Defendant if his trial counsel had successfully objected to Detective DeRosia's testimony regarding the flash cookies, much less the "reasonable probability" of such a result required to obtain relief on this basis. Rather, even if defense counsel was negligent in failing to object in this regard, such negligence cannot be said to call into question the reliability of the jury's verdict in this case. Thus, Defendant is not entitled to relief on this basis.

The victim testified that defendant assaulted her on several occasions while she pretended to sleep. Her testimony was corroborated by evidence of defendant's semen found on the carpet next to her bed, an indication that he masturbated either while or after he molested her. The fact that defendant would only touch the victim in her supposed slumber clarified his apparent interest in rendering her unconscious, whether by sleeping pills, spiked hot chocolate, or alcohol.

Even when she was awake, defendant's interest in the victim was apparent to Reito, if not the victim herself. Reito was bothered by two items of revealing clothing defendant purchased for the victim, and noticed that an uncomfortably large number of vacation and party photographs featuring the victim were deliberately focused on her buttocks. The victim testified that defendant engaged her in a perplexing conversation about masturbation, behind a closed door, when she was 13 years of age.

Defendant's attempt, from jail, to secretively direct his sister to remove the computer from the house using the code words "homework" and "assignments" suggests that he took responsibility for the computer's contents and did not want them revealed. Michael and the victim testified that defendant, who had the only password-protected account on the computer on the main floor, would hide his internet browser windows when he became aware that someone else was watching him use the computer. Michael could see that defendant was playing solitaire, but had minimized internet browser windows open at the same time.

Finally, defendant testified that, after receiving a text message from Reito that read, "Leave me alone, you sick . . . ," he stopped trying to contact Reito, Michael, and the victim, a peculiar reaction for a stepfather who claimed, at that point, not to have known about the complainant's allegations against him. Days later, the locks on the house had been changed, and the complainant's bedroom was "completely cleaned out," "[l]ike she never existed."

Given the overwhelming volume of evidence against defendant, it is not likely that the jury's verdicts would have been different but for trial counsel's alleged errors. Accordingly, defendant cannot show that he received ineffective assistance of counsel.

2. DALMAN

Defendant also argues that his trial counsel failed to shield Dalman from impermissible questioning by objecting when the prosecution expressed its intention to cross-examine Dalman about his sexually-oriented misconduct.

Before the jury was brought in on the fourth day of trial, the prosecutor informed the trial court that she had received, on the previous evening, Michigan State Police disciplinary records on Dalman. Dalman was disciplined in 2000 and 2002, for "engag[ing] in several inappropriate exchanges via e-mail," and visiting "a security officer's apartment while on duty and fail[ing] to document" the visit. Defendant prospectively objected to the prosecution's use of the disciplinary records during cross-examination because he received the records that day. The trial court overruled the objection, stating that, because Dalman was defendant's expert, it was defense counsel's obligation "to know your expert's background." Defense counsel preemptively questioned Dalman about his disciplinary record during direct examination. Dalman testified that he was disciplined for "an inappropriate e-mail" in which he asked a

California volunteer for a child pornography watch group to send him a nude photograph of her. He denied the allegations. On another occasion, he gave a security officer a lottery ticket, asking her whether she wanted to "get lucky." He said he was not disciplined for the second incident.

MRE 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

In its opinion and order denying defendant's motion for a new trial, the trial court stated:

> [T]he expert's history involves only employment discipline based on allegations that he inappropriately propositioned adult co-workers. The Court does not believe that a history of employment discipline for inappropriately propositioning adult co-workers in any way suggests that Defendant's expert had a "motive for conducting his investigation or slanting his testimony" to help a client who was charged with drugging and sexually assaulting a child he believed to be asleep. Thus, the misconduct for which Dalman was disciplined was not "similar" to the allegations against Defendant in this case, and this evidence would have been excluded under MRE 608 if a proper objection had been made.

The prosecution argues that, because defendant and Dalman were each retired police officers who faced allegations of improper sexual conduct that they disputed, questioning Dalman about the allegations on cross-examination was a proper method of establishing witness bias or interest. The case cited by the prosecution to support that statement, *People v Layher*, 238 Mich App 573, 580; 607 NW2d 91 (1999), aff'd 464 Mich 756 (2001), is not helpful, because the holding in *Layher* hinged more narrowly on "the fact that [the defendant's expert witness] had been accused and acquitted of *a crime* similar to that for which defendant was on trial." *Id.* at 581 (emphasis added). Here, the two types of misconduct are too different to have been relevant to the jury's determination of Dalman's bias or interest. Nevertheless, for the reasons previously stated, even if defense counsel's performance fell below an objective standard of reasonableness, defendant cannot show that he was prejudiced by the error, given the vast amount of other evidence against defendant.

III. FOURTH AMENDMENT VIOLATIONS

A. SEARCH OF THE HOME

Defendant next argues that the carpet sample on which his semen was found was obtained in violation of the Fourth Amendment, since the law enforcement scientists who removed it did not have valid consent to search the house. This argument is based on the premise that Reito lacked authority to consent to a police search of the house. We disagree.

"We review for clear error a trial court's findings of fact in a suppression hearing, but we review de novo its ultimate decision on a motion to suppress." *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). "A trial court's findings of fact are clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v McSwain*, 259 Mich App 654, 682; 676 NW2d 236 (2003).

The United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. "Searches conducted without a warrant are unreasonable per se, unless the police conduct falls under one of several specifically established and well-delineated exceptions." *People v Gonzalez*, 256 Mich App 212, 232; 663 NW2d 499 (2003). "'A consent to search permits a search and seizure without a warrant when the consent is unequivocal, specific, and freely and intelligently given.'" *People v Beydoun*, 283 Mich App 314, 337; 770 NW2d 54 (2009), quoting *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003). The prosecution has the burden of proving that consent was freely given by a person authorized to do so. *People v Malone*, 180 Mich App 347, 356; 447 NW2d 157 (1989). Generally, consent must come from the person whose property is being searched, or from a third party who possesses common authority over the property with joint access or control. *People v Brown*, 279 Mich App 116, 131; 755 NW2d 664 (2008). "Common authority" is based "on mutual use of the property by persons generally having joint access or control for most purposes...." *Id.* quoting *United States v Matlock*, 415 US 164, 171 n 7; 94 S Ct 988; 39 L Ed 2d 242 (1974). A third party without actual authority to consent may render a search valid if the police officer's belief in his or her authority to consent was objectively reasonable. *Brown*, 279 Mich App at 131.

In its opinion and order denying defendant's motion to suppress the search, the trial court surveyed several state-level cases from other jurisdictions, concluding that they "indicate[] that an estranged spouse who has vacated the premises only two or three days earlier retains authority to consent to a search of the premises, even where the spouse also removed personal possessions and began residing at another location." The trial court noted:

> The Court also notes that Reito granted consent to search the premises just one week after vacating the marital premises, and prior to the initiation of any legal proceedings regarding the parties' marriage or rights to joint property. Moreover, while it appears that she had already removed substantial amounts of her personal property from the premises at the time she gave her consent, it appears undisputed that personal property belonging to her remained on the premises. In this context, this Court finds that Reito's decision to vacate the premises following allegation, of sexual abuse on her daughter by the Defendant, did not constitute any sort of abandonment by Reito of her authority over the marital property. Therefore, Reito was legally entitled to consent to the police's search of the premises, and Defendant's motion to suppress must be denied.

While only defendant's name was on the title to the home, he and Reito had been married for a number of years. As defendant's wife, Reito maintained an interest in the home, especially absent a court order of exclusive occupancy. Alternatively, Reito had apparent authority to consent to a police search since the police reasonably believed that she had authority to consent as a resident of the house. She had shared the house with defendant, Michael, and the

complainant for seven years. She identified herself on a consent form as an "owner" of the house, and the address of the house was printed on her driver's license. The police knew that they were accompanying Reito both to search the house and to keep the peace between Reito, Shinabarger, and Fox. The officers likely understood that Reito had temporarily left the home in order to put distance between the victim and her alleged abuser.

Defendant argues that the fact that he changed the locks should have created an ambiguity in the minds of the police with respect to the question whether Reito had authority to consent to a search, but the police reasonably may have considered the changed locks part of a larger domestic dispute and not necessarily an indication that Reito lacked authority to enter. It was reasonable for the police to believe that Reito had authority to consent to their search of the house. See *Brown*, 279 Mich App at 131.

B. BUCCAL SWAB

Defendant next argues that the prosecution failed to establish probable cause to support the trial court's order compelling defendant to submit to a buccal swab of his cheek. Again, we disagree.

In reviewing a finding of probable cause to support a search warrant,[3] this Court asks "whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause." *People v Mullen*, 282 Mich App 14, 21-22; 762 NW2d 170 (2008) quoting *People v Martin*, 271 Mich App 280, 297; 721 NW2d 815 (2006). "Substantial basis" means that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Mullen*, 282 Mich App at 22.

At the time of the hearing on the prosecution's motion to compel defendant to submit to a buccal swab, the trial court was aware of the victim's preliminary examination testimony, wherein she testified that defendant touched her vagina and buttocks on several occasions while he thought she was sleeping. Defendant did not contest the prosecution's allegation that the Michigan State Police crime laboratory had analyzed a section of the carpet in the complainant's bedroom and found that it "tested positive for the presence of sperm."

Considering these facts, a "reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause." *Mullen*, 282 Mich App at 21-22. The presence of semen on the carpet next to the bed creates a reasonable inference that a man had ejaculated on that area. There was probable cause to support the trial court's decision to grant the prosecution's motion on the basis that "the defendant may have ejaculated during these encounters" and the DNA contained in the sperm sample collected from the carpet in the victim's room would match defendant's DNA.

[3] The prosecution notes in its brief, as it did in the trial court, that it filed a motion instead of a search warrant in order "to provide counsel for [defendant] notice of [the] request being made and an opportunity to respond."

IV. CUMULATIVE ERROR

Defendant next argues that the cumulative effect of several errors requires reversal. We disagree.

"We review this issue to determine if the combination of alleged errors denied defendant a fair trial." *People v Dobek*, 274 Mich App 58, 105; 732 NW2d 546 (2007). "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." *Id.* However, if no errors have been established, "there can be no cumulative effect of errors meriting reversal." *Id.*

Defendant challenged the prosecution's use of evidence found on a shared computer, the trial court's admission of expert testimony and its having allowed the prosecution to cross-examine defendant's expert regarding his disciplinary history, trial counsel's failure to make objections, Reito's authority to consent to a police search of the house, and the trial court's finding of probable cause to require defendant to provide a sample of his DNA to the prosecution. Because all of these issues lack merit, there is no cumulative effect of errors that requires reversal.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray