STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD THOMAS SMALL,

Defendant-Appellant.

UNPUBLISHED
October 14, 2021

No. 352306
Saginaw Circuit Court
LC No. 19-045937-FH

Before: BECKERING, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

Defendant was charged and convicted of two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (victim under 13). Defendant was sentenced, as a fourth-offense habitual offender,[1] MCL 769.12, to concurrent prison terms of 142 to 360 months for each count of CSC-II. On appeal, defendant argues that he was denied effective assistance of counsel at trial. For the reasons set forth in this opinion, we agree and so reverse and remand for a new trial.

In 2018, defendant's daughter contacted the police and reported that in 2012, when she was 12, defendant touched her bare breast and vagina[2] while they were taking a nap on a bed in the family's camper. Not long after she made the report, Detective Larry Biniecki interrogated defendant about the allegations.[3]

[1] Defendant had previously been convicted of breaking and entering in 1993 and several counts of credit card fraud in 2006.

[2] Penetration was not alleged.

[3] Although the interrogation occurred in the detective's car, he informed defendant that the doors were unlocked and he was free to leave if he wished to. Accordingly, he was not in custody and so no issue has been raised concerning defendant's *Miranda* rights.

Only two witnesses testified at the one-day trial, the complainant and Biniecki. Biniecki's testimony described inculpatory statements made by defendant during the interrogation. Defendant contends his attorney was ineffective for failing to play the recording of the interrogation at trial, and for failing to obtain a transcript of the interrogation to impeach the detective to show the jury that the inculpatory statements were prompted by the officer and were either not voluntary or unreliable. He also claims prosecutorial misconduct and that the trial court erred by imposing a sentence based on his continued assertion of innocence.

On defendant's motion we remanded the case for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Trial counsel testified that he listened to the audio recording of the interrogation before trial and decided as a matter of strategy not to play it in full for the jury because he viewed it as damaging. He conceded that he had not obtained a transcript of the interrogation. The trial court ruled that defendant was not denied the effective assistance of counsel and denied his motion for a new trial.[4]

A defendant seeking relief based upon a claim of ineffective assistance of counsel bears the burden of showing "(1) that trial counsel's performance was objectively deficient, and (2) that the deficiencies prejudiced the defendant." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018). "A counsel's performance was deficient if it fell below an objective standard of professional reasonableness. The performance prejudiced the defense if it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different." *People v Fyda*, 288 Mich App 446, 450; 793 NW2d 712 (2010). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Randolph*, 502 Mich at 9 (quotation marks and citation omitted).

The detective's interrogation of defendant lasted 49 minutes. In his direct testimony,[5] the detective summarized the 49-minute interrogation in a few seconds, as follows:

> So we talked about the allegations about his daughter. During the contact that I had with him and the interview that I had with him, he did indicate that he did take naps on a few occasions with his daughter. During the interview[,] I asked, so there could have been a time where your hand went down her pants, and he told me yeah, I guess so. Also during the interview, [defendant] indicated that he accidentally touched her. It was unintentional. He feels horrible. Extra horrible now. Really, really horrible. [Defendant] started to cry. I told him, I know you wish you could take it back. I know you wish you do. And he told me, a million times.

Cross-examination was brief and wholly unproductive. The portion of the cross-examination going to defendant's statements during the interrogation reads:

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[4] "Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law[.]" *People v Johnson*, 315 Mich App 163, 174; 889 NW2d 513 (2016) (citation omitted). A trial court's findings of fact, if any, are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

[5] Only two witnesses were called to testify at trial: complainant and Biniecki.

Q. And do you remember him telling you specifically towards the end of the interview, I honestly do not remember my hand ever being on her vagina?

A. I do remember him indicating during different parts of the interview that he didn't—that *he had a lack of memory of certain instances.*

Q. Do you also remember him telling you I feel like I'm being trapped or incriminated?

A. I don't recall specifically.

Q. So you don't recall him saying during the course of this interview, I would never intentionally touch my daughter in any way?

A. It's possible he could have said that during the interview. *I don't recall specifically*. [Emphasis added.]

A review of the interrogation transcript reveals that it was replete with material for cross-examination.

First, during the interrogation the detective misstates the law on one, perhaps two occasions. After defendant denied the allegation, the detective stated that he knew the touching had occurred but that the contact was likely an innocent "accident" and that if defendant was drunk at the time he would not be held "responsible." The latter is certainly a misstatement of law and the former comes close, even if it does not cross the line. Indeed, at one point in the interrogation it is defendant who accurately points out that alcohol is not an excuse for criminal sexual conduct and the officer disagrees and misstates the law:

Detective Biniecki: I could very easily see this situation where maybe you had some drinks and maybe you just messed up. Maybe you just made a mistake. You weren't you at the time. You weren't Todd at the time.

Defendant: That wouldn't excuse anything though . . . in my eye.

Detective Biniecki: In a way it does. I mean, think of some of the stuff that's happened to you in your life when you were drunk. And this is, goes for everybody. . . .

* * *

Defendant: I get that. I just don't believe that [drinking] should be, could be used as an excuse because you're the one that chose to drink in the first place.

Detective Biniecki: Sure, you're the one that chose to drink. *But the drink is what's responsible for the actions. Not you*. [Emphasis added.]

Later in the interrogation, the following colloquy occurred:

Detective Biniecki: . . . . Something happened here that was out of your control and out of your ability and we know it was an accident. But you gotta say "Hey, I did this."

Defendant: Doesn't that make me, I'm just trying to . . . think of the—

Detective Biniecki: Doesn't that make you what? A guy who had an accident?

Defendant: No. Make me, like, confessing to a crime?

Detective Biniecki: Confessing to a crime? It was an accident.

These statements were not brought out in cross-examination.[6]

Second, the detective's lack of memory about defendant's exculpatory statements could readily have been refreshed using the transcript. The detective testified that he could not recall whether defendant denied the allegations, but the transcript tells a different story. On at least 11 occasions, defendant stated that he had not sexually touched his daughter.

Third, the transcript makes clear that it was the detective, not defendant, who repeatedly suggested that defendant may have sexually touched his daughter by "accident" or mistaken his daughter for his wife while he was drunk. The detective emphasized that the evidence of the touching was certain and the only question was whether defendant was a "good guy" who accidentally touched his daughter, and if defendant admitted it was an accident or due to intoxication he would not be "responsible." He emphasized that if defendant did not admit to an accidental touching then the only possible conclusion would be that he was a pedophile and a "monster." The detective stated, "A mistake happened because you were drunk and fell asleep and woke up to your hand on her vagina. . . . That's nowhere near the same as trying to assault your daughter."

Two-thirds of the way through the interrogation, the officer succeeded in getting defendant to say that it was "possible" he touched his daughter by accident because if defendant was asleep or drunk when that happened he would not recall it. But shortly thereafter the following colloquy took place:

Detective Biniecki: Okay. Now here's, here's the thing of it. Do you actually physically remember something like that happening?

Defendant: No.

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[6] "[A] confession caused by a promise of leniency is involuntary . . . ." *People v Conte*, 421 Mich 704, 729; 365 NW2d 648 (1984). In such cases, a confession will be inadmissible unless the prosecution is able "to demonstrate voluntariness by a preponderance of the evidence[.]" *Id*. at 754-755 (citation omitted).

Detective Biniecki: Not, never.

Defendant: No.

Detective Biniecki: Never anything. Because—

Defendant: Not sexually at all. I'm—

Detective Biniecki: Well, not sexually, but accidentally while you were asleep, woke up in that position?

Defendant: Never any other time, no [cross-talk].

Detective Biniecki: 'Cause I mean saying it's possible, but I don't remember anything like that is . . . pretty much the same thing as saying—

Defendant: [cross-talk]

Detective Biniecki: . . . it didn't happen, but it's possible.

The detective then suggested to defendant that they come up with what he should say to his daughter to "make things right" with her.

Detective Biniecki: Let's clear this between you and your daughter. How—

Defendant: Yeah.

Detective Biniecki: . . . let's clear it. Let's clear it before it's too late to clear it. *Tell me. Say "Larry, I made a drunken mistake. I remember my hand being on her vagina—*

Defendant: But if it's not—

Detective Biniecki: . . . and this is why it was there."

Defendant: . . . if it's not true though, I mean it you know it's kind of—

Detective Biniecki: [cross-talk] you know as well as I do—

Defendant: I just feel like I'm being entrapped or incriminate [cross-talk] myself.

Detective Biniecki: . . . you know as well as I do that it's true.

Defendant: I do not.

Trial counsel's decision not to obtain a transcript of the interrogation and use it in cross-examination of the detective cannot be considered sound trial strategy.[7] Biniecki's testimony on direct examination was brief and referred only to the most damaging aspects of defendant's interrogation. Biniecki testified that defendant admitted to putting his hand down complainant's pants while taking a nap with her. He claimed a lack of memory as to any exculpatory statements. Utilizing the transcript to impeach Biniecki's testimony or to refresh his recollection would have undermined Biniecki's credibility (and possibly that of the entire case) and provided context regarding the circumstances under which defendant stated that he touched complainant's breasts and vagina. Moreover, it is far from clear that the prosecution would have responded by playing the entire recording of the interrogation because the prosecution's decision not to play the recording during their case-in-chief suggests a recognition that the recording, at least in part, was damaging to its case. Considering that Biniecki had already testified about the most damaging aspects of the interrogation on direct examination, trial counsel's decision to refrain from introducing favorable portions of the recording or a transcript of the interrogation did not constitute sound trial strategy. See *People v Douglas*, 496 Mich 557, 585; 852 NW2d 587 (2014) ("[Counsel's] strategy . . . in fact must be sound, and counsel's decisions as to it objectively reasonable; a court cannot insulate the review of counsel's performance by calling it trial strategy.") (quotation marks and citation omitted).

A defendant is not, however, automatically entitled to a new trial even if his or her lawyer provided ineffective assistance: "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). It is also "not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

We conclude that there is a reasonable probability that trial counsel's deficient performance affected the outcome of the proceedings. While the jury may have convicted defendant solely on the basis of complainant's testimony, it is also reasonable to conclude that defendant's confession as recounted by Biniecki was significant or even decisive to the jury's conclusions. See *Arizona v Fulminante*, 499 U. 279, 312; 111 S Ct 1246; 1266, 113 L Ed 2d 302 (1991) ("[A]n involuntary confession may have a more dramatic effect on the course of a trial than do other trial errors—in particular cases it may be devastating to a defendant."). We also note that the jury requested the transcript of the interrogation during its deliberations, but as it had not been placed in evidence it could not be provided to them. As a result, trial counsel's argument about what defendant said during the interrogation was mere argument; there was no evidence to provide a basis for the jury to accept it. And the absence of any evidence to support that argument likely created a negative inference against defendant and trial counsel. See *United States ex rel Hampton v Leibach*, 347

[7] Trial counsel's decision not to obtain a transcript of the interrogation, in and of itself, was not sound trial strategy, as the record demonstrates that not having the transcript rendered trial counsel's cross-examination completely toothless.

F3d 219, 259 (CA 7, 2003) (finding unfulfilled promise made by defense counsel in the opening statement caused prejudicial negative inference as to the credibility of the defense).

In sum, trial counsel provided ineffective assistance by failing to use portions of the recording or a transcript of Biniecki's interrogation of defendant to impeach Biniecki's testimony or to refresh his recollection. Accordingly, we vacate defendant's convictions and remand for a new trial. We do not retain jurisdiction.[8]

/s/ Jane M. Beckering
/s/ Douglas B. Shapiro
/s/ Brock A. Swartzle

[8] In light of our conclusion that trial counsel was ineffective for failing to impeach Detective Biniecki's credibility with the transcript and provided context regarding defendant's purported confession, we need not address whether counsel was also ineffective for failing to play the entire recording of the interrogation at trial. We also need not address defendant's claims of error concerning prosecutorial misconduct and sentencing on the basis of defendant's refusal to admit guilt.