

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ROCKWELL MAIER,

Defendant-Appellant.

UNPUBLISHED

March 14, 2013

No. 307744

Kent Circuit Court

LC No. 11-005979-FH

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of aggravated indecent exposure, MCL 750.335a(2)(b), and indecent exposure by a sexually delinquent person, MCL 750.335a(2)(c). The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to eight to 15 years' imprisonment for the aggravated-indecent-exposure conviction and to 15 years' to life imprisonment for the remaining conviction. We vacate the conviction and sentence for aggravated indecent exposure and affirm the conviction and sentence for indecent exposure as a sexually delinquent person.

On April 20, 2011, the victim was in the parking lot of the D&W grocery store at 6425 28th Street in Cascade, Michigan, and saw defendant in his car. She had "no doubt" defendant was masturbating. She did not see defendant's penis or the skin in his pubic area, but she was purposefully not looking in that area. The victim went into D&W and hoped defendant would be gone when she came out, but he was not. When she returned to her car, she saw that defendant's pants were unbuttoned or unzipped and open in a V-shape, but his skin was covered by underwear. The victim reported the incident to Sergeant Donald Fehsenfeld, who was in a fire-marshall vehicle in the D&W parking lot. He contacted Kent County Dispatch. Officers responded, and defendant denied being involved in indecent exposure or touching himself.

Evidence of previous incidents involving defendant was presented. On June 15, 1999, defendant was in a pickup truck in the parking lot of the Kohl's department store on Center Drive in Walker, masturbating, waving lingerie out the window, and yelling at women. On August 22, 2000, defendant was in his parked car on Pearl Street in Grand Rapids and was masturbating. On July 18, 2001, defendant was in his car in the parking lot of a Target store on Alpine Avenue in Walker. He was exposed from the waist down and was rubbing a white silky nightgown. On August 18, 2003, defendant was masturbating in a car in the Kohl's store

parking lot on Center Drive in Walker. On September 13, 2004, defendant was in a parked car on Ottawa Street in Grand Rapids, masturbating.

Before trial started, defense counsel indicated that he wanted to call Jeff Dwarshuis, a psychoanalyst who had been treating defendant, as a witness. Defense counsel made an offer of proof that Dwarshuis would testify about the reasons for defendant's behavior and about potential treatment. The trial court denied defense counsel's request, noting, in particular, that defendant had not adequately raised an issue regarding competency or sanity and that the alleged defense of "diminished capacity" was no longer legally recognized.

Defendant argues that he was denied the effective assistance of counsel because trial counsel failed to properly pursue an insanity defense. Defendant failed to preserve this issue by raising it in a motion for a new trial or an evidentiary hearing.¹ *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Review is limited to mistakes apparent on the record. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must also show that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). There is a strong presumption that trial counsel's action was sound trial strategy. *Toma*, 462 Mich at 302. To show prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . ." *Id.* at 302-303 (internal citation and quotation marks omitted).

"A criminal defendant is denied effective assistance of counsel by his attorney's failure to properly prepare a meritorious insanity defense." *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988). If the failure to investigate an insanity defense deprives a defendant of a reasonably likely chance of acquittal, the defendant is entitled to a new trial. *Id.* MCL 768.21a(1) provides that insanity can indeed be a defense:

It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness . . . or as a result of being mentally retarded . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.

For a claim of ineffective assistance of counsel, the defendant has the burden of establishing the factual predicate for the claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In this case, defendant presented evidence regarding why he engaged in certain behavior, and evidence that he was receiving treatment for the behavior, but he did not present evidence that he lacked

¹ We note that defendant's motion in this Court to remand for an evidentiary hearing was denied.

the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law. Defendant has failed to establish the factual predicate for his claim of ineffective assistance of counsel; specifically, he has failed to establish that there was an available insanity defense.

Defendant also argues that he was denied the effective assistance of counsel because his counsel relied on the allegedly weaker defense that the prosecution could not prove that defendant exposed himself. However, as noted, defendant has not established that he had a valid insanity defense. Accordingly, defendant has not overcome the strong presumption that defense counsel's strategy, arguing that the prosecution could not prove an element of the crime, was sound strategy. *Toma*, 462 Mich at 302. Similarly, defendant has not established "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . ." *Id.* at 302-303 (internal citation and quotation marks omitted).

Defendant next argues that his convictions of both aggravated indecent exposure and indecent exposure as a sexually delinquent person violated double-jeopardy principles. We agree.² Both the federal and the state constitutions "protect a person from being twice placed in jeopardy for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004); US Const, Am V; Const 1963, art 1, § 15. "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *Nutt*, 469 Mich at 574.

This Court has determined that convictions of indecent exposure and aggravated indecent exposure, based on the same action, violate double-jeopardy principles because the offense of indecent exposure does not contain any element different from the elements of aggravated indecent exposure. *People v Franklin*, ___ Mich App ___; ___ NW2d ___ (Docket No. 296591, issued November 15, 2012), slip op at 4. The *Franklin* Court relied on the rule that, "[w]here one statute incorporates most of the elements of a base statute and adds an aggravating conduct element with an increased penalty compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes." *Id.* (internal citation and quotation marks omitted). The *Franklin* Court, in rejecting an argument identical to that made by the prosecution in the present case, also stated:

To the extent that the prosecution argues that defendant's convictions do not violate double jeopardy because the indecent exposure conviction required a showing of sexual deviancy,³ we note that sexual deviancy is not an actual element of that offense. Rather, a finding of sexual deviancy merely allows for an enhancement of the sentence for the indecent exposure offense. [*Id.*]

² We review double-jeopardy issues de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). Even if we review this issue using the plain-error standard, see *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), appellate relief would still be warranted.

³ From context, it is apparent that the Franklin Court was referring to "sexual[] delinquen[cy]" under MCL 750.335a(2)(c) when it employed the phrase "sexual deviancy."

The Court thus held that a double-jeopardy violation occurred. *Id.*, slip op at 4. It is true that *Franklin* involved a plea of nolo contendere and that, therefore, the specific hearing procedure associated with pleas to the offense of indecent exposure by a sexually delinquent person was material in that case. *Id.*, slip op at 2-3. However, the fact that in this case a jury ruled with regard to both the indecent-exposure issue and the sexually-delinquent-person issue does not change the basic tenet of *Franklin* that the sexually-delinquent-person finding is essentially a sentencing enhancement, at least for purposes of double jeopardy. As noted in *People v Murphy*, 203 Mich App 738, 743; 513 NW2d 451 (1994) (internal citations and quotation marks omitted), “sexual delinquency is a matter of sentencing, unrelated to proof of the principal charge. No additional element of ‘sexual delinquency’ need be proven in order to convict on the principal charge.” According to the pertinent case law, then, defendant’s convictions in the present case violated double-jeopardy principles.

The proper remedy for a double-jeopardy violation is to vacate the lower charge and affirm the higher conviction. *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001). Aggravated indecent exposure is in a lower crime class than indecent exposure by a sexually delinquent person, see MCL 777.16q, and therefore the conviction of aggravated indecent exposure should be vacated.⁴

In *Franklin*, the Court vacated, instead, the conviction of indecent exposure by a sexually delinquent person. *Franklin*, ___ Mich App at ___ (slip op at 4). This may have been related to the fact that in *Franklin*, the proper hearing procedure related to a plea of guilt or nolo contendere had not been followed with regard to the conviction of indecent exposure by a sexually delinquent person. See *id.*, slip op at 1-3. We decline to read *Franklin* as requiring that, in every case in which there is found a double-jeopardy violation involving convictions of aggravated indecent exposure and indecent exposure by a sexually delinquent person, the latter conviction must be the one vacated. In the present case, a jury found that defendant was guilty of indecent exposure and of being a sexually delinquent person, and thus it is the conviction of “indecent exposure as a sexually delinquent person” that should stand. Defendant himself seems to acknowledge this, by arguing that this Court should “vacate the aggravated indecent exposure count, leaving the sexually-delinquent person count, and remand for amendment of the judgment of sentence.”

⁴ Even if case law defines the sexually-delinquent-person finding as a “sentencing enhancement” for purposes of double jeopardy, the fact remains that indecent exposure as “enhanced” by being a sexually delinquent person is considered a more serious crime by our Legislature than aggravated indecent exposure.

We vacate the conviction for aggravated indecent exposure, affirm the conviction for indecent exposure by a sexually delinquent person, and remand for amendment of defendant's judgment of sentence in accordance with this opinion.⁵ We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Michael J. Riordan

⁵ We note that defendant does not argue for resentencing but instead argues, as noted earlier, that this Court should “vacate the aggravated indecent exposure count, leaving the sexually-delinquent person count, and remand for amendment of the judgment of sentence.”