STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL BURNIE WELLBORN III,

Defendant-Appellant.

UNPUBLISHED
December 16, 2003

No. 242229
Kent Circuit Court
LC No. 01-005099-FC

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b), and two counts of second-degree CSC, MCL 750.520c(1)(a) and (b). He was sentenced to ten to fifteen years' imprisonment for the second-degree CSC convictions and to ten to thirty years' imprisonment for the first-degree CSC conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was deprived of his constitutional right to the effective assistance of counsel because trial counsel agreed with the prosecutor to exclude evidence of defendant's acquittal in a Montcalm County case involving similar charges brought by one of the complainants in this case. Because defendant failed to move for a new trial or an evidentiary hearing regarding his ineffective assistance claim, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We find no merit to defendant's argument.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984), on remand 737 F2d 894 (CA 11, 1984); *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001).

No ineffective assistance is apparent from the record. Trial counsel's representation did not fall below an objective standard of reasonableness because his concession on the inadmissibility of the acquittal was consistent with the law. In *People v Bolden*, 98 Mich App 452; 296 NW2d 613 (1980), the defendant argued that the trial court erred in precluding the jury from knowing that he was acquitted of the charges that comprised the prior similar acts evidence.

Relying on *People v Oliphant*, 399 Mich 472; 250 NW2d 443 (1976), the *Bolden* Court held that the trial court did not err in excluding evidence of the acquittal, reasoning as follows:

> We find this reasoning [that of *Oliphant*] equally applicable to our consideration. The prosecutor must produce evidence sufficient to show that defendant "probably committed the other acts", *People v Cook*, 95 Mich App 645; 291 NW2d 152 (1980). If he or she can satisfy that burden, the jury should not be confused by the additional information of an acquittal which could mislead them into believing that the defendant absolutely did not commit the prior similar acts. The fact that another jury harbored a reasonable doubt as to defendant's guilt of the other offense does not negate the substantive value of the testimony to establish identity, scheme, plan, etc. in the case at bar. The issue should not be clouded by encouraging speculation regarding the verdict reached in a separate trial on a separate offense involving a different complainant. Defendant's rights were sufficiently protected by the trial court's limiting instructions concerning the purpose of similar acts testimony. [*Bolden*, *supra* at 461.][1]

Moreover, while instructing the jury, the trial court said that it would not have admitted evidence of defendant's acquittal even if the parties had not agreed to exclude it because the evidence was irrelevant. The trial court explained that there is no meaningful comparison between the two trials because there are different juries, different prosecutors, and different accusations.[2] Because counsel is not required to advocate a meritless position, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), trial counsel's decision to forego mentioning the acquittal did not amount to objectively unreasonable assistance, let alone unreasonable assistance affecting the jury's verdict. We find no merit to defendant's ineffective assistance of counsel claim.

Defendant next argues that he was denied his constitutional right to a jury drawn from a venire representative of a fair cross section of the community because of a computer "glitch." Defendant has waived his challenges to the venire and the jury selection process because his defense counsel expressed satisfaction with the jury's composition. *People v McKinney*, 258 Mich App 157, 161-162; 670 NW2d 254.

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[1] Although a subsequent panel of this Court "expressed its support" for Judge Allen's partial dissent in *Bolden* on this issue, see *People v Nabers*, 103 Mich App 354, 364; 303 NW2d 205, rev'd on other grounds, 411 Mich 1046 (1981), that statement was dicta since it does not appear that either party raised as an issue in that case the admissibility of an acquittal. Furthermore, as was noted in *US v Gricco*, 277 F3d 339, 352-353 (CA 3, 2002), at least ten of the federal circuits (including the Sixth Circuit) have held that, except for purposes of determining whether the prosecution of a defendant is barred by double jeopardy or collateral estoppel, "evidence of prior acquittals is generally inadmissible." *Id.* at 352. That is so because judgments of acquittal "may not present a determination of innocence, but rather only a decision that the prosecution has not met its burden of proof beyond a reasonable doubt." *Id.*

[2] The trial court instructed the jury in this manner because, during cross-examination, defendant testified that the victim had previously "tried me and lost."

Defendant also argues that the sentencing court erred in failing to credit him with forty-eight additional days served between the time he was convicted and the date of his sentencing. Reviewing this preserved question of law de novo, *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997), we disagree.

MCL 769.11b, the relevant provision regarding jail credit for time served, provides as follows:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

On appeal, defendant contends that he is entitled to an additional forty-eight days of jail time for the time he served from the date of his conviction, March 27, 2002, through the date of his sentencing on May 13, 2002. But the sentencing court stated during sentencing that defendant's three concurrent sentences were to begin on March 27, 2002, "the day he was remanded to custody on these matters," rather than the date of defendant's sentencing. The judgment of sentence also indicates that the beginning sentence date was March 27, 2002, the day that defendant was convicted, rather than May 13, 2002, the day that defendant was sentenced. Because defendant's sentences include the forty-eight days defendant served from the date of his conviction to the date of his sentence, there is no need to give defendant additional credit for those days. Accordingly, there is no merit to defendant's argument.

Affirmed.

/s/ Richard Allen Griffin
/s/ Christopher M. Murray