# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 12, 2013 |
| v | No. 312389<br>Clare Circuit Court |
| WILLIAM EDWARD LAVELY,<br><br>Defendant-Appellant. | LC No. 11-004322-FH |

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under the age of 13).[1] Because defendant was not denied his constitutional right to the effective assistance of counsel, we affirm.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court must first find the facts and then determine whether those facts constitute a violation of the defendant's right to the effective assistance of counsel. *Id*. We review the trial court's factual findings, if any, for clear error and review de novo its determination whether the defendant was denied the effective assistance of counsel. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Because defendant failed to preserve his argument by moving for a new trial or a *Ginther*[2] hearing in the trial court, and this Court denied his motion to remand for a *Ginther* hearing,[3] our review is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Under both the United States and the Michigan Constitutions, a criminal defendant has a right to the effective assistance of counsel at trial. US Const, Am VI; Const 1963, art 1, § 20;

[1] Defendant was acquitted of four additional charges of first-degree criminal sexual conduct.

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

[3] *People v Lavely*, unpublished order of the Court of Appeals, entered July 16, 2013 (Docket No. 312389).

*Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994). In order to prevail on an ineffective assistance of counsel claim, a defendant must show: (1) that trial counsel's performance fell below an objective standard of reasonableness, and (2) that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 687-688, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. "Effective counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Eloby*, 215 Mich App 472, 476; 547 NW2d 48 (1996). "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant first argues that defense counsel's cross-examination of the victims, defendant's granddaughters "KE" and "LL," damaged rather than helped his case. During cross-examination, counsel asked KE about inappropriate statements that defendant had made to her. While cross-examining LL, counsel elicited testimony regarding other alleged sexual encounters between defendant and LL in Detroit. Defendant was not charged with those acts, and the prosecution did not elicit testimony about them on direct examination. Defense counsel also asked LL to clarify what she meant when she testified that it "hurt" when defendant penetrated her, to which she replied that it was like putting "salt into a wound."

"The questioning of witnesses is presumed to be a matter of trial strategy." *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). Defense counsel's inquiry of KE regarding inappropriate things that defendant had said to her was merely an attempt to clarify KE's direct examination testimony that defendant "says inappropriate things sometimes." When asked whether defendant's comments annoyed her, KE responded affirmatively. Having KE reiterate that defendant made comments that annoyed her allowed the jury to infer some level of hostility that could cause her to fabricate allegations against him, a matter that counsel explored during his closing argument. Thus, defense counsel's inquiry appeared to constitute sound trial strategy. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000) ("A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy . . . .").

With respect to defense counsel's questioning of LL regarding her allegation that defendant had sexually assaulted her in Detroit, the record shows that counsel was attempting to discredit LL. LL testified that defendant sexually assaulted her in Detroit approximately 25 to 30 times while he was babysitting her. To discredit her allegation and undermine LL's credibility in general, counsel questioned defendant's wife regarding whether defendant had ever babysat LL in Detroit. Defendant's wife denied that defendant had ever babysat LL in Detroit. She explained that LL's other grandparents had cared for LL as needed at that time in LL's life, which LL's aunt and brother confirmed. During closing argument, counsel used LL's testimony about the alleged sexual abuse in Detroit to call into doubt her character for truthfulness. Thus, counsel's questioning constituted sound trial strategy.

In addition, regarding defense counsel's inquiry of LL to expound on what she meant when she testified that defendant's attempts to penetrate her "hurt," counsel used that testimony

to highlight the lack of physical evidence: Counsel argued during closing argument that although LL maintained that it "hurt," there was no report evidencing scarring, tearing, or anything of the sort. Thus, again, counsel's questioning constituted sound trial strategy.

Defendant also contends that defense counsel called witnesses whose testimony aided the prosecution. Defendant cites to the testimony of "KA," KE's sister, who testified that the way that defendant said things "sometimes was kinda creepy." She also maintained that defendant made inappropriate comments about her physical appearance. Contrary to defendant's argument, the prosecution, rather than defense counsel, elicited that testimony from KA on cross-examination. During his redirect examination of KA, defense counsel attempted to mitigate the effect of that testimony by asking KA whether defendant is "an outgoing, joking-type individual" to which KA responded affirmatively. Thus, counsel's questions were strategically designed to mitigate the effect of the prosecutor's cross-examination of KA. Moreover, on direct examination, defense counsel elicited testimony that KA had no memory of an incident that allegedly occurred in defendant's bedroom. KE maintained that KA had been present during the incident.[4] Thus, defense counsel elicited testimony from KA that assisted defendant.

Defendant next argues that defense counsel's questioning of KE's mother, "Laurie," corroborated an incident that KE had testified occurred in defendant's bathroom. Laurie testified that when KE was approximately six years old she told Laurie that defendant had wiped her vagina after she had used the toilet and wanted to talk to her about sex. Counsel asked Laurie whether she had taught KE to tell her if anything of a sexual nature occurred to KE. Laurie responded affirmatively and then testified that KE had told her about the incident in the bathroom. Notably, Laurie did not testify that KE had told her about any other alleged inappropriate conduct that occurred when KE was a child. Moreover, Laurie's testimony regarding the bathroom incident was at odds with Laurie's sister's testimony. Laurie denied that defendant had helped KE wipe her "tushie" and claimed that defendant had helped KE wipe her vagina. Laurie's sister, "Lisa," on the other hand testified that Laurie had asked her to talk to KE because KE told Laurie that defendant had helped wipe her butt in the bathroom and it made KE uncomfortable. Thus, defense counsel's questioning of Laurie and Lisa assisted defendant's case by casting doubt on the credibility of both KE and Laurie regarding the alleged bathroom incident. Further, counsel elicited testimony from Laurie that she had never observed anything to make her think that defendant had interacted inappropriately with KE.

Defendant next faults defense counsel for eliciting testimony from defendant's sister that she had been sexually abused by her father, also defendant's father, until she was 11 years old. Defendant argues that such testimony was not helpful because it is known that sexual abuse runs in families. The record shows that defense counsel relied on defendant's sister's history of sexual abuse and her experience as a nurse to strengthen her testimony that she never suspected that either KE or LL had been abused. Calling on defendant's sister's personal knowledge in such fashion was a reasonable strategic decision.

[4] The incident forms the factual basis of one of defendant's convictions.

Defendant also asserts that defense counsel was unprepared to question Therese Sandomierski, one of defendant's character witnesses. Sandomierski testified that Lisa is her closest friend and that defendant and his wife are like family to her. On cross-examination the prosecutor elicited testimony regarding Sandomierski's education, and Sandomierski testified that she has a doctorate degree in school psychology. On redirect examination defense counsel sought to qualify Sandomierski as an expert, but the trial court denied the request. Because defense counsel called Sandomierski as a character witness, which Sandomierski confirmed in the beginning of her testimony, he cannot be faulted for being unaware of her professional credentials. In any event, the trial court permitted Sandomierski to offer her lay opinion that, looking back at the time that she spent with defendant's family, there was no indication that defendant was sexually abusing either KE or LL. Thus, Sandomierski's opinion was admitted as evidence, albeit her lay opinion rather than her expert opinion was admitted. Accordingly, defendant has failed to show that trial counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 US at 687-688, 694.

Defendant next argues that trial counsel rendered ineffective assistance by asking defendant's wife whether she and defendant had an active sex life. Defendant's wife testified that they used to engage in sexual intercourse three or four times a week, but that decreased to once every two months approximately 20 years previously because defendant began experiencing chest pains and other ailments. When asked whether it was painful for defendant to engage in sexual intercourse, defendant's wife responded affirmatively because defendant would have chest pains. Defendant fails to indicate how his wife's testimony harmed his case. In fact, counsel used the testimony to discredit LL's claim that defendant sexually assaulted her approximately 20 or 30 times in his Detroit home. Thus, defendant's challenge lacks merit.

Finally, defendant argues that defense counsel did not adequately prepare him to testify in his own defense. In his affidavit accompanying his motion to remand defendant asserts that "he was encouraged to testify himself in his own defense without any preparation by his attorney, further damaging his defense and aiding the prosecution." Defendant fails to indicate what defense counsel should have done differently to prepare defendant to testify or how defendant's alleged lack of preparation damaged his defense. A review of the record shows that defendant denied sexually assaulting KE and LL, explained that his wife had asked him to help KE in the bathroom on one occasion because she was busy, and explained that he was not physically able to engage in sexual activity. Defendant fails to identify what other testimony he should have offered. In addition, the record shows that it was defendant's decision to testify:

> *Q.* Mr. Lavely, for the record . . . we've talked that you have a constitutional right not to take the stand. Correct, sir?
>
> *A.* Yes, sir.
>
> *Q.* And that even if you didn't take the stand, the jurors couldn't use that silence and you not taking the stand against you.
>
> *A.* Correct.
>
> *Q.* Do you understand that?

*A.* Yah.

*Q.* And you understand that if you take the stand, after I question you, the prosecution, as you know, will question you and cross-examine you. Right?

*A.* Yes.

*Q.* And knowing this, it is still your desire to take the stand in your defense in this case?

*A.* I feel I have to.

*Q.* And why do you feel you have to, sir?

*A.* For what these allegations are. These things are horrible.

This exchange shows not only that defendant desired to testify but also that defense counsel discussed the ramifications of testifying with defendant so that he could make an informed choice. Thus, defendant has failed to show that counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 US at 687-688, 694. Further, based on our review of the record, the record is sufficient for this Court to determine that counsel made valid, strategic choices regarding the calling and examination of witnesses.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra