STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 26, 2004
v	No. 243334 Oakland Circuit Court
WILLIE EDWARD DAVIS, Defendant-Appellant.	LC Nos. 01-181750-FC 02-182176-FC

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant was charged in two separate cases with sexually assaulting his minor daughter and a niece, who were both residing with defendant's mother. Following a jury trial, he was convicted of a total of eight counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 75 to 150 years for each conviction. He appeals as of right. We affirm.

I. Effective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel. Defendant was represented by two attorneys. The first attorney was appointed to represent defendant in connection with the action brought in 2001. A second attorney was retained by defendant's family when additional charges were brought in 2002. Defendant argues that his first attorney failed to prepare for trial, failed to present a defense, communicated disdain for defendant by sitting with his back turned toward defendant throughout the trial, failed to move to dismiss for delay in prosecuting the action, and made inappropriate closing arguments.

The right to counsel is not offended unless counsel's performance fell below an objective standard of reasonableness and the defendant was so prejudiced that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, a defendant must show that there is a reasonable probability that the result of the proceeding would have been different, i.e., the jury would have had a reasonable doubt about guilt, absent the alleged error. *Id*. at 312.

Because defendant did not raise this issue in connection with a motion for a new trial or request for an evidentiary hearing in the trial court, *People v Ginther*, 390 Mich 436, 442-443;

212 NW2d 922 (1973), appellate review is foreclosed unless the details of the alleged deficiencies are apparent on the record, *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987). Our review of the record fails to disclose support for defendant's claims.

Defendant has not demonstrated counsel's level of preparation. To the contrary, the record contradicts defendant's claim that counsel was unprepared and offered no defense. Appointed trial counsel filed a pretrial motion to exclude evidence, raised objections during the prosecution's proofs, cross-examined prosecution witnesses, conducted direct examination of a witness called by co-counsel, met before trial with that defense witness, and moved for a directed verdict at the conclusion of the prosecutor's proofs. Appointed counsel disclosed on the record that potential defense witnesses were directed to co-counsel because co-counsel had been hired by the family and possessed the family's trust. There is nothing on the record supporting defendant's contention that counsel was unprepared or that he failed to present a defense.

The record additionally does not disclose that counsel sat with his back turned toward defendant or, if he did, why he chose that seating position.[1] Nor does the record disclose whether an awkward seating arrangement was necessary due to the layout of the courtroom or the presence of multiple lawyers at the defense table, or whether counsel preferred to face the jury to analyze their reactions to the trial.

Although defense counsel stated during closing arguments that he had read a book about representing unpopular clients, defendant has failed to show prejudice from that statement. Read in context, defense counsel also stated that "those who are unpopular, those who might be falsely charged, those who have allegations brought forth against them, they're the ones who need the lawyer the most. . . . The fact that Mr. Willie Davis is unpopular is not evidence of guilt at all. . . . As you know, the constitution protects Willie Davis just like it protects any of you, and he's presumed innocent until the State has convinced you beyond a reasonable doubt that he's guilty of something." During closing argument, counsel conceded that defendant was having difficulties with counsel. We will not second-guess defense counsel's strategy for diffusing the apparent tension between counsel and client, while focusing the jurors' attention to the issue of guilt or innocence. Defendant has failed to overcome the strong presumption that counsel engaged in sound trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant also argues that counsel should have moved to dismiss the case under the 180-day rule. MCL 780.131(1). Defendant has failed to fully present that argument in his brief, and, therefore, has not shown that the outcome would have been different had the motion been raised. By effectively abandoning this argument, defendant has failed to demonstrate prejudice.

II. Reopening of Proofs

Defendant next argues that the trial court erred by denying his motion to reopen proofs to present additional defense witnesses. After the defense rested, defendant informed the judge, in

[1] At one point, counsel had difficulty hearing a witness, and the court suggested that counsel move to another chair. It is not clear whether this is the incident of which defendant complains.

a contentious exchange outside the jury's presence, that he did not believe his attorneys were representing his best interests because he had witnesses waiting in the hallway who were not called to testify. Defendant demanded that his attorneys be discharged from representation. The court asked defendant to explain his objections. When he finished, the court asked the attorneys for their comments. Defendant repeatedly interrupted the attorneys, prompting the judge to order defendant removed from the courtroom. Appointed counsel stated that he did not know the identities of the people waiting in the hallway, or what their testimony would be, but that he had interviewed other witnesses referred by the family and they were not added to the witness list because they would not have supplied relevant testimony. After a cooling-off period, defendant returned to the room, renewed his objections, and asked to have his waiting witnesses testify. The court ruled that the proofs were closed and would not be reopened.

A trial court's decision whether to permit the reopening of proofs is reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 419; 633 NW2d 376 (2001). The record discloses only that defendant's retained counsel had determined that the witnesses were not able to supply relevant evidence. Defendant has not demonstrated that the court abused its discretion by denying him the opportunity to reopen the proofs. Moreover, because defendant has failed to establish the substance of the proposed testimony, we cannot conclude that his rights were prejudiced. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996) (reversal is required only if the error was prejudicial).

III. Evidence of Other Acts

Defendant argues that the trial court erred by allowing two relatives to testify that they, too, had been sexually assaulted by defendant when they were minors in the care of defendant's mother. The prosecutor introduced the evidence to show a common plan or scheme to molest young girls left alone with defendant while in the care of his mother. Defendant objected before trial, arguing that the prejudicial effect substantially outweighed the probative value of such evidence.

Under MRE 404(b)(1),[2] evidence of other crimes, wrongs, or acts may be admissible to show motive, opportunity, intent, preparation, scheme, plan, system, knowledge, identity, or absence of mistake or accident. Because of the similarities between the other acts and the charged offenses, it is not apparent that it would have been improper to admit such evidence under MRE 404(b)(1), under an appropriate theory. *People v VanderVliet*, 444 Mich 52, 74-75;

[2] MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

508 NW2d 114 (1993) (evidence of other sexual assaults is permissible if offered for a proper purpose, the evidence is relevant, its probative value is not substantially outweighed by the potential for unfair prejudice, and a cautionary instruction is given if requested); *People v Gibson*, 219 Mich App 530, 533; 557 NW2d 141 (1996) (evidence of similar sexual assaults admissible).

We find no error here. The evidence was relevant and introduced for a proper purpose to show that defendant had a common plan to molest underage girls under his mother's care. This was particularly relevant when tied together with evidence that his mother failed to prevent the abuse after personally witnessing one sexual assault, and after hearing complaints from other family members. The evidence showed that defendant was able to molest young girls for years with relative impunity while his mother continued to accept vulnerable children into her household. Whether introduced to show plan, scheme, opportunity, or some other permissible purpose, the evidence was relevant to demonstrate defendant's long-standing methodology.

Additionally, we cannot say that the probative value of the evidence was substantially outweighed by any prejudicial effect, in part because of the number of claims tried in this matter. In other words, where a defendant is charged with nine similar counts, it is difficult to conclude that evidence of other acts had a substantial additional impact in the case. The overwhelming evidence against defendant was *supported* by the testimony of prior acts, but it was not greatly reliant upon that testimony. Finally, an appropriate limiting instruction was read to the jury.

We affirm.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Patrick M. Meter