

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NORMAN EDWARD FOX,

Defendant-Appellant.

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UNPUBLISHED

June 8, 2004

No. 244936

Oakland Circuit Court

LC Nos. 02-183849-FC;

02-183850-FC

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), (b). He was later sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of fifteen to thirty years on the first-degree convictions and ten to twenty-two and a half years on the second-degree convictions. Defendant appeals by right, and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that he was denied the effective assistance of counsel. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff'd* 468 Mich 233; 661 NW2d 553 (2003) (citations omitted).]

These cases involve charges that defendant digitally penetrated two young girls, touched the genital area of one of those girls, and touched the breast of a teenage girl. He contends that

counsel was ineffective because he did not request severance of the charges or separate juries. We disagree.

Given the circumstances under which two young girls were touched, it appears that the acts were part of a single scheme or plan, see *People v Sabin (After Remand)*, 463 Mich 43, 66; 614 NW2d 888 (2000), and thus defendant was not entitled to severance. MCR 6.120(B)(2). The record shows that counsel's decision to have the charges joined for trial was strategic, in part because the acts against each of the young girls would be admissible under MRE 404(b) to prove the acts against the other, and in part to spare defendant, who was in poor physical and mental health, the ordeal of several trials. 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. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant also contends that counsel was ineffective because he admitted defendant's guilt to one of the charges. We disagree. Given the evidence against defendant as to that charge, including defendant's admission that the touching occurred, counsel made a reasonable strategic decision to admit guilt on that charge but maintain innocence on the remaining charges, a strategy to which defendant agreed on the record. *People v Krysztopaniec*, 170 Mich App 588, 595-596; 429 NW2d 828 (1988); *People v Wise*, 134 Mich App 82, 98-99; 351 NW2d 255 (1984).

We affirm.

/s/ Jane E. Markey  
/s/ Kurtis T. Wilder  
/s/ Patrick M. Meter