

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMIE ALLEN MAYNARD,

Defendant-Appellant.

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UNPUBLISHED

March 8, 2005

No. 253608

Bay Circuit Court

LC No. 03-010545-FH

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

In this case, defendant, Jamie Maynard appeals as of right his conviction by a jury of one count of third-degree criminal sexual conduct, MCL 750.520d. Defendant was sentenced to 96 months to fifteen years imprisonment. We affirm.

**I. FACTS**

The victim in this case is a fourteen-year-old girl. The victim met defendant when she was around nine-years-old and babysat for defendant and his wife's children. The two became friends and defendant would come over to the victim's mother's house once or twice a week to talk. In March, 2003, the victim asked her father to give defendant a job at his wood-cutting business. About a week after defendant began to work for the victim's father, the victim moved from her mother's house to her father's trailer.

Jason Defeyter, the victim's sixteen-year-old brother, testified that he lived with his father and the victim in his father's trailer in March 2003. He stated that he walked in on the victim and defendant having sex in his bedroom during March, 2003. Specifically, he stated that on one occasion, he was on the phone with his mother when his mother asked to speak with the victim. He went to his room to find the victim and saw her wearing only a shirt with her arms around defendant's neck and her legs around his waist. Defendant was standing with his pants down. The victim told Jason Defeyter not to tell their mother. Jason Defeyter handed the phone to the victim and told her and defendant to "knock it the heck off."

About fifteen minutes later, he heard sexual noises coming from the living room. When he walked in to the living room he saw defendant on top of the victim on the couch, but could not tell if they were actually having intercourse. He told them to stop and left the room. About five minutes later, he walked in to the living room and Jason Defeyter could tell for certain that

defendant and the victim were having sex because the blanket that had been on top of them had slid off.

The victim testified that she and defendant were just friends and that they had never engaged in sexual intercourse. She admitted that she had romantic interest in defendant at one time, but that she came to view him more like an older brother. The prosecution introduced a notebook wherein the victim had written many entries to defendant. She addressed most of the entries to "Jamie" and stated,

"I can't what (sic) until I am old enough to be with you. And I don't know why you get so jealous over people I don't even like. I love you and only you. I am not going to cheat on you. I love you too much to lose you. I want to have kids with you and be your wife. I have been thinking I just want you to know if I ever end up having a kid before I am old enough, I will make sure that you don't go to jail."

In another entry the victim wrote:

"I wish I was older so you would not have to go throw (sic) all of this. If you ever what (sic) to brake (sic) up with me I will understand. I know it must be hard to see me than (sic) go home to Kandy (sic-Kandi is defendant's wife) and listen to her bitch than (sic) have your mom bitch at you too. I don't no (sic) why it has to be a law but it is an I can't do much about it. . .I wont (sic) to be with you for the rest of my life and have kids with you I really mean it. If I ever end up pragnite (sic) I would not really care as long as it was from you. I don't care how old I am as long as I have one from you."

There were also two entries in the notebook that appeared to have been written by defendant. Although the victim denied that defendant had written in the notebook. The entries written in handwriting different from the victim expressed anger at the victim for not spending enough time with the writer. The victim testified that she told police that she and defendant had written "things" in her notebook because she suspected that her dad was reading the notebook. Trooper Brad Woolman of the Michigan State Police testified that when he questioned defendant, defendant denied any knowledge of the notebook.

Shellie Turmell, a neighbor of the victim's father, testified that in the spring of 2003 she witnessed the victim and defendant walking by her house holding hands and kissing. The victim claimed that she was dating someone else at that time and recalled walking down the street and kissing him, not defendant. Turmell also testified that Jason Defeyter often confided in her and on one occasion came over to her house visibly upset. Jason Defeyter told her that he had witnessed the victim and defendant having sexual intercourse.

The defense theory of the case was that the victim's father, Steven Defeyter, had convinced his son Jason Defeyter to lie about seeing defendant and the victim engaged in sexual intercourse because Steven Defeyter was attempting to extort money from defendant by threatening to send defendant to prison for life if he did not pay him \$750. The defense further argued that defendant had walked in and caught Steven Defeyter having sexual intercourse with his (Steven Defeyter's) daughter, a twin sister of the victim. The defense theorized that Steven

Defeyter exerted a great deal of influence over Jason Defeyter and had coerced him to lie on the stand to extort money from defendant and to deflect attention from Steven Defeyter's illicit sexual relationship with his own daughters.

## II. ADMISSION OF EVIDENCE

Defendant argues that the trial court erred in ruling evidence inadmissible, specifically: that Jason Defeyter and his father Steven Defeyter were attempting to extort money from defendant; statements made by Steven Defeyter about Jason Defeyter; and Steven Defeyter's alleged sexual relationship with his daughters. We disagree.

### A. Standard of Review

A trial court's evidentiary decisions are reviewed for an abuse of discretion. See *People v Gonzalez*, 256 Mich App 212, 217; 663 NW2d 499 (2003).

### B. Analysis

At trial, Steven Defeyter exercised his Fifth Amendment claim of privilege and declined to testify. Based on his inability to question Steven Defeyter, defense counsel asked the court if he could present hearsay testimony that Steven Defeyter was attempting to extort money from defendant and members of defendant's family. According to defense counsel, Steven Defeyter offered to have Jason Defeyter change his testimony in order to have the charges against defendant dropped in exchange for money. The trial court ruled "any statements made by Mr. Steven Defeyter to others that he may be able to get Jason to testify differently or the like are just simply not relevant in this case." The court further found that MRE 804(b)(3) did not apply.

In his brief on appeal, defendant argues that he was prevented from showing that Jason and Steven Defeyter fabricated Jason's story of witnessing defendant and the victim engaged in sexual intercourse. This is inaccurate. Defendant presented witnesses who testified that Jason would lie to protect his father and that Jason's father made him testify when he did not want to. Further, the jury heard testimony about Steven Defeyter's alleged sexual relationship with his daughter. The only testimony the trial court declined to allow was testimony about Steven Defeyter's statements concerning the alleged extortion. The scenario presented by defense counsel to the trial court was that, in exchange for money, Steven Defeyter offered to have his son change his testimony that he had seen defendant and the victim having sexual intercourse. Defense counsel, at that point, never even suggested that Jason Defeyter had fabricated his testimony from the outset in order to extort money from defendant. Thus, the trial court correctly concluded that this testimony was not relevant.

Additionally, the trial court properly excluded the testimony as hearsay on the grounds that MRE 804(b)(3) did not apply. MRE 804(b)(3) provides that the hearsay rule does not exclude testimony of an unavailable declarant where:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the

statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Although Steven Defeyter's alleged attempts at extortion were against his interest and could have exposed him to criminal liability, the statements would not have exculpated defendant. Further, the rule states that "a reasonable person in the declarant's position would not have made the statement unless believing it to be true. Steven Defeyter's statement was essentially, "give me money and in return I will have my son change his testimony so you will not have to go to jail." This is not the type of statement that is more likely true because it is against Steven Defeyter's interest. In fact, this statement has no bearing on whether defendant actually committed this crime. The trial court properly excluded testimony about Steven Defeyter's alleged attempts to extort money from defendant.

### III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that defense counsel was ineffective for failing to question the victim about Steven Defeyter's influence over his son Jason Defeyter in order to impeach Jason. We disagree.

#### A. Standard of Review

Defendant did not move for a new trial or a *Ginther*<sup>1</sup> hearing, therefore defendant has not preserved this issue for appeal and our review is limited to the mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). A trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court will not reverse a conviction based on ineffective assistance of counsel unless the defendant establishes that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), and that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578; *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

#### B. Analysis

The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

proceedings would have been different, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (#244817, rel'd 7/13/04) slip op p 8. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997), habeas corpus gtd sub nom *Mitchell v Mason*, 60 F Supp 2d 655 (ED Mich, 1999), aff'd 257 F3d 554 (CA 6, 2001), vac'd and rem'd 536 US 901; 122 S Ct 2354; 153 L Ed 2d 177 (2002), on rem 325 F3d 732 (CA 6, 2003), cert pending; *People v Dixon*, 263 Mich App 393, 398; \_\_\_ NW2d \_\_\_ (2004), and the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *Dixon, supra*. A substantial defense is one which might have made a difference in the outcome of the trial. *Id.*

Here defendant argues that counsel was ineffective for failing to impeach Jason Defeyter with direct evidence that he fabricated the testimony that he saw the victim and defendant having sexual intercourse. The record reflects that defense counsel did cross-examine Jason Defeyter on the issue of whether his father influenced his testimony. The trial court correctly ruled that Steven Defeyter's alleged statements regarding extortion were inadmissible. Thus, defense counsel could not have used them to impeach Jason Defeyter's testimony. Counsel is not required to advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). Defendant does not suggest that there was other known credible and admissible evidence that defense counsel failed to use in support of this alleged extortion. Thus, defendant has failed to demonstrate that counsel's performance was below an objective standard of reasonableness under prevailing professional norms.

#### IV. WITNESS BOLSTERING

Finally, defendant argues that the trial court abused its discretion in allowing the prosecution to improperly bolster Jason Defeyter's testimony with a prior consistent statement. We disagree.

##### A. Standard of Review

A trial court's evidentiary decisions are reviewed for an abuse of discretion. *Gonzalez, supra* at 217.

##### B. Analysis

At trial, the prosecution attempted to question witness Shellie Turmell about a night in 2003 when Jason Defeyter came over to her house and mentioned that he had witnessed the victim and defendant "goin' at it." Defense counsel objected to this testimony as hearsay. The trial court, however, allowed the testimony in order to rebut the charge of the defense of recent

fabrication. Defense counsel argued that this was not recent fabrication and that it was the defense theory that Jason Defeyter had fabricated this story in the spring of 2003.

Where a prior out-of-court statement of a witness is consistent with his trial testimony, the prior statement is hearsay and is generally not admissible as substantive evidence. *People v Washington*, 100 Mich App 628, 632, 300 NW2d 347 (1980). However, the trial court's ruling is supported by MRE 801(d)(1)(B) which provides that a statement is not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Here, Turmell's testimony was that Jason Defeyter confided in her that he had witnessed his sister and defendant having sexual intercourse. She testified that she told him that he should tell his father, so his father could report this to the authorities. This testimony was properly offered to rebut the charge of improper influence. One of defense counsel's main arguments was that Jason Defeyter was lying on the stand at the behest of his father who was improperly influencing him. Turmell's testimony indicates that Jason Defeyter confided in her before he had even talked to his father about what he had witnessed. Therefore, the trial court properly admitted Turmell's testimony under MRE 801(d)(1)(B) to rebut the defense charge of improper influence and did not abuse its discretion.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Janet T. Neff  
/s/ Bill Schuette