STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DIANA HUDSON,

Defendant-Appellant.

UNPUBLISHED
February 4, 2000

No. 210773
Livingston Circuit Court
LC No. 97-010112-FH

Before: Talbot, P.J., and Gribbs and Meter, JJ.

PER CURIAM.

Defendant appeals by right from her conviction by a jury of uttering and publishing, MCL 750.249; MSA 28.446. The trial court, applying a fourth-offense habitual offender enhancement under MCL 769.12; MSA 28.1084, sentenced her to seven to fourteen years' imprisonment. We affirm.

Defendant first argues that because the prosecutors violated a discovery order by failing to give several documents to defendant until after the trial commenced, the trial court should have granted a continuance to allow defense counsel to review the newly-obtained documents. This Court "review[s] a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion." *People v Davie (On Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). The trial court's analysis requires balancing the interests of the parties, the public, and the courts. *Id*. at 598. The court must consider all the relevant circumstances, including the causes of noncompliance or tardy compliance and any resulting prejudice to the complaining party. *Id*.

Here, it is not disputed that the prosecutors failed to provide defendant with copies of several documents until after the trial commenced. However, the prosecutors themselves did not obtain the documents until the day before trial, and defendant made no allegation that they acted in bad faith by failing to timely provide the evidence. Moreover, the documents were originally taken from defendant, meaning that she had knowledge of the documents independent of discovery. Furthermore, the documents were discussed in investigation reports that had been provided to defense counsel ahead of trial. Finally, defendant made only a generic claim of prejudice when discussing the discovery violation; she could point to no specific, actual prejudice. Indeed, the record on appeal does not disclose any specific way in which a continuance would have allowed defendant to rebut the documentary evidence.

We conclude that under these circumstances – where the prosecutors did not act in bad faith, where defendant knew about the existence of the documents well before trial, and where defendant made no specific allegations or showings of prejudice as a result of the discovery violation – the trial court did not abuse its discretion in failing to grant a continuance so that defense counsel could review the documents. See *Davie, supra* at 598 (causes of tardy compliance and absence of actual prejudice relevant inquiries in fashioning remedies for discovery violations), *People v Burwick*, 450 Mich 281, 294-296; 537 NW2d 813 (1995) (failure by a defendant to show how a continuance would have aided his case weighs against a finding of error requiring reversal), and *People v Taylor*, 159 Mich App 468, 487-488; 406 NW2d 859 (1987) (if a defendant has knowledge of particular evidence independent of discovery, the prosecution's nondisclosure of the evidence does not require any remedial measures).

Next, defendant argues that she received ineffective assistance of counsel because her trial attorney elicited evidence of other bad acts while cross-examining a prosecution witness, Gloria Flucks. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's unprofessional error or errors, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Moreover, there is a strong presumption that counsel's actions constituted sound trial strategy. *Id*. Here, because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to mistakes that are apparent from the record. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

The testimony defendant challenges consisted of various statements by Flucks concerning defendant's involvement in a widespread check-passing ring. Defendant contends that the introduction of this testimony could not possibly have constituted sound trial strategy because the testimony inculpated defendant in other crimes and because defense counsel originally sought to suppress the other-acts testimony. Counsel's strategy at trial, however, was to admit (in the face of documentary evidence) that defendant participated in the scheme to pass checks but to argue that she did not fraudulently pass the check involved in the instant case. The cross-examination of Flucks was intended to show that several other individuals who participated in the scheme could have passed the check involved in the instant case. The cross-examination, therefore, constituted sound trial strategy. See *People v Murphy*, 146 Mich App 724, 726; 381 NW2d 798 (1985), rejected on other grounds by *People v Wright*, 431 Mich 282 (1988). We will not second-guess counsel on matters of trial strategy or attempt to review counsel's actions with the benefit of hindsight, even if the strategy was ultimately unsuccessful. See *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999), and *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Furthermore, that defense counsel originally sought to suppress the other-acts testimony does not mean that its later introduction was unsound, since counsel was free to employ a new, potentially better strategy as the proceedings progressed.

Next, defendant contends that she is entitled to reversal for cumulative error based on her two preceding claims of error (i.e., on the trial court's failure to grant a continuance and on alleged

ineffective assistance of counsel). Since neither of defendant's two preceding claims of error have merit, however, no cumulative error necessitating reversal has been shown. See *Rice, supra* at 447-448.

Finally, defendant contends that the trial court erred by sentencing her using a three-month-old presentence investigation report ("PSIR"). Although this Court has not specifically articulated a standard of review for this type of claim, it has generally reviewed such claims de novo. See, e.g., *People v Crook*, 123 Mich App 500, 503; 333 NW2d 317 (1983). A court must use a reasonably updated PSIR, prepared for the case before it, when sentencing for a felony conviction. *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980); *People v Anderson*, 107 Mich App 62, 67; 308 NW2d 662 (1981). If several years pass between the preparation of a PSIR and sentencing, or if a defendant alleges significantly changed circumstances that are not incorporated into his PSIR prior to sentencing, resentencing using an updated PSIR is generally warranted. See *Crook, supra* at 503, *Triplett, supra* at 512, 516, and *People v Bruce*, 102 Mich App 573, 580; 302 NW2d 238 (1980). We conclude that under the circumstances of the present case – where defendant's PSIR was only three months old and where her only allegations of changed circumstances were that she had joined a choir, been baptized, and gotten into college – the PSIR was reasonably updated and a remand for resentencing is unwarranted. *Id*. Indeed, the present situation differs from that in *Crook*, where there were sufficient allegations of changed circumstances to warrant a remand for resentencing. See *Crook, supra* at 503.

Affirmed.

/s/ Michael J. Talbot
/s/ Roman S. Gribbs
/s/ Patrick M. Meter