

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO MATTHEW MORENO,

Defendant-Appellant

UNPUBLISHED

December 21, 2006

No. 264057

Calhoun Circuit Court

LC No. 2004-002841-FC

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a),¹ and two counts of second-degree criminal sexual conduct, MCL 750.520c. The court sentenced defendant to prison terms of 12 to 20 years for the first-degree CSC conviction and 5 to 15 years for the second-degree CSC conviction. Defendant appeals as of right. We affirm.

Defendant allegedly sexually molested the eleven-year-old niece of his former wife. The victim alleged that defendant penetrated her with his fingers and his penis many times during her regular every-other Saturday overnight visits with defendant's daughters² from 2000 to 2004. The victim testified that defendant would wake her up and invite her to play video games with him. He then touched her vagina while she sat in his lap at the computer, and would place her on the living room couch and touch her, occasionally penetrating her vagina. The victim recalled an incident in which defendant came into her cousin's room while the three girls slept. She woke up and found defendant on top of her penetrating her vagina with his penis. The victim revealed this abuse to a mental health counselor while being evaluated for behavioral problems.

Defendant argues that he was deprived of the effective assistance of counsel at trial and on appeal. Because defendant did not move for a new trial or an evidentiary hearing before the trial court, this Court's review is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). Errors apparent on the record must satisfy the

¹ The victim was under 13 years of age.

² The victim referred to defendant's daughters as her cousins.

plain error standard. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). If this Court's review of the record does not support the defendant's claims, the issue of ineffective assistance of counsel is waived. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate that counsel's performance was deficient, defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms, and to demonstrate prejudice, defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland, supra* at 690-691; *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In general, this Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant first argues that defense counsel failed to present a substantial defense by failing to investigate and call certain witnesses to attest to his good character and to refute the victim's testimony. Generally, decisions concerning what evidence to present and whether to call or question witnesses are presumed to be matters of strategy, *Dixon, supra*, for which this Court will not substitute its judgment for that of trial counsel. *People v Davis*, 250 Mich App 357; 368; 649 NW2d 94 (2002). But a defendant is entitled to have his counsel "prepare, investigate, and present all substantial defenses." A substantial defense is "one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant has not shown that defense counsel's failure to present his alleged witnesses deprived him of a substantial defense. The proposed witnesses were not *res gestae* witnesses, and the record does not support a finding that the witnesses were known to trial counsel in advance of trial or, more importantly, that their testimony would serve to exculpate defendant. Defendant has not established a reasonable probability that the result of the proceeding would have been different if the witnesses had testified. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant next argues that defense counsel failed to object to testimony regarding defendant's substance abuse and sexual misconduct. At the outset, we note that defense counsel successfully objected to the admission of other-acts testimony from two witnesses and unsuccessfully objected to the testimony of one other witness. He also unsuccessfully objected to the testimony of defendant's substance abuse, contrary to his position on appeal.

Defense counsel did not object to the testimony of the victim's mother regarding sexual abuse perpetrated on her by defendant. As a general rule, the use of bad acts as evidence of defendant's character is prohibited. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). Other-acts evidence may be admitted, however, under MRE 404(b). The prosecutor has the initial burden of showing the other-acts evidence is relevant to a noncharacter theory, such as those found in the nonexclusive list under MRE 404(b). *People v Knox*, 469 Mich 502, 509; 674

NW2d 366 (2004). A four-part test must be satisfied in order for other acts evidence to be admissible under MRE 404(b). *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). First, the prosecutor must expressly offer the evidence for some purpose other than showing the defendant's propensity to commit the offense. Second, "the evidence must be relevant under MRE 402, as enforced through MRE 104(b)[.]" *Id.* Third, the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice. Fourth, the trial court, upon request, may provide a limiting instruction. *Id.* Further, MRE 404(b)(2) requires a prosecutor to provide reasonable notice in advance of trial "of the general nature of any such evidence it intends to introduce at trial and the rationale . . . for admitting the evidence."³

In *People v Sabin*, 463 Mich 43; 614 NW2d 888 (2000), the Court explained that two types of evidence fit under the common plan or scheme theory. One is "where the charged and uncharged acts are constituent parts of a plan in which each act is a piece of the larger plan," and the other is "where the defendant allegedly devised a plan and used it repeatedly to perpetrate separate but very similar crimes." *Id.* at 63. The Court held that evidence of similar uncharged sexual misconduct is admissible to support an inference of a common plan or scheme only to the extent that the uncharged misconduct and the charged offense of sexual misconduct are sufficiently similar. *Id.* "The logical relevance of the evidence is based on the system, as shown through the similarities between the charged and uncharged acts, rather than on defendant's character, as shown by the uncharged act." *Id.* at 64. Therefore, the charged and uncharged acts must not only be similar in a general sense but must have "common features indicating common design." *Id.*

In *Sabin*, the Court explained that evidence of the uncharged acts of sexual assault by the defendant on his stepdaughter shared common features with the acts alleged by complainant, his biological daughter, and these common features went beyond the mere fact that both alleged sexual abuse:

Defendant and the alleged victims had a father-daughter relationship. The victims were of similar age at the time of the abuse. Defendant allegedly played on his daughters' fear of breaking up the family to silence them. One could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetrate abuse. [*Id.* at 66.]

The *Sabin* Court noted that the acts were not identical in the manner in which they were executed. Some details varied, such as time of day and the particular sexual acts defendant allegedly performed on the girls. *Id.* at 67. However, the Court held that when reasonable minds could differ as to the degree of similarity between the acts, the trial court's decision could not constitute abuse of discretion. *Id.* at 67-68. "[D]istinctive and unusual features are not required

³ The prosecution provided advance notice of its intent to introduce the evidence of defendant's past behavior with the victim's mother for the purpose of proving that defendant followed a common scheme or plan in molesting girls of a certain age within his family.

to establish the existence of a common design or plan. The evidence of the uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense.” *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002). See also *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003) (evidence of the defendant’s consensual sexual activity with older teenagers was sufficiently similar to the charged acts of abusing three girls under the age of thirteen because all the acts took place in the context of a youth community center where the defendant worked as supervisor).

The victim’s mother’s testimony was admitted, without objection, under MRE 404(b). The victim’s mother described instances of defendant’s past sexual misconduct that were sufficiently similar to the experiences of the victim to establish a common scheme or plan. The common features of the charged and uncharged acts include: the fact that the girls were family members sleeping under the same roof as defendant, the ages of the girls at the time defendant initiated sexual contact with them, the pattern of waking the girls up at night for sexual contact, the pretext of giving the girls backrubs, and the allegations that defendant touched or penetrated the girls while they slept. Under these circumstances, the trial court did not abuse its discretion by admitting the testimony pursuant to MRE 404(b). Defense counsel’s failure to object to the testimony did not constitute ineffective assistance of counsel as counsel is not required to make a futile objection. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Defendant further argues that defense counsel failed to object when the prosecutor referred to defendant in his closing arguments as a “monster.” Calling the defendant a “monster” because he committed the charged offenses is permissible commentary on the evidence. *People v McElhaney*, 215 Mich App 269, 285; 545 NW2d 18 (1996). “Prosecutors may use ‘hard language’ when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms.” *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Examined in context, the remarks in this case were properly directed at defendant’s conduct underlying the charged crime, rather than other crimes or bad acts. The prosecutor’s characterization of defendant as a “monster” in closing and rebuttal arguments was not misconduct, and counsel was not ineffective for failing to object. *People v Watson*, 245 Mich App 572, 591-592; 629 NW2d 411 (2001).

Defendant next argues that defense counsel failed to raise the issue of defendant’s competency to stand trial. To establish that competency was a valid issue, defendant has the burden to demonstrate that he was “incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner.” *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). “The issue of competence can only be raised by evidence of incompetence.” *People v Blocker*, 393 Mich 501, 508; 227 NW2d 767 (1975). A criminal defendant is presumed competent to stand trial absent facts that raise a bona fide doubt as to his competency. *Harris, supra*. In this case, the record does not demonstrate any bona fide doubt or dispute about defendant’s competence at the time of trial. Defendant’s brief on appeal and supporting affidavits state that he was hospitalized for paranoid schizophrenia on several occasions, including three times between the time the victim made her allegations against him and the time of his trial. Defendant states in his affidavit that he had audio hallucinations and heard voices during his trial. However, defendant does not aver in his affidavit that he was incapable of understanding the nature and object of the proceeding or of assisting in his own defense, and his brief does not include any medical documentation of his

mental incompetence. Further, the record does not support a finding that defendant suffered hallucinations or heard voices during trial. Given the absence of any evidence that a competency hearing was warranted, defendant has not met his burden of proof that his counsel's conduct in failing to raise the issue amounted to ineffective assistance of counsel.

Finally, defendant argues that his appellate attorney was ineffective for failing to file a timely request for an evidentiary hearing regarding trial counsel's effectiveness. The standards that apply to claims of ineffective assistance of trial counsel also apply to claims of ineffective assistance of appellate counsel. *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993). Here, defendant was not prejudiced by appellate counsel's failure to move for remand because this Court considered a delayed motion to remand filed by defendant. The motion was denied because defendant failed to provide sufficient detail or an adequate offer of proof to suggest that an evidentiary hearing on remand was warranted, not because it was untimely filed.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot