

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
May 19, 2015

v

LEON DALE BUNING,  
  
Defendant-Appellant.

No. 320140  
Mecosta Circuit Court  
LC No. 13-007743-FC

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Before: DONOFRIO, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, the trial court convicted defendant Leon Dale Buning of one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age), and acquitted him of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b (sexual penetration with a person under 13 years of age). The trial court sentenced him to serve 38 months' to 15 years' imprisonment. We affirm.

**I. FACTUAL BACKGROUND**

The victim testified that she and her mother began living with Buning in 2008, and Buning became her stepfather in 2009. According to the victim, she slept in the master bedroom because she did not have an alarm clock. The victim's mother testified that there were periods of time when the victim did not have an alarm clock and she would sleep in the master bedroom. Buning testified that the victim slept in the master bedroom because she was cold and scared.

According to the victim, Buning began touching her inappropriately when she was ten years old. The victim testified that Buning began touching her inappropriately after her mother and Buning were married, but also inconsistently testified that Buning stopped touching her after Buning and her mother married. Buning touched her about 10 other times, including once on a hunting trip. The victim also testified that Buning engaged in penetrative sex with her.

Buning testified that he would lay down next to the victim when she was sleeping in the master bedroom. According to Buning, he and the victim sometimes cuddled. The cuddling was mutual and he did sometimes initiate it, but he denied ever touching the victim for sexual gratification or engaging in intercourse with her.

According to the victim, she did not tell anyone about the contact because Buning told her she would get in trouble, her mother was happy, and she wanted people to figure out for themselves what was occurring. The victim testified that she told her cousin about Buning's actions. The victim's cousin testified that at one point the victim asked to stay at the cousin's house, which was unusual because it had not happened in several years. The victim's cousin testified that the victim made a statement about not trusting Buning and, because of a combination of rumors and the victim's statement, the victim's cousin asked if Buning had ever touched her. According to the cousin, the victim responded "how did you know" and began to cry. Michigan State Police Sergeant Eric Sumpter testified that he interviewed the victim for the first time in late 2010.

The victim's mother testified that the victim had good grades before moving in with Buning but by the end of 2009 the victim was failing her classes. The victim's mother testified, and similarly, that the victim engaged in destructive behavior, mood swings, talking back, and self-harm. The victim testified that she started cutting herself on top of her wrists to send a message.

Buning testified that the victim engaged in self-harming behavior after he grounded her. According to Buning, the victim's behavioral problems, including trouble at school, caused friction between him and the victim's mother. He also was seeing another woman in 2010, and that the victim's mother said that the victim told her about the other woman.

According to Sergeant Sumpter, Buning denied engaging in inappropriate contact with the victim but did admit that he sometimes cuddled with the victim and that there were times the victim slept in his bed. Dr. Sarah Brown, a child abuse pediatrician, testified that she examined the victim. Dr. Brown testified that victims of sexual abuse often engaged in vandalizing, self-inflicted injury, and have trouble sleeping. Dr. Brown testified that the victim's behaviors were consistent with those of sexual abuse victims.

The jury acquitted Buning of three counts of CSC I but found him guilty of one count of CSC II. Following the trial, Buning moved for a new trial, alleging that the verdict was against the great weight of the evidence and that defense counsel did not provide effective assistance at trial. The trial court denied the motion. Buning now appeals.

## II. VERDICT AGAINST THE GREAT WEIGHT OF THE EVIDENCE

Buning contends that the jury's verdict was against the great weight of the evidence because the victim's testimony was self-contradictory, unreliable, and inconsistent. We disagree.

This Court reviews for an abuse of discretion a trial court's denial of a defendant's motion for a new trial on the basis that the verdict was against the great weight of the evidence. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). The trial court abuses its discretion when its outcome falls outside the range of reasonable and principled outcomes. *Id.*

The prosecution must prove each element of a crime beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). Generally, courts review a defendant's claim that the jury's verdict was against the great weight of the evidence to determine whether "the evidence preponderates so heavily against the verdict that it would be a

miscarriage of justice to allow the verdict to stand.” *Lacalamita*, 286 Mich App at 469. This Court does not resolve credibility questions on appeal. *Id.* at 470.

We conclude that the evidence was sufficient to support the jury’s verdict. We recognize that the victim’s testimony at trial sometimes conflicted with itself and with her previous statements. But the presence of conflicting testimony alone does not provide a sufficient ground to discard a verdict as against the great weight of the evidence. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). This Court must defer to the trier of fact’s determination of credibility “unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the [trier of fact] could not believe it, or contradicted indisputable physical facts or defied physical realities . . . .” *Id.* at 643-644.

In this case, the victim’s testimony was not deprived of all probative value and was not unbelievable. While defense counsel did thoroughly impeach the victim’s testimony, the testimony was not directly contradictory on important points. The victim consistently maintained that the defendant touched her under her clothes, though she inconsistently recalled details such as when and where the conduct occurred. Further, the victim’s testimony was not the only support for the jury’s verdict. The jury may have credited Buning’s statements that he cuddled with the victim while discrediting his statement that he did not do so for a sexual purpose. The jury may also have weighted the victim’s cousin’s testimony that the victim began crying and stated “how did you know” when she asked the victim if Buning touched her. We conclude that the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow it to stand.

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

Buning contends that defense counsel was ineffective because counsel (1) failed to impeach the victim on several points, and (2) failed to request a jury instruction on the use of other-acts evidence. We disagree.

A criminal defendant has the fundamental right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). A defendant’s ineffective assistance of counsel claim “is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). When reviewing an ineffective assistance of counsel claim, this Court reviews for clear error the trial court’s findings of fact and reviews de novo questions of law. *Id.* The trial court’s findings are clearly erroneous if this Court is definitely and firmly convinced that it made a mistake. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

To prove that a defense counsel was not effective, the defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel’s deficient performance prejudiced the defendant. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must overcome the strong presumption that counsel’s performance constituted sound trial strategy. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). We give defense counsel wide discretion in matters of

trial strategy because counsel may be required to take calculated risks to win a case. *Pickens*, 446 Mich at 325.

We conclude that defense counsel's decisions not to impeach the victim on the inconsistencies that Buning raises on appeal do not demonstrate that counsel was ineffective. Decisions about the manner in which to question witnesses are matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defense counsel may validly decline to cross-examine a child victim because counsel

might want to avoid the appearance of bullying the witness, might believe that the complainant's testimony can best be undermined by pointing out inconsistencies with other testimony, and might want to avoid elaboration on damaging points of testimony . . . . [*People v Gioglio*, 296 Mich App 12, 26; 815 NW2d 589 (2012).]

At the hearing on the motion, defense counsel testified that he did not impeach the victim on specific inconsistencies between her trial testimony and her statements to Sergeant Sumpter because he did not want to risk opening the door on admission of the entire recorded interview, which also contained damaging information. Defense counsel further explained that impeaching a child victim is a balancing act because excessive impeachment risks may make the victim appear bullied and may cause the jury to sympathize with the victim. Finally, in counsel's experience with the victim, he found that she could become emotional and tearful, which would undo the benefit of any impeachment. We note that the record reflects that defense counsel did impeach the victim in other ways and on less peripheral matters. Counsel's decisions appear to this Court to be strategic rather than an oversight. We are not definitely and firmly convinced that the trial court made a mistake when it found that counsel's decisions were reasonable.

We also conclude that defense counsel's decision not to request an instruction on the use of other-acts evidence does not demonstrate that counsel was ineffective. Counsel's decision whether to request a specific jury instruction is a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003). Certain instructions might damage a defendant's case as much as they might help. See *id.*

In this case, the victim testified about other specific instances of inappropriate touching. Defense counsel testified that he did not want to risk drawing the jury's attention to this evidence by having the judge instruct the jury about it. He instead wanted to "let those dogs lie" and address the larger issues with the victim's case in closing arguments. We agree that the proposed jury instruction could have harmed Buning's case by drawing the jury's attention to the victim's allegations that Buning touched her on other occasions. Defense counsel chose not to emphasize this evidence by having the trial court refer to it during jury instructions. While this strategy did not work, that does not mean that counsel was ineffective. See *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). We are not definitely and firmly convinced that the trial court made a mistake when it found that this strategy was objectively reasonable.

We affirm.

/s/ Pat M. Donofrio  
/s/ Peter D. O'Connell  
/s/ Amy Ronayne Krause