STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2012
v	No. 305190 Oakland Circuit Court
ANDREW JOSEPH MCKNIGHT, Defendant-Appellant.	LC No. 2010-234230-FC

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree criminal sexual conduct (CSC 2), MCL 750.520c. He was sentenced to 2 to 15 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied the effective assistance of counsel, where counsel failed to call to the stand a psychological expert in forensic interviewing techniques, patterns of disclosure, and typical behaviors associated with child sex abuse cases, which was needed to undermine the reliability of the complainants' testimony.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011) (internal quotation marks and citation omitted). We review a trial court's factual findings for clear error, and constitutional determinations are reviewed de novo. *Id.*

In *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011), our Supreme Court set forth the analytical framework for addressing ineffective assistance claims:

> A defendant must meet two requirements to warrant a new trial because of the ineffective assistance of trial counsel. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. [Citations omitted.]

"[F]ailure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy." *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009). "[T]he failure to call a witness can constitute ineffective assistance of counsel only when it 'deprives the defendant of a substantial defense.'" *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (citation omitted). "'A substantial defense is one that might have made a difference in the outcome of the trial.'" *People v Chapo***,** 283 Mich App 360, 371; 770 NW2d 68 (2009), quoting *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant was accused of sexually abusing his two adopted daughters, the complainants, aged 14 and 15. The charges consisted of multiple counts of both first-degree criminal sexual conduct (CSC 1), MCL 750.520b, and CSC 2. At trial, both complainants testified that defendant had been sexually abusing them for several years. Defendant claimed that the complainants fabricated the allegations against him because they were angry at him for imposing strict rules regarding cell phone use. The jury convicted defendant of committing one count of CSC 2 against the 14-year-old complainant. Defendant was acquitted of five other CSC 1 and 2 charges.

At trial, counsel did not call an expert witness to testify regarding forensic interviewing techniques, patterns of disclosure, and typical behaviors associated with child sex abuse cases. Counsel's failure to call an expert witness now forms the basis of defendant's ineffective assistance of counsel claim on appeal. To assert that trial counsel was ineffective for failing to call an expert witness, a defendant must offer proof that an expert witness would have testified favorably if called by the defense. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). To support his claim, defendant offered an affidavit from Dr. Katherine Okla, who averred that she is "a licensed clinical psychologist in Michigan with a Ph.D. in clinical psychology" and has been "qualified as an expert approximately 75 to 100 times . . . in the area of forensic interviewing techniques, memory, suggestibility and patterns of disclosure in child sex abuse cases[.]" Dr. Okla reviewed the record in this case, and identified several factors that she believed undermined the complainants' testimony.

Although defendant offered proof that an expert witness would have testified favorably if called by defense counsel, counsel's performance did not fall below an objective standard of reasonableness. Again, failure to call a witness is presumed to be a matter of trial strategy unless defendant can show that he was deprived of a substantial defense, which defendant cannot prove in this case. *Payne*, 285 Mich App at 190. At trial, defense counsel's theory was that the allegations against defendant were pure fabrication, and counsel presented a substantial case to prove his theory. Counsel aggressively cross-examined the complainants and highlighted inconsistencies in their testimony for the jury. Counsel called four witnesses that impeached specific portions of the complainants' testimony. An adoption counselor and psychiatrist testified that they had interviewed the complainants during the adoption proceedings and received no reports of physical or sexual abuse. Defendant's neighbor testified that defendant had attended a party during a time when he was accused of sexually abusing one of the complainants. A former principal of one of the complainants testified that the complainant's testimony regarding a certain school event, which was referenced by the complainant in relationship to the timing of a particular act of abuse, was inaccurate. These four impeachment witnesses cast doubt on the complainants' testimony. Defense counsel also called defendant's

biological daughter and defendant's wife as witnesses and elicited favorable testimony from them on direct examination. Both witnesses testified that they lived in the home with defendant and the complainants and that they had never seen defendant engage in any sexual behavior toward the complainants. Finally, defendant testified, and counsel elicited testimony through direct examination that the complainants had fabricated the allegations. Based on the record, defense counsel presented significant evidence that discredited the complainants' testimony and suggested that the allegations against defendant were false. Furthermore, it is clear that counsel's efforts at trial were at least partially successful, as defendant was acquitted of five out of the six charges brought against him. Considering the myriad evidence presented to the jury that advanced defense counsel's trial theory, we cannot conclude that defendant was deprived of a substantial defense simply because a psychological expert was not called to even further advance the theory.

Defendant next argues that the trial court abused its discretion when it excluded, on relevancy grounds, testimony from one of defendant's former foster children that she had not been abused by defendant. Defendant maintains that the evidence was relevant and constituted character evidence that could properly be admitted in the form of specific instances of conduct because it pertained to an essential element of his defense. See MRE 401, 404(a), and 405(b). We review a trial court's decision to exclude evidence for an abuse of discretion. *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012). "A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes." *Id*. We find that the evidence at issue is problematic, given that it concerns defendant's character or a trait of character and its form relates to instances of conduct, where MRE 405(b) provides that such evidence is only admissible when "character or a trait of character . . . is an essential element of a charge, claim, or defense[.]" See *People v Harris*, 458 Mich 310, 319; 583 NW2d 680 (1998) (act of victim was the material issue relative to the defense and not a trait of the victim's character). We question whether the character evidence actually concerned an *essential element* of the defense.[1] Regardless, assuming any error, we conclude that it did not result in a miscarriage of justice, as defendant has failed to show that it is more probable than not that the presumed error was outcome-determinative. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[1] We also note that it is difficult to assess relevancy when defendant, below and on appeal, provides no information concerning the prospective witness's age during the foster care period, the length of time that defendant cared for her, or other circumstances regarding the witness and the foster care relationship that could bear on relevancy in relationship to the charges at issue here.