

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
July 30, 2013

v

ROBERT RICHARD-HOWARD NELSON,  
  
Defendant-Appellant.

No. 308244  
Bay Circuit Court  
LC No. 10-010892-FH

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

PER CURIAM.

Defendant appeals as of right his conviction by a jury of one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years old). The trial court sentenced him to 300 days in jail and placed him on probation for five years. We affirm.

The victim testified that while she and defendant were lying on a couch watching television in defendant's mother's home in Bay County, defendant put his hand underneath her underwear and touched her crotch area, skin-to-skin. Defendant claimed that the victim asked him to rub her tummy and that he put his hand underneath her underwear but immediately pulled it out after realizing that it was wrong.

**I. INEFFECTIVE ASSISTANCE OF COUNSEL**

Defendant argues that his trial attorney rendered ineffective assistance of counsel by (1) introducing evidence of other acts involving defendant and the victim and (2) failing to ask the trial court to voir dire defendant regarding his right against self-incrimination. Because defendant did not file a motion for a new trial below based on ineffective assistance of counsel, our review of defendant's claim is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of trial counsel is presumed. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). To establish ineffective assistance of counsel, a defendant must show "that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *Id.* 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). This Court will not second-guess with hindsight a trial attorney's choice and

implementation of trial strategy. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

During the preliminary examination, defense counsel was the first to introduce evidence of other acts by asking the victim, “was that the only time that [defendant] touched you like that?” The victim responded, “[n]o.” At the close of the preliminary examination, the prosecution successfully requested to add an alternative count of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2), for the already-charged couch incident. The prosecution explained that this second count was in anticipation of a potential defense at trial that defendant had not “reach[ed] her genitals,” but “stopped halfway down.”

During defense counsel’s opening statement at trial, he introduced evidence of a camping trip outside Bay County during which defendant allegedly touched the victim while playing with her in the water. Defense counsel then told the jury, “And there are two separate counts you are to- -to sort through. And the first one is the camping trip touching in the water. And the second is the alleged touching at [defendant’s mother’s] home.” Defense counsel was clearly wrong in his assertion that the camping trip outside Bay County was a *charged offense*.<sup>1</sup> However, this limited error by defense counsel (which he corrected in his closing statement) does not warrant reversal when viewed in light of counsel’s overall performance, which did not fall “outside the wide range of professionally competent assistance.” *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994), quoting *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 90 L Ed 674 (1984).

Counsel’s overall strategy of mentioning the camping trip and other acts may have been unusual, but in the context of this specific case it made sense, and counsel was reasonably competent. *People v Stanaway*, 446 Mich 643, 688; 521 NW2d 557 (1994). Evidence of the other acts directly supported the defense strategy. As noted by the trial court, evidence of the other acts tended to “show that [the victim] reports things that didn’t happen or reports them differently than they did.” Defense counsel also used the other-acts evidence to attempt to show that the victim’s mother was a liar who was inconsistent, jumped to conclusions, coached her daughter to embellish, and had a personal vendetta against defendant. Counsel implemented this strategy throughout the trial, repeatedly finding inconsistencies in both the victim and victim’s mother’s testimony and highlighting the victim’s mother’s propensity to jump to conclusions. Therefore, contrary to defendant’s argument, trial counsel did present a reasonable defense to the charges, and credibility determinations were left to the jury. *People v Drohan*, 264 Mich App 77, 89; 689 NW2d 750 (2004). Again, “[w]e will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel’s competence.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

At any rate, even assuming counsel’s “performance was ‘outside the wide range of professionally competent assistance,’” *Pickens*, 446 Mich at 330, quoting *Strickland*, 466 US at

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<sup>1</sup> The prosecutor referred only to the couch incident in his opening statement, and during closing arguments it was clear that only the couch incident was involved in terms of the charged offenses.

690, defendant cannot establish that the proceedings were fundamentally unfair or unreliable, *Rodgers*, 248 Mich App at 714.

“A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and . . . [t]hat other person is under 13 years of age.” MCL 750.520c(1)(a).

‘Sexual contact’ includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification [or] done for a sexual purpose . . . . [MCL 750.520a(q).]

MCL 750.520a(e) defines “[i]ntimate parts” as “the primary genital area, groin, inner thigh, buttock, or breast of a human being.” A victim’s testimony does not have to be corroborated in order to support a CSC conviction. MCL 750.520h.

It is for the jury to determine the credibility of the witnesses appearing before it. *Drohan*, 264 Mich App at 89. During the victim’s testimony, the prosecutor used a cup and a pen to see if the victim understood the difference between “inside” and “outside.” The victim then stated that defendant touched her inside her crotch. On cross-examination, when defense counsel asked, “But [defendant’s hand] never reached your crotch, did it?” she responded, “No.” However, the prosecutor attempted to clear up the discrepancy during redirect by having the victim step down from the witness stand and physically indicate where defendant had touched her. Although the transcript does not describe where she indicated, the prosecutor stated in closing that “she put her hand right down with her fingers down between her legs and put her hand fully on her vagina and the area right above her vagina.” Defendant did not object. Further, a state trooper who interviewed defendant testified that defendant indicated he had “touched the . . . skin of her private area one time.” A sexual assault nurse who examined the victim testified that while performing a physical examination of the victim, the victim said that defendant “touches me inside and out.” The nurse also testified that the victim told her that defendant asked her if she “like[d] it.” Defendant conceded on cross-examination that he had put his hand underneath the victim’s underpants and that he knew it was wrong. There was ample evidence adduced regarding the couch incident to support a finding of guilt.

Moreover, and significantly, the other-acts evidence would have been admissible anyway. The trial court stated:

It just- -It’s an unusual way this evidence has come in, and so as a result, we haven’t done any balancing tests, but- -and I think it would be appropriate before we would give . . . an instruction that the Court performs a balancing test under 404(b), and that is whether or not the probative value of this evidence for the use that we would tell the jury that they could put the evidence to, the use for which they could use the evidence or the purposes for which they could use the evidence, I think it’d be incumbent on the Court to not allow that unless I could find that the probative value of the evidence substantially outweighs any prejudicial effect that- -that it would have.

And in- -in this case, that's easy to do. One, because of the way the evidence was introduced. This is an additional limitation on it, but it does have probative value. The defendant used a plan, system or characteristic scheme that he used before in touching the victim in the way that he did in the manner that he did. And reacting as he- -he did, at least according to some of the evidence.

And so I do find that the probative value of that evidence does substantially outweigh any prejudicial effect.

In this case, the prejudicial effect is- -is nil because they would've heard- - heard about it anyway.

But we have a- -In Section 2, there- - that is at [defense counsel's] request, that in weighing the evidence, the jury may also consider, ah, to help them judge the be- -believability of the testimony of [the victim] regarding the act for which the defendant is now on trial. . . . [W]hat they can weigh is the- -the fact that [the victim] reported it and then- -and that would help to show that she reports things that didn't happen or reports them differently than they did.<sup>[2]</sup>

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<sup>2</sup> The court instructed the jury:

You have heard evidence that the defendant committed improper sexual conduct for which he is not on trial.

In weighing this evidence, you may also consider it to help you judge the believability of the testimony of [the victim] regarding the act for which the defendant is now on trial.

. . . If you believe this evidence, you must be very careful only to consider it for certain other purposes. You may only think about whether this evidence tends to show:

- (a) That the defendant ha- -had a reason to commit the crime;
- (b) That the defendant specifically meant to . . . touch [the victim's] groin or her genital area;
- (c) That the defendant act [sic] . . . purposefully, that is, not by accident or mistake, or because he misjudged the situation;
- (d) That the defendant used a plan, system, or characteristic scheme that he had used before.

You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that he is

Any error that may have arisen from defense counsel's actions did not render the proceedings fundamentally unfair or unreliable because of the additional evidence adduced and because evidence of the other acts would, in our opinion, have been admissible regardless, given the trial court's proper reference to a plan or scheme and the significant probative value of that evidence. See MRE 404(b); see also MCL 768.27a(1).<sup>3</sup>

Defendant also argues that he received ineffective assistance of counsel when defense counsel failed to request voir dire of defendant from the trial court concerning defendant's right to remain silent. As we have reiterated in many contexts, "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (alteration in *Watson*). Defendant has not provided any supporting authority for his assertion. We consider the issue abandoned. *Watson*, 245 Mich App at 587.

## II. EVIDENCE OF DEFENDANT'S MENTAL LIMITATIONS

Defendant argues that the trial court erred in excluding evidence of his mental limitations and failing to instruct the jury about his communication problems, resulting in a violation of his constitutional right to present a defense. We disagree.

We review a trial court's evidentiary decisions for an abuse of discretion, *Unger*, 278 Mich App at 216, as we do a trial court's determination concerning whether a jury instruction is applicable to the facts of a case, *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). This Court reviews de novo whether a violation of a defendant's constitutional right to present a defense occurred. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

On the opening day of trial, defendant asked the court to allow his mother to testify about his mental capacity. Defendant sought to introduce evidence of his intellectual limitations and inability to communicate at an adult level. Defendant indicated that the purpose was to show

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likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct.

We note that "[j]urors are presumed to follow instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

<sup>3</sup> We note that the propensity inference, typically forbidden under MRE 404(b), is to be weighed on the probative side of the equation under MCL 768.27a. See *People v Watkins*, 491 Mich 450, 487; 818 NW2d 296 (2012) ("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").

that if there was touching, it was accidental and not for sexual gratification. The trial court denied defendant's request. However, the trial court did allow defendant's mother to testify in some respects about his limited mental capacity, to explain defendant's difficulties communicating while testifying in the courtroom.

The Michigan Supreme Court has held that the diminished-capacity defense is no longer valid in Michigan. *People v Carpenter*, 464 Mich 223, 241; 627 NW2d 276 (2001). "The Legislature has enacted a comprehensive statutory scheme setting forth the requirements for . . . a defense based on either mental illness or mental retardation. . . . [E]vidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent" is prohibited. *Id.* This Court has held that

a defendant is not entitled to offer evidence of a lack of mental capacity for the purpose of avoiding or reducing criminal responsibility by negating the intent element of an offense. But this does not mean that a defendant who is legally sane can never present evidence that he or she is afflicted with a mental disorder or otherwise has limited mental capabilities. [*People v Yost*, 278 Mich App 341, 354-55; 729 NW2d 753 (2008).]

Evidence of mental limitations may be admissible if it is given for a proper purpose and a limiting instruction is provided to the jury. *Id.* at 355.

Following *Carpenter* and *Yost*, we hold that the trial court did not abuse its discretion by limiting the testimony offered by defendant's mother. The trial court concluded that defendant was attempting to insert his mental limitations to show that he could not have intended to touch the victim for a sexual purpose. Because the Supreme Court has concluded that there is specific intent required to complete the crime of CSC II, see *People v Nyx*, 479 Mich 112, 118; 734 NW2d 548 (2007), the trial court did not abuse its discretion when it denied defendant the opportunity to negate intent through evidence of mental limitations. Rather, the trial court concluded that the evidence was relevant so the jury would not make improper decisions about defendant based on his ability or inability to communicate in court. The trial court accordingly allowed defendant's mother to testify about both an administrative law judge's findings concerning defendant's IQ and about defendant's communication difficulties. This was not an abuse of discretion.

Defendant also asserts that the trial court abused its discretion when it instructed the jury: "You may consider this evidence only in evaluating [defendant's] in-court testimony." However, where a limiting instruction is necessary, there is no abuse of discretion in giving it. MRE 105; see also, generally, *Dobek*, 274 Mich App at 82. Because the trial court properly allowed evidence of defendant's diminished mental capacity for the limited purpose of explaining his in-court testimony, a limiting instruction was required, and the trial court did not abuse its discretion in giving one.

The trial court did not err and thus defendant was not denied his constitutional right to present a defense.

Affirmed.

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