STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 18, 2013
v	Nos. 307893; 307913 Washtenaw Circuit Court
JAMES DARRIN MOSS, Defendant-Appellant.	LC Nos. 10-001769-FH; 10-000235-FH

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

In these consolidated matters, a jury convicted defendant James Darrin Moss of several counts of criminal sexual conduct and accosting a minor for immoral purposes based on sexual assaults perpetrated against the teenage daughter and niece of his live-in girlfriend. Defendant raises several challenges to the performance of appointed trial counsel. Because the asserted errors likely did not affect the outcome of defendant's trial, we affirm.

I. BACKGROUND

Between 2002 and 2008, defendant lived with his girlfriend, Tammy Tansey, and their young daughter, A, in a four-bedroom mobile home. Defendant's daughter, T, was 10 years old when she moved in with her father and Tansey. A year later, Tansey's 11-year-old niece, K, moved into the home as well. Shortly thereafter, Tansey's 17-year-old daughter, M, began to stay in the home periodically.

K testified that when she was between the ages of 13 and 16 defendant repeatedly touched her in a sexual manner. K indicated that defendant would jokingly steal her towel after her shower and "grab" her breasts. She further claimed that defendant grabbed her breasts while they were alone in defendant's truck and he was teaching her to drive. K asserted that defendant also bribed her to show him her breasts in exchange for cigarettes.

M similarly accused defendant of sexually touching her in the kitchen of the home. M also claimed that defendant forcibly digitally penetrated her on one occasion and forced her into sexual intercourse on another. M admitted that she drank heavily during this period and often blacked out. M claimed that defendant often provided her with alcohol. She testified that she once awoke from an alcohol-induced slumber to find defendant performing oral sex on her and awoke on several other occasions when defendant forced penile-vaginal intercourse.

Neither K nor M reported these incidents until 2009, after they had left defendant's home. T testified that she never witnessed any inappropriate contact between defendant and K or M. Tansey also denied witnessing anything. Tansey claimed that K denied that defendant had touched her when directly asked. Tansey also claimed that M once taunted her that she and defendant were involved in a consensual sexual relationship but then told Tansey that she was lying.

Based on this evidence a jury convicted defendant, in relation to his conduct with K, of three counts of second-degree criminal sexual conduct (CSC) in violation of MCL 750.520c(1)(b)(*i*) (sexual contact with a victim between the ages of 13 and 16 who is a member of the defendant's household), and two counts of accosting a child for immoral purposes in violation of MCL 750.145a. In relation to M, the jury convicted defendant of two counts of CSC-3 in violation of MCL 750.520d(1)(b) (sexual penetration by force or coercion), one count of CSC-3 in violation of subpart (1)(c) (sexual penetration of a mentally incapacitated victim), and one count of CSC-4 in violation of MCL 750.520e(1)(b) (sexual contact by force or coercion).

II. STANDARD OF REVIEW

Whether a defendant has received the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "[T]he right to counsel is the right to the effective assistance of counsel'" *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984) (quotation marks and citation omitted). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's ineffective assistance claim includes two components: the defendant must establish that counsel's performance was deficient and that the deficient performance was prejudicial to the defense. Counsel's performance is deficient if it falls below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's deficient performance is prejudicial if there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 663-664. The defendant must overcome the strong presumptions that counsel's conduct was reasonable and amounted to sound trial strategy. *Strickland*, 466 US at 689.

Our review of challenges to counsel's performance is limited where a defendant fails to preserve the issue by requesting a new trial or a *Ginther*[1] hearing. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Defendant filed a motion to remand in this Court to conduct an evidentiary hearing. This Court granted the motion but only to the extent defendant wanted to explore counsel's failure to present the testimony of Novella Alliston, M and K's maternal grandmother. *People v Moss*, unpublished order of the Court of Appeals, entered September 4, 2012 (Docket Nos. 307893, 307913). Accordingly, as to defendant's remaining challenges, our review is limited to plain error on the existing record. *Riley*, 468 Mich at 139.

[1] *People v Ginther*, 390 Mich 436, 440; 212 NW2d 922 (1973).

II. ANALYSIS

A. WITNESS NOVELLA ALLISTON

Defendant challenges counsel's failure to effectively investigate Alliston and to call her as a defense witness. Counsel's defense was to attack the victims' credibility and argue that their sexual abuse claims were false. Prior to trial, counsel was provided with a police report in which Alliston indicated that M told her "she made up the entire incident." Counsel did not interview Alliston and had "no independent recollection" of whether he discussed Alliston with defendant. Alliston testified at the *Ginther* hearing that M denied to her on two separate occasions that anything happened with defendant. According to Alliston, M was intoxicated when she made these statements.

The circuit court deemed that it could not pass judgment on counsel's intentions because counsel claimed that he had no independent recollection of Alliston or her police report. The court ruled that counsel's failure to investigate and present Alliston as a witness was not prejudicial because M's testimony was supported by K's similar reports of sexual abuse and the jury heard M's previous inconsistent statements to Tansey.

The failure to call or investigate a witness amounts to ineffective assistance only if it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009); *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *Kelly*, 186 Mich App at 526. Alliston's testimony regarding M's recantation certainly would have strengthened defense counsel's attack on the victims' credibility. Her absence did not deprive defendant of a substantial defense, however. Counsel presented evidence that M recanted her accusation to Tansey and elicited witness testimony that generally painted the victims in a negative light. On this record, we cannot discern a reasonable probability that Alliston's testimony would have swayed the jury.

B. CROSS-EXAMINATION OF M

Defendant challenges the quality of defense counsel's cross-examination of M. "Decisions regarding . . . how to question witnesses are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Counsel's cross-examination of M spanned 13 pages of the transcript. Defense counsel questioned M about the time periods during which she lived in defendant's home and the other individuals who resided there. In relation to the incident in which M awoke to find defendant performing oral sex upon her, M indicated that she kicked defendant and screamed for her mother. Counsel elicited testimony to highlight the unlikelihood that her screams would not have been heard by someone else in the mobile home. Counsel queried why M returned to live in defendant's home after she claimed he had sexually assaulted her. During the trial, M testified for the first time that defendant had apologized and promised "it will never happen again." Counsel questioned M regarding her failure to provide that information during the investigation or at the preliminary examination. Counsel elicited testimony that M told Tansey "this stuff was happening" and Tansey did not believe her. M conceded that she recanted her statement and told

Tansey that she was lying. Counsel also elicited testimony from M that she drank heavily during the times in question. Counsel further queried why M did not tell anyone about the assaults during the time when they were occurring.

On appeal, defendant asserts that counsel should also have asked M about her recantation of the allegations to her grandmother, Alliston. As noted above, evidence that M had told Alliston that she fabricated the allegations would have further bolstered the defense theory. But the information would have been cumulative of evidence that M recanted the allegations to her mother, Tansey. It is not reasonably probable that this additional testimony would have swayed the jury.

Defendant asserts that counsel should have questioned M regarding inconsistencies between her police reports and her trial testimony. M testified that she voluntarily reported defendant's abuse to law enforcement in Roscommon County after she permanently moved out. The police reports indicate that M's boyfriend actually reported the abuse and then law enforcement contacted M. We fail to see how this trivial detail could have affected the outcome of the trial. In the police reports, M indicated that the sexual assaults began in 2002 when she was 16 years old. At trial, M testified that the events began in 2003 when she was 17 years old. Although defense counsel did not present the police report to impeach M's trial testimony, he did attack M's credibility specifically noting inconsistencies in her timeline of events. It is unlikely that the presentation of the police report to attack this detail would have affected the outcome of the trial. Accordingly, defendant is not entitled to relief in this regard.

C. EXPERT ON FORENSIC INTERVIEW TECHNIQUES

K reported defendant's abusive acts in 2009, when she was 17 years old. At that time, law enforcement officers referred her to the Washtenaw Child Advocacy Center for a forensic interview. On appeal, defendant presents the affidavit of Katherine Okla, Ph.D., stating that after reviewing various reports and the forensic interview notes, her "opinion is that there were multiple factors which undermine the reliability of the complainants' testimony in this case, and which should have been identified as part of a thorough and effective defense strategy." Dr. Okla noted that the interview was neither recorded nor transcribed and it was impossible to discern the phrasing of the questions asked from the notes. Therefore, "the reliability of the information is unknown and even possibly useless . . . ." Dr. Okla asserted that, had she been consulted by trial counsel, she would have assisted the defense in dissecting the victims' testimony to emphasize how their "recall and report of events" was skewed by "exposure to marital discord and family discussions including a negative tone of incrimination."

The decision whether to retain and present an expert witness is a matter of trial strategy. *Payne*, 285 Mich App at 190. As with any other witness, the decision to forego presenting an expert witness only amounts to ineffective assistance if it deprives the defendant of a substantial defense. *Id.* The prosecutor did not base her case on the results of the forensic interview with either victim. The individual that conducted the forensic interview was not presented as a witness. The only law enforcement official presented at trial was called as a defense witness and he merely testified that he took K's report in the Washtenaw County Sheriff's Office and thereafter received notice from the Michigan State Police that M had also filed a complaint against defendant. There was no evidence presented that could have been attacked with an

expert in forensic interview techniques. Expert testimony is only admissible if it "provide[s] the fact-finder with a better understanding of the evidence or assist[s] in determining a fact in issue." *People v Matuszak*, 263 Mich App 42, 51; 687 NW2d 342 (2004). Absent evidence concerning the forensic interview, the suggested expert witness could fill neither of those roles and her testimony would have been inadmissible. The failure to call such an expert therefore could not have deprived defendant of a substantial defense.

D. TANSEY LETTER FROM CUSTODY CASE

Defendant presented the testimony of his then ex-girlfriend, Tansey, in support of his claims that he was innocent and the victims fabricated their tales. On cross-examination, the prosecutor questioned Tansey about a notarized letter she authored shortly after the break-up. The letter was sent to a Child Protective Services worker and was meant to hinder defendant's success in their custody battle over A. In the letter, Tansey accused defendant of being "very violent" and "yelling . . . all the time." Tansey's letter accused defendant of bribing K for sex and making the child's "life hell." It also accused defendant of "getting [M] drunk . . . and having sex with her."

Contrary to defendant's assertion in his appellate brief, defense counsel did object to the admission of Tansey's statements in the letter. Counsel asserted that the letter's contents were irrelevant to the case now before the court. The court overruled these objections because the letter included prior inconsistent statements made by the witness. On redirect, defense counsel attempted to remedy the damage caused by Tansey's earlier letter. Tansey testified that she "was hurt and angry" when she wrote the letter and wanted to hurt defendant's chances of gaining custody of their daughter.

Defendant now contends that the letter's contents were inadmissible hearsay under MRE 801 because they were out-of-court statements introduced to prove the truth of the matters asserted. But the letter was not used to prove the truth of the matters asserted; it was used to impeach Tansey's trial testimony that she believed the victims fabricated their accusations. MRE 613(b) permits the admission of "[e]xtrinsic evidence of a prior inconsistent statement by a witness" if "the witness is afforded the opportunity to explain or deny the same" and the opposing party is given the opportunity to examine the witness regarding the statement. The statements in the letter were admissible to impeach Tansey "even though the statement[s] tend[ed] directly to inculpate the defendant." *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997).

Defendant also challenges that the letter's contents were inadmissible as they represented the opinion of a witness regarding the guilt of a criminal defendant. "A witness may not opine about the defendant's guilt or innocence in a criminal case." *People v Heft*, 299 Mich App 69, 81; ___ NW2d ___ (2012). Tansey, however, was called to the stand by the *defense* to opine that defendant was innocent and the victims were lying. The prosecutor merely presented evidence to challenge her testimony in this regard. If the prosecutor's line of questioning was improper, defendant opened the door and may not complain.

Finally, defendant contends that counsel should have objected that the letter was inadmissible under MRE 404(b) because the prosecutor used it "to convince the jury that

[defendant] was a bad and evil man and thus, must be guilty of the charged offenses." MRE 404(b) is completely inapplicable in this case. Tansey's statements in the letter were not "[e]vidence of other crimes, wrongs, or acts" covered by the rule of evidence. Tansey's statements were about the charged offenses in this case. And Tansey's statements were not introduced to "show action in conformity therewith"; they were presented to impeach Tansey's testimony that the victims were untruthful.

E. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

Defendant contends that defense counsel should have objected when the prosecutor appealed to the jury's sympathy for the victims in closing argument. Specifically, the prosecutor argued:

> Ladies and gentlemen of the jury, these girls were young. These girls were afraid. These girls were emotionally damaged. They were hurt, they thought they had a place to call home, they thought they had found love and support. And what they found was a nightmare. Every time they had contact with the defendant, it turned into defendant raping [M] or touching [K].

"Appeals to the jury to sympathize with the victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). A prosecutor may structure his argument to fairly respond to the defense, however. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Defendant's theory of the case was that the victims' stories were incredible and that they lied. The prosecutor's comments, when read in light of the entire closing argument, emphasized that the victims were believable despite that they delayed in reporting the sexual assaults, recanted their accusations, and generally made some poor choices in life. Taken in context, the prosecutor's comments were not improper, *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977), and defense counsel was not ineffective in failing to object. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

F. SECOND ACCOSTING A MINOR CHARGE

Defendant asserts that defense counsel should have moved for a directed verdict or judgment notwithstanding the verdict because the prosecutor presented no evidence to support a second count of accosting a minor for immoral purposes in relation to K. Defendant is really making two separate challenges. First, defendant seemingly argues that the prosecutor presented insufficient evidence to support his conviction of two counts of this offense. Second, defendant appears to challenge counsel's decision to approve a supplemental instruction in response to a jury question during deliberation.

A defendant violates MCL 750.145a when he "accosts, entices, or solicits a child" or "encourages a child" "to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency." See *People v Kowalski*, 489 Mich 488, 498-500; 803 NW2d 200 (2011). K testified at trial that she asked defendant for a cigarette on numerous occasions while she was living in his home. Each time defendant would agree to give her a cigarette but only in exchange for K showing him her breasts. K indicated that she complied with defendant's bribes more than once. Viewed in the light most favorable to

the prosecution and accepting the jury's assessment of the witness's credibility, *People v Lemmon*, 456 Mich 625, 634, 636; 576 NW2d 129 (1998), this evidence sufficed to support two counts of accosting a child for immoral purposes. Counsel is not ineffective for failing to raise a meritless motion for a directed verdict or JNOV. *Riley*, 468 Mich at 141-142.

Mid-deliberation, however, the jury sent a note to the court asking, "[W]hat are the two Accosting charges for [K]? . . . [N]umber one, I'll give you a cigarette if you flash your boobs . . . . [N]umber two, question mark." The prosecutor indicated her belief that K had not testified to a second count of accosting a minor. She argued to the court, "I don't think [K] testified to a number two, so I would just refer 'em to the testimony. And if they don't believe that there was sufficient testimony for more than one Accosting—[.]" The court agreed that the jury should be reinstructed to consider the charges "from the evidence presented." Defense counsel agreed with this plan, stating "Well that's what I was gonna say, your Honor. That's fine."

As noted, the prosecutor presented adequate evidence for the jury to determine that defendant committed multiple counts of accosting a minor for immoral purposes. Defense counsel could have taken advantage of the prosecutor's erroneous belief that there was a lack of evidence to convict defendant of a second charge and the prosecutor or the court may have dismissed the charge as a result. We will not engage in such speculation with the benefit of hindsight. The evidence did support defendant's commission of two and even more charges and we will not fault counsel for approving the supplemental instruction as given.

Affirmed.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens