

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

FREDDIE SMITH,

Defendant-Appellant.

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UNPUBLISHED

May 13, 2004

No. 245616

Wayne Circuit Court

LC No. 02-007068-01

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant Freddie Smith was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (child under thirteen), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (child under thirteen). Defendant was sentenced as a fourth habitual offender to fifty to eighty years' imprisonment for his CSC I convictions and received a concurrent sentence of ten to fifteen years' imprisonment for his CSC II conviction. Defendant appeals of right his convictions and sentences. We affirm.

On appeal, defendant first argues that the trial court committed error requiring reversal by failing to strictly comply with the juror-selection procedures specified by MCR 2.511(F). We disagree.

Defendant concedes that no objection was made to the alleged jury selection error but requests that we review the issue for plain error. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). However, as noted by the prosecutor, defense counsel not only failed to object but also expressly acquiesced to the process that was used. The record contains the following exchange between the trial court and defense counsel:

*The Court:* Preemptory challenges to you, Mr. Jackson.

*Mr. Jackson (defense counsel):* May I use more than one, Judge?

*The Court:* Yes, as many as you like.

*Mr. Jackson:* Thank you.

I would like to thank and excuse the juror in seat number 13, Mr. Massa.

*The Court:* Mr. Massa, thank you very much.

*Mr. Jackson:* The juror in seat number two, Mr. Rawlings.

*The Court:* Thank you, Mr. Rawlings.

*Mr. Jackson:* And the juror in seat number one, Mr. Pickell.

*The Court:* Thank you, Mr. Pickell.

Any others at this time?

*Mr. Jackson:* Not at this time.

*The Court:* Thank you very much.

Like most jurisdictions, Michigan recognizes a distinction between waiver and forfeiture. *People v Eaton*, 184 Mich App 649, 650; 459 NW2d 86 (1990). As noted by the Michigan Supreme Court in *Carines*, *supra* at 762 n 7, (quoting with approval *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993)):

Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the “intentional relinquishment or abandonment of a known right.”

The prosecutor in his brief correctly asserts that the substantive distinction between waiver and forfeiture is important for purposes of appellate review:

The general rule in Michigan, then, is that “[c]ounsel may not “expressly acquiesce” to the court’s handling of a matter and then raise it as an error before [the appellate court].” *People v Carter*, *supra*, 462 Mich [206] at 213-216 [612 NW2d 144 (2000)]; *People v Riley*, *supra*, 465 Mich [442; 636 NW2d 514 (2001)] at 449. This acquiescence (waiver) extinguishes any error, *and* precludes defendant from raising the issue on appeal. *People v Carter*, *supra*, 462 Mich at 208-209. Any other result would allow counsel to harbor error to use as an appellate parachute. [Emphasis in original.]

On this record, we hold that the alleged juror-selection error was waived by defense counsel. No error requiring reversal occurred. See *People v Russell*, 434 Mich 922; 456 NW2d 83 (1990).

Next, defendant claims that he was denied his right to effective assistance of counsel because his counsel failed to file a motion to suppress other acts evidence and brought out at trial that defendant had been incarcerated and was a parole violator. We disagree. A claim of ineffective assistance of counsel under the Sixth Amendment is evaluated under the standard set forth by the United States Supreme Court in *Strickland v Washington* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). On appeal, we review the issue de novo, although findings of fact made by the trial court are reviewed for clear error. *Id.* MCR 2.613(C). Under the standards of *Strickland*, *supra*,

defendant bears the burden of establishing that counsel's performance was deficient and that he was prejudiced by such errors to the extent that it is reasonably probable that but for the errors the result of the proceeding would have been different. *Id.* In addition, appellate courts are reluctant to second guess matters of trial strategy, which in hindsight prove to be unsuccessful. As the Michigan Supreme Court stated in *Pickens, supra* at 330, "[a] defense attorney must enjoy great discretion in the trying of a case—especially with regard to trial strategy and tactics." Error is not presumed because a trial strategy was unsuccessful.

In the present case, defense counsel pursued a strategy that defendant could not have been the perpetrator of some of the offenses because he was in prison at the time. While the tactic ultimately proved to be unsuccessful, on this record we are unable to conclude that trial counsel's alleged error was objectively unreasonable or that the error, if any, prejudiced defendant to the extent that it was reasonably probable that the result of the proceeding would have been different. *Strickland, supra; Pickens, supra.*

In addition, defendant was not denied effective assistance of counsel by the failure of his counsel to file a motion to suppress the other acts evidence. It is well settled that counsel is not required to file futile motions or objections. *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989). Here, such a motion would have been futile because the other acts evidence were admissible under MRE 404(b) to establish defendant's common plan, scheme, or system for sexually molesting children. *People v Knox*, 469 Mich 502; 674 NW2d 366 (2004); *People v Sabin*, 463 Mich 43; 614 NW2d 888 (2000); *People v Vandervliet*, 444 Mich 52; 508 NW2d 114, (1993).

As his third issue, defendant argues that error requiring reversal occurred because of alleged prosecutorial misconduct. Specifically, defendant claims that he was denied a fair trial by the prosecutor's alleged "civic duty argument." Because no objection was made to this issue at trial, we review for plain error. *Carines, supra.* An allegation of plain error is evaluated under the following criteria:

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The *Olano* Court emphasized that a constitutional right may be forfeited by a party's failure to timely assert that right. *Id.*, p 731. To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Id.*, pp 731-734. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.*, p 734. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.*, pp 736-737. [*Id.* at 763.]

In the present case, the prosecutor, after summarizing the evidence, stated in her closing argument:

This man has been abusing children for decades, and because no one said a word he was allowed to do it to another generation of children, and I hope you tell him he's guilty and he can't do it to any others.

Assuming, without deciding, that the prosecutor's comments were improper, we hold that plain error requiring reversal did not occur. Following our review of the record, we conclude that the outcome of the trial would not have been different absent the alleged error. Moreover, exercising our discretion, we are not convinced that the alleged error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceeding. See, generally, *People v Kimble*, 252 Mich App 269, 283-284; 651 NW2d 798 (2002) (Griffin, J., dissenting), lv gtd 468 Mich 870; 659 NW2d 231 (2003).

Finally, defendant argues that his sentences as a habitual fourth offender to fifty to eighty years' imprisonment violate his federal constitutional rights to be free from cruel and unusual punishment. We disagree. First, defendant concedes that the sentences are within the Legislative statutory sentencing guidelines for the offender and the acts of child molestation for which he was convicted. Under the statutory guidelines, sentences within the guidelines shall be affirmed. MCL 769.34(10). Further, in view of the offense and the offender, we are not persuaded that the sentence is so excessive to be cruel and unusual punishment under the United States Constitution. See, generally, *People v Milbourn*, 435 Mich 630, 650-651; 461 NW2d 1 (1990).

Affirmed.

/s/ Jessica R. Cooper  
/s/ Richard Allen Griffin  
/s/ Stephen L. Borello