STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2026 10:12 AM
v	No. 368049 Chippewa Circuit Court
RICHARD MILLER MCCALLON, Defendant-Appellant.	LC No. 2020-004061-FH

Before: CAMERON, P.J., and KOROBKIN and BAZZI, JJ.

PER CURIAM.

Defendant, Richard Miller McCallon, appeals as of right his jury trial conviction of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(b) (force or coercion). McCallon was sentenced to 20 months' to 15 years' incarceration for the CSC-III conviction. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of McCallon's sexual abuse of his then-girlfriend (complainant) in November 2018. One morning, complainant woke up in her university dorm room to McCallon pulling down her pants. Complainant attempted to sit up, but McCallon was sitting on her legs. When complainant asked what McCallon was doing, he pushed complainant down, shushed her, and stated that "it will be over soon." Complainant instructed McCallon to stop, but he proceeded to penetrate her vaginally. McCallon pinned complainant's wrist above her head, and complainant was unable to free herself. McCallon ejaculated on complainant's back, and he remained in her dormitory for an unspecified period of time before leaving the premises. McCallon drove home from complainant's university with a friend, and McCallon disclosed to this friend that he had taken advantage of complainant while she was asleep.

Complainant was unsure of the exact date the underlying sexual abuse occurred. However, complainant recognized that it was the week of November 12, 2018, and that it was either on a Monday, Wednesday, or Friday, because she had history class on the day of the assault. Complainant reported the sexual abuse incident in January 2019 to the police. Following a jury trial, McCallon was convicted and sentenced as previously detailed. McCallon moved for a new trial, arguing the trial court improperly prohibited his presentation of alibi evidence, and that he

received ineffective assistance of counsel. Following a hearing, the trial court denied McCallon's motions. This appeal followed.

II. ANALYSIS

McCallon argues that he was denied effective assistance of counsel during the lower court proceedings. We disagree.

"Generally, whether a defendant had the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012) (quotation marks and citation omitted). "This Court reviews findings of fact for clear error and questions of law de novo." *Id*. However, when the trial court did not hold an evidentiary hearing on the claim, "there are no factual findings to which this Court must defer, and this Court's review is for mistakes that are apparent on the record alone." *People v McFarlane*, 325 Mich App 507, 527; 926 NW2d 339 (2018). This Court reviews de novo whether a defense counsel's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms and resulted in prejudice to the defendant. *People v Dingee*, ___ Mich App ___, ___; ___ NW3d ___ (2025) (Docket No. 365531); slip op at 3.

The United States Constitution and the Michigan Constitution both entitle a criminal defendant to the assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. This counsel must be effective to satisfy this constitutional requirement. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Counsel is ineffective if "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that [the] outcome would have been different." *People v Yeager*, 511 Mich 478, 488; 999 NW2d 490 (2023) (quotation marks and citation omitted). There is a reasonable probability that the outcome would have been different if the probability is sufficient to undermine confidence in the outcome. *Id*. "A reasonable probability need not rise to the level of making it more likely than not that the outcome would have been different." *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). The burden is on the defendant to establish the factual predicate for an ineffective assistance claim. *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014).

"There is a presumption that counsel was effective, and a defendant must overcome the strong presumption that counsel's challenged actions were sound trial strategy." *People v Cooper*, 309 Mich App 74, 80; 867 NW2d 452 (2015). "This Court will not substitute [its] judgment for that of counsel on matters of trial strategy, nor will [this Court] use the benefit of hindsight when assessing counsel's competence." *Id*. (quotation marks and citation omitted; alteration in original). "Failure to raise a futile objection or advance a meritless argument does not constitute ineffective assistance of counsel", and "failing to raise an objection may be consistent with a sound trial strategy." *People v Isrow*, 339 Mich App 522, 532; 984 NW2d 528 (2021).

A. ALIBI NOTICE

McCallon first contends that defense counsel was ineffective for failing to file a notice of alibi as required by MCL 768.20(1). The statute provides, in pertinent part:

> (1) If a defendant in a felony case proposes to offer in his defense testimony to establish an alibi at the time of the alleged offense, the defendant shall at the time of arraignment on the information or within 15 days after that arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney a notice in writing of his intention to claim that defense. [MCL 768.20(1).]

In this case, defense counsel apparently intended to offer an alibi defense by introducing McCallon's school attendance records and the testimony of McCallon's mother regarding McCallon's location on certain suspected dates of the underlying assault, but counsel neglected to file the necessary notice. The trial court, thus, barred McCallon from presenting this alibi evidence during the subsequent jury trial. Considering defense counsel's intent to present the alibi defense, there does not appear to be a conceivable strategic reason to omit filing the statutorily required notice. See *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994).

Nevertheless, McCallon has failed to establish the required showing of prejudice. First, the proposed alibi evidence did not pertain to all potential dates when the subject assault may have occurred. Complainant testified that the assault occurred during the week of November 16, 2018, on either Monday (November 12, 2018), Wednesday (November 14, 2018), or Friday (November 16, 2018), before 11:00 a.m. McCallon's attendance record indicated that he was present at school on November 12, 2018, but he was absent on November 16, 2018, and November 14, 2018, was a snow day. Moreover, McCallon's mother solely asserted that she returned from work for her lunch break on November 14, 2018, at some point between 6:00 a.m. and 3:00 p.m., and that McCallon was home with no sign of having left the residence. Accordingly, McCallon's alibi did not cover the date of November 16, 2018.

Further, despite the court order barring the presentation of alibi evidence, McCallon's mother testified at trial that McCallon resided with her during the week in question; that McCallon did not break his 10:00 p.m. curfew that week; and that McCallon did not appear to have left the home on November 14, 2018. Additionally, when McCallon was asked whether it was possible for McCallon to have sexually abused complainant on November 12, 2018, or November 14, 2018, she answered, "No." Notably, her testimony was not stricken. Thus, the jury ultimately heard the contested alibi testimony and it was implicitly permitted to consider the testimony in its deliberations. Ultimately, because the proposed alibi evidence did not cover the entire range of dates the subject incident may have transpired, and because the testimony of McCallon's mother regarding McCallon's alibi was introduced at trial, defense counsel's failure to timely file the notice of alibi did not prejudice McCallon.

B. COMPLAINANT'S TESTIMONY

McCallon next argues that trial court was constitutionally deficient for neglecting to object to complainant's hearsay testimony regarding her post-traumatic stress disorder (PTSD) diagnosis. "Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *People v Smith*, 336 Mich App 79, 110; 969 NW2d 548 (2021), citing MRE 801(c) (quotation marks omitted). It is inadmissible unless the Michigan Rules of Evidence provide otherwise. MRE 802.

Complainant's contested trial testimony is as follows:

> *Q.* Since the sexual assault, have you noticed a change in your mental health?
>
> *A.* Yes
>
> *Q.* Can you tell me a little bit about that?
>
> *A.* Afterwards, I just started going to counseling and I got diagnosed with PTSD, severe depression, and generalized anxiety disorder with [obsessive compulsive disorder] tendencies.

Complainant's testimony constituted hearsay, because the out-of-court statement of her diagnoses was offered to establish that she suffered from a variety of mental health conditions. However, assuming defense counsel's failure to object to this testimony fell below an objective standard of reasonableness, the deficient performance did not prejudice McCallon, considering its isolated and limited nature. Further, complainant permissibly testified regarding her trauma after the sexual abuse, sharing that she woke up in the middle of the night to check the locks, and that she continually struggled with eating and sleeping. Additionally, McCallon's friend testified that McCallon admitted to the assault, and there was also testimony that McCallon attempted to pressure this friend into not testifying.[1] Accordingly, there is not a reasonable probability that an objection to complainant's hearsay testimony would have affected the outcome of the case.

C. COMPLAINANT'S OTHER-ACTS TESTIMONY

McCallon argues that defense counsel unreasonably failed to object to complainant's other-acts testimony under MCL 768.27b. At the time of his trial, MCL 768.27b provided:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.
>
> (2) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown. [MCL 768.27b, as amended by 2018 PA 372.]

[1] Evidence of a defendant attempting to influence a witness can show consciousness of guilt. See *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010).

Under MRE 403, "[T]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

At trial, complainant testified regarding an incident during which McCallon "grabbed [her] really hard and yelled at [her]," and a second instance in which McCallon seized her chin to make complainant look at him. Complainant further asserted that McCallon did not allow complainant to have certain friends and would take her phone away when she was speaking to her parents. It is apparent that these prior acts, as described by complainant, constituted "domestic violence" under MCL 768.27b. See MCL 768.27b(6)(a). MCL 768.27b therefore governed the admission of these prior acts, and McCallon does not challenge their substantive admissibility under that statute.

McCallon's argument, as it pertains to MCL 768.27b, is ultimately premised on a lack of notice. MCL 768.27b(2) requires the prosecution to provide notice to the defendant regarding the evidence that it intends to introduce under the statute "not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown." The statute does not mandate that notice be provided in any particular method. Compare MCL 768.27b(2) (requiring notice) with MRE 404(b)(2) (requiring "written notice" or oral notice on the record); see *People v Wisniewski*, ___ Mich App ___; ___ NW3d ___ (2025) (Docket No. 361978); slip op at 12 & n 7.[2] McCallon contends that he was not notified of the prosecution's intent to introduce his alleged other acts of domestic violence against complainant until trial, but the record in this case reflects that McCallon previously received notice of the substance of the contested testimony. In its pretrial witness and exhibit list, the prosecution included a videorecording of complainant's interview with the police, in which she alleged that McCallon perpetrated domestic violence against her.

McCallon further appears to argue that the other-acts testimony may have been excluded under MRE 403, though McCallon does not elaborate on how. Generally, "[a]n appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Nonetheless, the potentially prejudicial nature of the contested testimony did not outweigh its probative value. When complainant testified regarding the sexual abuse, the prosecution asked complainant why she did not fight back, and complainant responded, "I was scared." The prosecution then inquired whether McCallon had previously hurt complainant, and complainant answered affirmatively. The prosecution subsequently requested examples of how McCallon injured complainant in the past; complainant asserted that McCallon grabbed her, McCallon "could be rough," and he isolated complainant from friends and family. Therefore, the contested testimony served to contextualize why complainant did not fight back against McCallon, a matter probative of sexual assault without being outweighed by unfair prejudice. In light of the foregoing, the other-acts testimony was admissible despite the alleged lack of notice under MCL 768.27b and MRE 403. See *People v*

[2] *Wisniewski* addresses the disclosure requirement of MCL 768.27a, not MCL 768.27b. However, because the language of the two statutes regarding disclosure is identical, we deem it appropriate to interpret the disclosure language of MCL 768.27b similarly to the disclosure language in MCL 768.27a. See *People v Cameron*, 291 Mich App 599, 609-610; 806 NW2d 371 (2011).

Lowrey, 342 Mich App 99, 118; 993 NW2d 62 (2022) (providing, "Although notice was not given, this testimony was clearly relevant and admissible under MCL 768.27b(1), was highly probative, and was not outweighed by unfair prejudice," particularly because it demonstrated "defendant's pattern of prior abuse of the victim, that he did not take 'no' for an answer, and that the victim felt that she could not resist on the night in question").

D. HEARSAY TESTIMONY FROM COMPLAINANT'S ROOMMATE

McCallon further argues that defense counsel was ineffective for neglecting to object to the hearsay testimony of complainant's roommate regarding the sexual assault. As previously noted, hearsay is generally inadmissible, MRE 802, and constitutes "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Smith*, 336 Mich App at 110, citing MRE 801(c) (quotation marks omitted). However, MRE 801(d)(1)(B) provides:

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
>
> > (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> >
> > * * *
> >
> > > (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying;

Four elements must be met for a statement to not be hearsay under this rule:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000).]

This exception applies to the testimony of complainant's roommate. First, the declarant was complainant, who testified at McCallon's trial and was subject to cross-examination. Second, defense counsel's opening statement included a charge of recent fabrication or improper influence against complainant as follows:

> You're also going to hear that [complainant] chose a very convenient time to come forward. And it wasn't just because of Me Too. There were more convenient times for her to come forward. But you will hear about the triggering

> effect right from her mouth that made her come forward. And you will believe that she was lying.
>
> You're going to find out that [complainant] thought that this was a relationship. That [complainant] thought that they were going be soul mates. When that didn't happen, she became a woman scorned. The woman, because she was the adult, is scorned. Ain't nothing more dangerous—dangerous in this world, than a woman scorned.
>
> * * *
>
> [Complainant] didn't think, and that you don't think you make crap up and you're ruining a young man's life. And this child's life has been apart, overturned, because of a woman scorned.

Essentially, defense counsel advanced that complainant fabricated the sexual abuse allegation because McCallon had "scorned" her, presumably referring to the fact that McCallon ended his relationship with complainant around December 2018. Third, the in-court testimony of complainant's roommate was consistent with complainant's statements regarding the sexual abuse. Complainant's roommate asserted that complainant had disclosed to her that McCallon had woken her up by initiating sex; complainant disclaimed that McCallon sexually abused her in her dorm room, initiating the assault while she was asleep. Fourth, complainant informed her roommate of what transpired the day of the subject incident, which would have been before the time that the supposed motive to falsify arose, i.e., McCallon ending their relationship.

Because the hearsay statement was offered for a proper purpose under MRE 801(d)(1)(B), an objection to the statement would have been futile. Counsel is not ineffective for failing to make a futile objection. *People v Milstead*, 250 Mich App. 391, 401, 648 N.W.2d 648 (2002). Therefore, McCallon has failed to raise a viable ineffective assistance claim on this basis.

E. CHARACTER TESTIMONY FROM COMPLAINANT'S ROOMMATE

McCallon argues that defense counsel was deficient for failing to object to the character testimony of complainant's roommate regarding McCallon. MRE 404(a)(1) provides, "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." A defendant is entitled to present evidence of their own character trait that makes it less likely for the defendant to have committed the offense; if the defendant does so, the prosecution is then entitled to present character evidence about the defendant to rebut the defendant's character evidence. *People v Roper*, 286 Mich App 77, 93; 777 NW2d 483 (2009). However, the prosecution can only do so *after* the defendant has introduced character evidence. *Id*.

In this case, there was improper character evidence under MRE 404(a)(1). Complainant's roommate testified, "I feel like [McCallon] is slightly angry." This testimony may be relevant to show that McCallon was an angry person who would commit a sexual assault. McCallon had not offered any evidence of a character trait for being peaceful or nonviolent; thus, the door was not open to evidence of McCallon being an angry person. However, even if an objection on this basis

may have been successful, such an error does not rise to the level of ineffective assistance of counsel. First, choosing not to object, particularly to limited, minor errors, may be a part of reasonable trial strategy. See *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). The statement of complainant's roommate that McCallon was "slightly angry" was isolated, and the matter was not addressed again. It is also a relatively minor statement as evidenced by the use of the term "slightly," and complainant's roommate prefaced the contention by stating that McCallon "doesn't feel like a bad person."

Even assuming, arguendo, that defense counsel was deficient by failing to object to this statement, the omission did not prejudice McCallon considering the limited and restrained nature of the contested testimony, and the proofs against McCallon. A successful objection to complainant's roommate stating that McCallon was "slightly angry" would not establish a reasonable probability of a different trial outcome. See *Yeager*, 511 Mich at 488. Accordingly, McCallon is not entitled to relief on this ground.

F. THE DETECTIVE'S OTHER-ACTS TESTIMONY

McCallon lastly argues that the other-acts testimony of Sault Ste. Marie City Detective Kristin Autore was inadmissible under MRE 801(d)(1)(B) and MCL 768.27b, such that defense counsel was ineffective for neglecting to object to her testimony. Detective Autore interviewed complainant in January 2019. At trial, Detective Autore testified that during the interview, complainant disclosed that McCallon had engaged in domestic violence against her, with the following exchange occurring during Detective Autore's direct examination:

> *Q.* Okay. Now, another area that Defense had indicated that [complainant] was being inconsistent was that she never brought up any domestic violence allegations before. Did you hear that?
>
> *A.* Yes.
>
> *Q.* And is that true?
>
> *A.* No.
>
> *Q.* Can you explain that?
>
> *A.* In the interview with me, she told me that he had grabbed her by the throat, she estimated five times.
>
> *Q.* Okay.
>
> *A.* I asked her if, at any point, she couldn't breathe or speak. That's a standard question for anyone being grabbed by the throat. She stated no. He seemed to do it to control. To show he was in control.
>
> *Q.* Did she make any other statements, that in your training experience, in investigating domestic violence, would be a red flag?

A. Just that he became controlling, even that—one of the times was that she—she was mouthing off.

This testimony was admissible under MRE 801(d)(1)(B) because (1) complainant was the declarant, and she testified and was subject to cross-examination, (2) defense counsel implicitly charged complainant with recently fabricating the claim of domestic violence during her cross-examination, stating, "Well, you're saying here—you're telling all these wonderful people and myself, all these new allegations of him hurting you. Your first chance with a police officer, you never tell him that," (3) Detective Autore's testimony regarding complainant's domestic violence disclosure is consistent with complainant's testimony that McCallon had hurt her before the sexual abuse, and (4) complainant's domestic violence allegations predated the underlying sexual abuse.

McCallon additionally contends that Detective Autore's testimony regarding the domestic violence accusations was inadmissible because the prosecution failed to provide notice as required under MCL 768.27b. As previously stated, the prosecution timely filed its witness and exhibit list, which included videos of the relevant police interviews, such that McCallon was aware of the substance of the domestic violence allegations. MCL 768.27b does not contain the formal notice requirements of MRE 404(b). See *Wisniewski*, ___ Mich App at ___; slip op at 12, 12 n 7. Accordingly, the contested testimony was properly offered, and defense counsel was not deficient for neglecting to object to Detective Autore's statements, because an attorney is not ineffective for failing to make a futile objection. See *Isrow*, 339 Mich App at 532.

Affirmed.

/s/ Thomas C. Cameron
/s/ Daniel S. Korobkin
/s/ Mariam S. Bazzi