

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD ROY DINIUS, JR.,

Defendant-Appellant.

UNPUBLISHED

May 23, 1997

No. 177269

Lenawee Circuit Court

LC No. 93-005948-FH

Before: Holbrook, Jr., P.J., and White, and S.J. Latreille,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree child abuse, MCL 750.136(b)(2); MSA 28.331(b)(2), and was sentenced to 60 to 180 months in prison. Finding defendant's first issue dispositive, we reverse.

Defendant argues that he was denied a fair trial by the introduction of extensive evidence establishing that he was abused as a child; expert evidence that he would therefore have the propensity to be an abuser himself; and testimony that in the expert's opinion, defendant was guilty and was lying. Defendant further asserts that to the extent defense counsel contributed to the introduction of this evidence, defendant was deprived of the effective assistance of counsel. We must agree.¹

Through the introduction of extensive evidence regarding defendant's family history, and the prosecutor's use of the evidence, the trial became as much a dispute over whether defendant had been abused as a child, the extent of that abuse and other abuse in the household, and the effect of the abuse on defendant, as a trial regarding whether defendant was responsible for the victim's injuries. As a result, the trial focused on defendant's character and propensities at least as much as his guilt of the charged offense, and it is impossible to state with any confidence that the jury was persuaded by the evidence concerning the victim's abuse as distinguished from the evidence concerning defendant's history as a window into his character and propensities.

* Circuit judge, sitting on the Court of Appeals by assignment.

We also agree that to the extent defense counsel contributed to the introduction of this character/propensity evidence, he was ineffective. The record establishes that counsel was aware that the prosecutor possessed records concerning defendant's history, but nevertheless opened the door to inquiry into this aspect of his background. While this Court will not second-guess counsel on matters of trial strategy, *People v Murph*, 185 Mich App 476, 479; 436 NW2d 156 (1990), and the fact that a strategy may not have succeeded does not render the decision to pursue that strategy ineffective assistance, *id.*, this Court has found reversible error where counsel took actions which were not "sound trial strategy." See *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988) (emphasis supplied), citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Because defense counsel knowingly opened the door to the admission of highly prejudicial evidence, we find that his assistance cannot be considered "sound trial strategy." *Strickland*, *supra* at 689.

Defense counsel also committed a serious error with regard to the testimony of Nancy Hebert, a child protective services' worker. Counsel did not object when Hebert testified that she believed defendant and his girlfriend, the victim's mother, were responsible for abusing the child. Nor did defense counsel challenge Hebert's assertion that defendant and the victim's mother were not being honest with her. A witness may not express an opinion concerning the credibility of other witnesses or the guilt or innocence of the accused. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). Such issues are questions for jury resolution. *People v Suchy*, 143 Mich App 136, 149; 371 NW2d 502 (1985). There is no reasonable explanation that would justify defense counsel's failure to object to this improper opinion testimony. Further, after the prosecution had examined Hebert for a time, defense counsel interjected that he would object "unless [the prosecutor] is willing to stipulate that this witness is an expert in these areas. . . I'll stipulate to that if the prosecutor will, Your Honor." There had been no testimony regarding Ms. Hebert's qualifications, experience or credentials at this point, other than that she had been at the job for nine years.

Finally, we conclude that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994).

Our reading of the entire transcript leads us to conclude that defendant was denied a fair trial. Accordingly, we reverse and remand for a new trial.²

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ Stanley J. Latreille

¹ We decide this case after a thorough review of the record, but without the benefit of a prosecutor's brief, as no brief has been filed.

² Because our disposition of defendant's first issue is dispositive, we need not reach his remaining arguments on appeal.