STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD EARL BAILEY,

Defendant-Appellant.

UNPUBLISHED
March 23, 2023

No. 358040
Chippewa Circuit Court
LC No. 19-003984-FH

Before: K. F. KELLY, P.J., and BOONSTRA and REDFORD, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of domestic violence, MCL 750.81(2), and second-degree child abuse, MCL 750.136b(3).[1] The trial court sentenced defendant to concurrent prison terms of 93 days for the domestic violence conviction and 24 months to 10 years for the second-degree child abuse conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On July 8, 2019, defendant's girlfriend RB and her two children—CB and WB—were at defendant's house, along with defendant and his daughter BB; Tina Harrison, an unrelated adult, was also present. BB and CB were in the pool while RB, WB, Harrison, and defendant were inside the house.

WB testified that RB and defendant began discussing marriage, but that WB "did not agree with that" and stated, "I'm not ready for this to happen." WB testified that, after his statement, RB and defendant got "into a big fight." He testified that RB "got upset and she was getting ready to go." WB testified that defendant used both of his hands to push RB in the back, knocking her

[1] Defendant was also charged with assault and battery, MCL 750.81(1), but the trial court granted the prosecution's motion to dismiss that charge prior to trial.

off the porch[2] and onto the ground. WB told defendant, "Don't touch my mom," and as WB walked down the steps of the porch, defendant grabbed WB on the shoulders from behind and kicked him in the middle of his back, causing him to fall to the ground. WB testified that his wrist hurt after this fall. WB testified that he ran away from the house, and he fell as he ran, but he did not fall on his wrist; Harrison ran to him and sat with him after he fell the second time. WB was diagnosed with a wrist fracture two days later. The treating physician's assistant testified that "[t]he fracture pattern indicated that it was a higher impact mechanism of injury than standing height's fall."

RB testified that after the topic of marriage was brought up, WB "freaked out" and went out the door. She went after him, and after exiting the house ended up on the ground. She thought that defendant had pushed her because she "landed so hard on the ground," but she was "not a hundred percent sure." She testified that she did not see defendant push or touch WB but later saw that WB "had some scratches on his knees and stuff like that."

CB and BB were in the pool when they heard people yelling. They got out of the pool and went to the front of the house. CB testified that she saw RB, defendant, and WB on the porch. CB saw defendant use both of his arms to push RB in the back as she was on the porch and walking toward the steps, "trying to go towards her car." CB further testified that WB started to go down the steps of the porch, but defendant kicked WB in the back. BB testified that she saw WB jump off the porch and fall. BB further testified that she saw defendant standing on the porch and RB "laying on the ground with her knee all busted up," but BB did not know how she had ended up on the ground.

Christopher Milliner, a tenant of a home rented from defendant, testified that he had observed some of the events from approximately 150 yards away. Milliner testified that WB fell off the porch, and that defendant was not near him when he fell. Milliner further testified that he did not see defendant push RB and that it "looked like she stumbled off" the porch.

CB and BB called 911. Two police officers were dispatched to the house, Kinross Police Department Chief Joe Micolo and Chippewa County Sheriff's Deputy Jeffrey Kietzman. Chief Micolo testified that BB reported to him that defendant and RB had been arguing; that defendant had shoved RB off the porch; and that defendant had grabbed and kicked WB. Deputy Kietzman testified that when he arrived RB was crying and appeared to be intoxicated, and she had abrasions and was bleeding from her legs. WB was upset and had abrasions on his leg.

Defendant intended to call Harrison as a witness in his defense. However, a charge was pending against her for an unrelated domestic violence incident that had occurred in March 2021. Further, during the prosecution's case in chief, Chippewa County Sheriff's Department Patrol Sergeant Bradley Clegg testified that he had recently learned that Harrison was currently in a romantic relationship with defendant. The prosecution informed defense counsel and the trial court that it intended to impeach Harrison with information from her pending criminal case and about her relationship with defendant. Harrison's attorney indicated that Harrison would assert

[2] Testifying witnesses variously referred to the same area as a "porch" or a "deck." For simplicity, this opinion will use the term "porch."

her Fifth Amendment right if the trial court allowed this cross-examination. Following an off-the-record discussion, defense counsel indicated that the parties had stipulated that, rather than calling Harrison to testify, defense counsel would read a generalized statement for the record. Counsel read the following statement into the record:

> "I, Tina Harrison, if called to testify, would state that . . . on July 8th, 2019, I was present at . . . Clifford Bailey's house.
>
> "I saw [WB] fly out of the house straight across the porch and fall on his own accord. I then saw him get up and run towards the road and the driveway. I followed [WB]. During this time, he fell. I tripped and landed on top of him. At this time he complained that his wrist hurt."

Defendant was convicted and sentenced as described. This appeal followed. Defendant moved this Court to remand for a new trial or *Ginther*[3] hearing regarding his trial counsel's alleged ineffectiveness, which this Court denied "without prejudice to a case call panel of this Court determining that remand is necessary" on plenary review.[4]

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel when his trial counsel stipulated to read Harrison's statement rather than call her to testify. We disagree.

A defendant's claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error, and we review de novo questions of constitutional law. *Id*. Because a *Ginther* hearing was not held, our review of the relevant facts is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

The Sixth Amendment of the United States Constitution guarantees defendants the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Michigan's Constitution affords the same right to defendants. *People v Pickens*, 446 Mich 298, 318-320; 521 NW2d 797 (1994). When a defendant claims that he was denied the effective assistance of counsel, the defendant must "show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *Riley*, 468 Mich at 140. To prove counsel's performance was deficient, the defendant must show that "counsel's performance was below an objective standard of reasonableness." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). To prove that counsel's deficient performance prejudiced the defense, the defendant must show "a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's errors." *Id*.

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[3] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

[4] *People v Bailey*, unpublished order of the Court of Appeals, entered August 12, 2022 (Docket No. 358040).

Counsel's performance is presumed to be the product of sound trial strategy, and defendant must overcome that strong presumption. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "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." *Id*. at 76-77. However, a reviewing court "must determine whether the 'strategic choices [were] made after less than complete investigation,' or if a 'reasonable decision [made] particular investigations unnecessary.' " *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015), quoting *Strickland*, 466 US at 690-691 (alterations in *Ackley*). "A trial strategy is not ineffective simply because it ultimately does not succeed." *People v White*, 331 Mich App 144, 149; 951 NW2d 106 (2020). "A strategy is also not ineffective because it entails taking calculated risks, especially if the range of available options for the defense is meager." *Id*.

In this case, the prosecution had indicated that it intended to impeach Harrison with information from the investigation into Harrison's unrelated criminal charge in order to challenge her credibility as a witness. However, her attorney stated on the record that Harrison would assert her Fifth Amendment right if the court allowed the prosecution to question her about the information related to the domestic violence incident. Ultimately, after meeting with the prosecution, Harrison's attorney, and the trial judge in chambers, defense counsel entered into a stipulation that allowed defendant to present the relevant information from Harrison that supported defendant's case while also preventing the prosecution from cross-examining her on her alleged bias. Counsel was able to use the facts from this statement during closing argument to support the defense theory that Harrison fell on WB as she ran after him, which caused the injury to WB's wrist. Counsel also argued that the alleged dating relationship between defendant and Harrison "was never substantiated."

Defendant's counsel had to determine the best strategy for admitting Harrison's relevant testimony while limiting damage to her already-questionable credibility. It is clear from the record that defense counsel chose to enter into a stipulation that allowed the admission of testimony favorable to defendant while avoiding potential impeachment. Defense counsel, as a matter of sound trial strategy, could have reasoned that attempting to bolster defendant's case with a witness who would assert her Fifth Amendment privilege, and who already had been revealed as defendant's current romantic partner, was simply not worth the risk that the jury would find Harrison incredible and perhaps view defendant unfavorably for the attempt. Defendant has failed to overcome the presumption that his counsel's decision was the product of sound trial strategy, despite its ultimate failure. See *White*, 331 Mich App at 149. Moreover, defendant has not demonstrated a reasonable likelihood that Harrison's testimony would have overcome the clear testimony of several witnesses and the victims themselves and altered the outcome of the proceedings against him. *Ackerman*, 257 Mich App at 455. Therefore, defendant has failed to establish that he was denied the effective assistance of counsel.

III. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecution failed to present sufficient evidence to convict him of second-degree child abuse. We disagree.

This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Savage*, 327 Mich App 604, 613; 935 NW2d 69 (2019). "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Therefore, when we review a challenge to the sufficiency of the evidence, we are "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack*, 462 Mich at 400.

MCL 750.136b(3) provides:

> A person is guilty of child abuse in the second degree if any of the following apply:
>
> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.
>
> (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
>
> (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.
>
> (d) The person or a licensee, as licensee is defined in section 1 of 1973 PA 116, MCL 722.111, violates section 15(2) of 1973 PA 116, MCL 722.125.

MCL 750.136b(1)(d) defines "person" as "a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person." It is undisputed that defendant was not WB's parent, stepparent, or legal guardian. Defendant argues that the prosecution failed to present sufficient evidence that he cared for, had custody of, or had authority over WB. We disagree.

In this case, the testimony of WB and CB showed that defendant treated RB and her children as a family, bought them essential items, and went on trips with them. WB and CB also testified that they sometimes referred to defendant as their stepdad, that they referred to BB as their stepsister, and that they were expected to obey defendant. RB testified that defendant cooked meals for her children and, although she testified that she "tried" to "parent" her children and have defendant parent his, she agreed that she and her children considered themselves to be a family with defendant and his children; RB further testified that her children were expected to obey defendant. Viewing the evidence in the light most favorable to the prosecution, and drawing all reasonable inferences in support of the jury verdict, *Nowack*, 462 Mich at 400, the prosecution presented sufficient evidence for a rational jury to find that defendant both cared for and had

authority over WB at the time of the abuse, and was therefore a "person" within the meaning of MCL 750.136b(1)(d).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark T. Boonstra
/s/ James Robert Redford