

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 31, 2012

v

LONNIE RICHARD MANNING,
Defendant-Appellant.

No. 299518
Jackson Circuit Court
LC No. 09-006140-FC

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

PER CURIAM.

Defendant appeals as of right from his conviction following jury trial of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age). This case arises out of allegations that defendant sexually abused the son of defendant's then live-in girlfriend. According to the victim, the sexual abuse began when he was seven years old and continued until he was 12 or 13. Defendant was sentenced to 18 to 40 years in prison. We affirm.

After defendant filed his appeal, this Court granted his motion to remand for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), to determine whether defendant received constitutionally deficient representation. Following a three-day hearing, the trial court determined that defendant was not denied the effective assistance of trial counsel.

On appeal defendant argues that a new trial is required because he was denied the effective assistance of counsel. "Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). "The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Regard should be given to the trial court's opportunity to assess the credibility of the witnesses who appeared before it. MCR 2.613(C); *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859, amended on other grounds 481 Mich 1201 (2008). A finding is clearly erroneous when, although there is evidence to support it, we are left with a definite and firm conviction that a mistake was made. *Dendel*, 481 Mich at 130.

“To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel’s performance fell below objective standards of reasonableness and that, but for counsel’s error, there is a reasonable probability that the result of the proceedings would have been different.” *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010), lv den 488 Mich 992 (2010). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

Defendant contends that counsel was deficient because he failed to adequately prepare for trial, call essential witnesses, and allow defendant to take the stand. In regard to trial preparation, defendant argues that counsel was ineffective because he failed to effectively impeach the victim. Specifically, defendant argues that trial counsel failed to cross-examine the victim regarding the victim’s use of drugs, stealing, lack of memory, dislike of defendant, and changing of his accounts of the alleged abuse. Decisions regarding how to question a witness are presumed to be matters of trial strategy, and we “will not second-guess counsel on matters of trial strategy, nor will we assess counsel’s competence with the benefit of hindsight.” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

A review of the record reveals potential issues that could have been the subject of cross-examination. During the preliminary examination, the victim testified that his memory was not great because he experimented with drugs. The victim acknowledged that he smoked a lot of marijuana and experimented with ecstasy, hallucinogenic mushrooms, and another drug that he described as a “heroin detox drug.” Further, the victim acknowledged that he stole his mother and grandmother’s debit cards and had been convicted of larceny in a building. Additionally, there were also some inconsistencies between the victim’s preliminary examination and trial testimony.

The failure to attempt to impeach the victim on these topics during cross-examination was a matter of trial strategy. As counsel testified at the *Ginther* hearing, cross-examination of an alleged sexual abuse victim is a sensitive matter, especially when a jury is present. Counsel stated his cross-examination of the victim was based on his “experience and . . . on upon how [he] feels juries relate to a defense attorney going after” victims.

Counsel testified that he spoke with two expert witnesses prior to trial and discussed the victim’s delinquent behavior. Counsel was told that the type of behavior described could be interpreted as a sign that the victim had been sexually abused. Counsel was concerned that rather than undermining the victim’s credibility, the jury might view the victim’s behavioral issues as corroboration of his truthfulness. Under these circumstances, the decision to limit cross-examination about these matters was not objectively unreasonable.

Additionally, prior to trial, the trial court specifically excluded the victim’s conviction for larceny in a building. The trial court noted that the victim was placed on Holmes Youthful Trainee Act¹ status for the offense of larceny in a building. The court reasoned that because the victim was not actually convicted of larceny in a building, the evidence was not admissible under

¹ MCL 762.11 *et seq.*

MRE 609(a). The court was correct. MRE 609(a) provides for the impeachment of a witness with evidence that the witness had been convicted of a crime. “An assignment of an individual to the status of youthful trainee . . . is not a conviction for a crime . . .” MCL 762.14(2).

Moreover, the record reveals that the victim’s testimony was effectively impeached. He was questioned about his relationship with defendant and specifically stated that the relationship was not good from the start and he did not like defendant. Further, the victim’s mother contradicted nearly every assertion the victim made about the abuse. The victim testified that the abuse occurred when he was left alone with defendant. However, his mother testified that she never left the victim alone with defendant. The victim also testified that defendant had several firearms in the house. His mother testified that she never saw any firearms in the house. The victim testified about an assault that occurred when defendant flipped him over a chair, but his mother stated that she saw the incident and the victim injured himself. The victim also stated that he bled twice after defendant sexually penetrated him and blood got in his underwear, which was subsequently put in the laundry. His mother, who did his laundry, testified that she never saw any blood in his underwear. Further, she stated generally that she never saw any signs or evidence of abuse. Therefore, contrary to defendant’s argument, the victim’s credibility was effectively impeached.

Defendant also argues that counsel failed to include several essential witnesses on defendant’s witness list, failed to call several witnesses that were on the witness list, and failed to obtain an expert witness to testify on his behalf. Defendant lists a number of witnesses in his brief, and he identified over 15 witnesses during the *Ginther* hearing. Defendant, however, failed to call the majority of the identified witnesses during the evidentiary hearing. “The burden [is] on defendant to establish evidentiary support for his claim of ineffective assistance of counsel.” *People v Armstrong*, 124 Mich App 766, 772; 335 NW2d 687 (1983). “Witnesses who might have been called at trial should [be] produced and their testimony made part of the evidentiary hearing record.” *Id.* at 771. Because the majority of the identified witnesses were not called during the *Ginther* hearing, we have no evidentiary record from which we can assess counsel’s performance. In regard to the witnesses who did testify, we conclude that the decision not to call them did not deny defendant of his right to effective assistance of counsel.

Dennis Conant offered no relevant testimony other than character evidence. Although trial counsel did not specifically say why he decided not to call Conant, counsel did testify that he was concerned about opening up defendant’s character to attack. Counsel stated that there was evidence that defendant has a tendency to be violent, especially when he drinks, and he did not want defendant’s violent nature being introduced at trial. Indeed, Conant acknowledged that defendant uses alcohol and has a few drunk driving convictions. Conant also knew that alcohol had affected defendant’s judgment in the past, and that defendant had been charged with assault and battery. The decision not to call Conant was a matter of sound trial strategy and will not be second guessed on appeal. See *Horn*, 279 Mich App at 39.

The victim’s sister testified during the *Ginther* hearing and stated that she lived with the victim and their mother until she was approximately 17 years old. The victim’s sister stated that she would have testified that her grandmother was often in charge of watching the children (including the victim) and transporting them back and forth to school and other activities. However, the evidence showed that she moved out of the house before defendant moved in.

Therefore, she had no firsthand knowledge of who watched the victim while the victim lived with defendant. Because her testimony was minimally relevant at best, it was not objectively unreasonable for counsel to decline to call her.

Gary Rutledge also testified during the evidentiary hearing. Rutledge, a licensed psychologist and social worker, stated that he began counseling the victim in 2001 when his mother brought him in because she was concerned about how her divorce from defendant was affecting him.² Rutledge counseled the victim for several years and stated that the victim never raised any allegations of sexual abuse. Rutledge acknowledged that he has a legal obligation to report child abuse, and he never reported any allegations of abuse concerning the victim.

Trial counsel testified that he did not call Rutledge at trial because he could not get ahold of him and because his records of the counseling sessions were likely privileged. The psychologist-patient privilege is statutorily enshrined in MCL 330.1750(1), which provides that “[p]rivileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, . . . unless the patient has waived the privilege.” In *People v Stanaway*, 446 Mich 643, 679-680; 521 NW2d 557 (1994), our Supreme Court concluded that the state’s interest in preserving the confidentiality of the psychologist-patient relationship “must yield to a criminal defendant’s due process right to a fair trial when the defendant can show that those records are likely to contain information necessary to his defense.”

Assuming that the victim would not have waived the privilege (as he did at the preliminary examination), the necessity of accessing Rutledge’s records is not obvious. It is not clear from the evidentiary hearing the scope of the counseling sessions. Rutledge testified that he began seeing the victim because his mother was concerned about how the divorce was impacting him. It is not readily clear that the subject of sexual abuse would have arisen out of any discussions about how the victim was feeling about the divorce. Nor is there any indication that Rutledge and the victim had established the kind of rapport that would have led to the victim spontaneously bringing the matter up. Indeed, the victim indicated that this kind of relationship had not been established. Moreover, the victim conceded during cross-examination that he did not tell anyone about the sexual abuse for years, first reporting the abuse to his mother when he was 16, approximately three years after the abuse stopped. Without more evidence relating to the nature and scope of the victim’s counseling, it cannot be determined whether Rutledge’s records contain material information necessary to the defense. Therefore, defendant has not met his burden of showing that the failure to call Rutledge denied him effective assistance of counsel. See *Armstrong*, 124 Mich App at 772.

Defendant next argues that counsel failed to obtain necessary expert witnesses. Counsel acknowledged that he spoke with defendant about retaining an expert witness, and he actually spoke with two experts prior to trial. Both experts indicated that they would not be helpful and in fact would hurt the defense. Therefore, contrary to defendant’s argument, the decision to not retain an expert was a matter of sound trial strategy.

² The victim and his mother agreed to waive the patient-psychologist privilege at the evidentiary hearing.

Finally, defendant argues that he was denied effective assistance of counsel because counsel did not inform him of his right to testify. Defendant testified that he planned on testifying, but counsel never consulted him about his right to testify. Defendant stated that he did not have a clear understanding of his right to testify and counsel never informed him of his right. Counsel, however, testified that the decision not to testify was mutual. Counsel stated that he did not want to call defendant because he believed he would make a poor witness, but defendant ultimately made the decision not to testify. The trial court found “that the Defendant and his [attorney] discussed whether or not he should take the stand to testify, and under the recommendation of his attorney the Defendant chose not to.”

Defendant contends that the trial court’s determination was clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made.” *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008). Upon review of the record, we conclude that the trial court’s finding was not clearly erroneous. The trial court had to choose from conflicting testimony and was in a far better position to judge the witnesses’ credibility than this Court. MCR 2.613(C).

Defendant next argues that the prosecutor committed misconduct and denied him a fair trial because she intimidated defendant’s daughter into testifying against him. Because no objection was made below, our review is limited to ascertaining whether there was plain error that affected substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Reversal is warranted only when plain error resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

Prior to trial, the prosecutor filed a motion to admit evidence of prior sexual assaults against minors pursuant to MCL 768.27a. Specifically, the prosecution wanted to admit the testimony of defendant’s biological daughter and his stepson. Defendant’s daughter was contacted by the police, and she informed them about an incident that occurred when she was between the ages of five and seven. Defendant’s daughter stated that she fell asleep next to defendant and when she woke up defendant’s finger was inside her vagina. However, she stated that she was unsure whether the incident was a dream or actually happened. Later, defendant’s daughter talked to the prosecutor and told her that she made the story up and was not being truthful. She then retained independent counsel and asserted her Fifth Amendment right against self-incrimination during an evidentiary hearing. Defendant’s daughter was then arrested and charged with false report of a felony. After being released on bond, defendant’s daughter again changed her story, indicating that the incident with defendant actually occurred.

Defendant accuses the prosecutor of misconduct, arguing that she intimidated or coerced defendant’s daughter into testifying against him. “Both our Supreme Court and this Court have strongly condemned prosecutorial intimidation of witnesses.” *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992). “Although the issue of prosecution intimidation usually arises in the context of alleged intimidation of defense witnesses, this Court has condemned as well intimidation by the prosecution of its own witnesses.” *People v Clark*, 172 Mich App 407, 409; 432 NW2d 726 (1988).

In *People v Crabtree*, 87 Mich App 722; 276 NW2d 478 (1979), this Court reversed a defendant's conviction after the prosecution threatened the alleged victim with perjury charges if she changed her story from that given at the preliminary examination. In *Crabtree*, the 14-year-old alleged victim visited the prosecutor's office the day before trial and informed him that she wanted to drop the charges, stating that the defendant did not touch her and she felt pressured by a police officer to say he did. *Id.* at 724-725. "The prosecutor responded with a thinly-veiled threat of a perjury charge against the victim if she changed her story from that given at the preliminary examination (wherein she testified to the sexual act)." *Id.* at 725. The details of the prosecutor's threats were revealed during cross-examination at trial, and on redirect the prosecutor stated, "I do not intend to prosecute this person as a perjurer. I am just interested in the truth'." *Id.*

The *Crabtree* Court reversed and remanded for a new trial. "We recognize the dilemma of the prosecutor when confronted with such a situation," the Court stated. *Id.* "But there were three additional problems which conclusively tilted the balance here toward reversal." *Id.* First, the witness was never asked whether she had been intimidated by the threat. *Id.* at 725. Second, the prosecutor made no effort to bring the matter to the attention of the court; rather, it was brought up during cross-examination. *Id.* at 725-726. Finally, the prosecutor's statement that he was not pursuing perjury charges "was a blatant attempt to bolster the witness's credibility." *Id.* at 726.

Like the witness in *Crabtree*, defendant's daughter was threatened with prosecution. Indeed, she was actually arrested, charged with a felony, and spent a night in jail. Additionally, defendant's daughter was never questioned regarding whether she was in fact intimidated by the prosecutor's threat. Both the prosecutor and defense attorney questioned defendant's daughter about feeling pressured, but she was never directly asked whether she was intimidated by the prosecutor's conduct. Intimidating a witness by means of threatening with legal process is a form of coercion above and beyond that of merely applying pressure. Additionally, the prosecutor asked defendant's daughter if "in terms of coming with your attorney and speaking with me and sort of clearing everything up, it is your understanding that now that that's been cleared up that that charge is going to be dismissed." She responded yes. As in *Crabtree*, the prosecutor's question was an attempt to bolster her credibility.

However, it was the prosecutor who brought up the subject of the felony charge during questioning of defendant's daughter. More importantly, defendant's daughter was not the complaining witness, as was the case in *Crabtree*. Rather, she was presenting evidence pursuant to MCL 768.27a that defendant committed a prior sexual assault against a minor. Before she testified, the jury was specifically instructed that if it believed her testimony, it must be very careful to consider it only with respect to determining whether defendant acted purposefully. The jury was instructed not to use her testimony to decide defendant is a bad person, or that he is likely to commit crimes. Further, the court instructed the jury that it must not convict defendant because it thinks defendant committed other crimes. The jury was similarly instructed during closing jury instructions. Additionally, the court instructed the jury that when deciding what testimony to believe, it should consider, among other things, whether "there have been any promises, threats, suggestions or other influences that affected how the witness testified." We see nothing of record to undermine the oft-stated maxim that jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235.

Defendant's final argument is that the trial court abused its discretion when it admitted the testimony of defendant's daughter and stepson. "The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion." *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). However, "[w]hen the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

As indicated above, defendant's daughter testified regarding an incident that occurred when she was between five and seven years old, stating that she woke up to find defendant's finger in her vagina. Defendant's stepson testified regarding an incident that occurred when he was between 12 and 13 years old. He stated that defendant woke him up and took him into defendant's bedroom, showed him a pornographic magazine, and forced him to masturbate in front of defendant. The trial court admitted the testimony under MCL 768.27a, which states as follows:

(1) Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

(2) As used in this section:

(a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.

(b) "Minor" means an individual less than 18 years of age.

Defendant argues that although a limiting instruction was given to the jury on how to use the challenged testimony, it would be difficult if not impossible for the jury to separate propensity evidence from evidence of culpability. Moreover, he argues that the probative value of the testimony was substantially outweighed by its prejudicial affect. Defendant's argument is without merit.

In *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007), this Court explained that "[w]hen a defendant is charged with a sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b)." This conclusion was recently affirmed by our Supreme Court in *People v Watkins*, ___ Mich ___; ___ NW2d ___

(Docket No. 142031, decided June 8, 2012). In *Watkins*, the Supreme Court concluded that MCL 768.27a prevails over the court rule and allows the “admission of evidence that defendant committed another listed offense ‘for its bearing on any matter to which it is relevant.’” *Id.* at slip op at 16, 22. This includes evidence that is relevant only to show a defendant’s propensity for committing a particular type of crime. *Id.* at slip op at 16-17. Indeed, the Court noted that “a defendant’s character and propensity to commit the charged offense is highly relevant because ‘an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity.’” *Id.* at slip op at 17 (citation footnote omitted). The only limitation to MCL 768.27a is MRE 403. And “when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect.” *Id.* at slip op at 34.

Therefore, contrary to defendant’s argument, the propensity inference of the prior acts evidence in this case actually increases its probative value and is not grounds for its exclusion. The probative value of the prior acts evidence is further increased because of the similarities between the prior conduct and the current conduct, most notably of which is the fact that all the allegations of abuse involve minor children that lived with defendant. Thus, the testimony of defendant’s daughter and stepson was properly admitted under MCL 768.27a and MRE 403. The probative value of the evidence was not “substantially outweighed by the danger of unfair prejudice.” MRE 403.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Donald S. Owens