

Order

Michigan Supreme Court
Lansing, Michigan

October 14, 2022

Bridget M. McCormack,
Chief Justice

164441

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 164441
COA: 349918
Wayne CC: 18-007516-FC

JOSHUA LEE DUFEK,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the March 31, 2022 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and REMAND this case to that court for reconsideration of the defendant's ineffective-assistance-of-counsel claims. Although the Court of Appeals cited the correct standard for assessing prejudice under *Strickland v Washington*, 466 US 668 (1984), it did not apply that standard. Prejudice is established where a defendant shows that "but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51 (2012). As the United States Supreme Court explained in *Strickland*:

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . .

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by

errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. [*Strickland*, 466 US at 695-696.]

The defendant argued on appeal that his trial counsel was ineffective for asking his ex-wife whether she was aware of any other allegations that the defendant had molested a child. In response, the witness said she had learned from the defendant's sister that he had molested her when they were children. The Court of Appeals agreed with the defendant that his counsel was objectively unreasonable for opening the door to other-acts evidence. But it held that he was not prejudiced by the error.

In assessing whether the defendant was prejudiced, the panel made a critical error. It concluded that because the victim's testimony was "sufficient to convict defendant," he was not prejudiced by the admission of other-acts evidence. *People v Dufek (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued March 31, 2022 (Docket No. 349918), p 3. Sufficient evidence to convict does not obviate the need to make a prejudice determination. Rather, as the Court noted in *Strickland*, a prejudice analysis requires determining how the error affected other evidence properly presented.

On remand, the Court of Appeals shall resolve the defendant's claims of ineffective assistance of counsel under the correct standard, evaluating the interaction of the improper other-acts evidence with the other evidence presented at trial. Additionally, since this issue logically connects to the defendant's claim of cumulative error, that claim should also be addressed on remand, if necessary.

We do not retain jurisdiction.

ZAHRA, J., did not participate due to a familial relationship with counsel of record.



t1011

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 14, 2022

Handwritten signature of Larry S. Royster in black ink.

Clerk