STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY RITCHIE,

Defendant-Appellant.

UNPUBLISHED
May 20, 2008

No. 275061
Muskegon Circuit Court
LC No. 06-053154-FC

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of one count of criminal sexual conduct in the first degree (CSC I), the victim being under 13 years of age, MCL 750.520b(1)(a), and three counts of criminal sexual conduct in the second degree (CSC II), the victim being under 13 years of age, MCL 750.520c(1)(a). The trial court sentenced defendant to serve concurrent terms of imprisonment of eight to 20 years for CSC I, and eight to 15 years for each conviction of CSC II. Defendant appeals as of right. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

I. Facts

The prosecutor's theory of the case was that defendant repeatedly touched a girl, who was eight years old at the time of trial, in sexual ways, including contacting her vagina with his hands and mouth. The evidence included a recording of an interview with a police officer, in which defendant stated that he was now "ruined," and admitted initially that sexual contact had occurred once, then later admitted to taking such liberties with the child on four or five occasions. Defendant specifically admitted rubbing the child's vagina, but denied that oral sex took place. Defendant told the officer, "Just throw me in jail, I can never look at anybody anymore."

On appeal, defendant argues that he was denied a fair trial by defense counsel's poor performance.

II. Assistance of Counsel

The United States and Michigan constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. The constitutional right to counsel is a right to the *effective* assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

In assessing counsel's performance, 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 Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant asserts that his trial attorney was ineffective for failing to seek suppression of the statement he made to the police as described above, to seek complainant's medical or counseling records, or to interview or call possible character or expert witnesses.

The trial court convened a posttrial evidentiary hearing to decide the question of trial counsel's effectiveness. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Review of a trial court's decision following a *Ginther* hearing presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The factual aspect is reviewed for clear error, and the legal aspect is reviewed de novo. See *id.*

A. Suppression of Evidence

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). In this case, defense counsel testified at the *Ginther* hearing that he had not sought to suppress the inculpatory statements in question, which were given without *Miranda* warnings, because he reasoned that defendant was not in custody at the time.

For purposes of the *Miranda* doctrine, criminal proceedings commence when a suspect is first subjected to custodial police interrogation, or otherwise deprived of freedom of action in a significant way. See *People v Rogers*, 14 Mich App 207, 211-212; 165 NW2d 337 (1968). *Miranda* itself took pains to distinguish between actual criminal proceedings and mere investigation: "'Our decision is not intended to hamper the traditional function of police officers in investigating crime.'" *Id* at 212, quoting *Miranda*, 384 US at 477. In determining whether a defendant was in custody when the interrogation took place, this Court looks at the totality of the circumstances, with the key question being whether the defendant reasonably could have believed that he was not free to leave. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d

612 (2001). The custody determination depends on the objective circumstances of the interrogation and not on the subjective views harbored by the defendant or the interrogating officers. *Id.* at 219-220.

In this case, defendant testified that the police detective contacted him at work and then interviewed him in the officer's unmarked car. Defendant stated that, from the detective's facial expressions, he felt that he would be taken to jail if he did not cooperate. However, defendant continued that the detective had told him that after their "chat" he would be free to go. Asked if he felt he had a choice whether to speak to the officer, defendant replied, "Well I had a choice, yeah," even if he thought he would end up "downtown" if he did not talk. Defendant could remember nothing else about the interview that suggested to him that he had no choice but to talk to the officer. Additionally, the interview between the detective and defendant was taped, and the tape was admitted into evidence at trial. The detective immediately informed defendant as follows: "I want you to understand right away, I'm only here to talk to you, okay? I don't want you to think that you're coming with me anywhere or you're under arrest, or anything like that, okay? I'm just here to talk to you." Subsequently, before any incriminating statements were elicited, the detective once again informed defendant that the detective was only there to talk and that defendant would not be going with the detective. The detective further stated, "When we're done talking, you can go back to work, or home, or watch a movie, or whatever you're gonna do, okay?" And the detective never told defendant that he had to talk to him.

We agree with the trial court that the interview was not a custodial interrogation. Even if defendant subjectively felt that he might be taken into custody if he did not offer some cooperation, he made that calculation as a person who understood himself at that moment to be at liberty and wishing so to continue. Further, viewing the interview objectively as reflected in the tape, a reasonable person would not have believed that he was not free to leave, was under arrest, or was in custody. Defendant makes much ado over the detective's indication that, after the interview, defendant could go where he wished. However, we view this as indicating not that defendant was not free at that moment, but as assuring defendant that he was, and would for the time being remain, a free man. The detective was engaging in the sort of investigative functioning the United State Supreme Court expressly determined not to hamper in *Miranda*.

Because a motion to suppress the statements in question would not have succeeded, a claim of ineffective assistance of counsel predicated on the lack of such a motion must fail. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991) (counsel is not obliged to argue futile motions).

B. Medical or Counseling Records

Defendant asserts that complainant had earlier suffered sexual abuse at the hands of a young cousin and that exploration of related medical or counseling records might have yielded information suggesting why complainant might falsely accuse defendant.

"[W]here a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably

necessary, and therefore essential, to the defense." *People v Stanaway*, 446 Mich 643, 649-650; 521 NW2d 557 (1994).

The trial court noted that there was no evidence that any such records existed, credited defense counsel with his eschewing of a transference or fabrication defense in light of defendant's inculpatory statements to the police, and held that "[i]t is speculation that the records would shed some light on the complainant's motivations for her accusation and/or her molestation by an adolescent cousin." We agree. In light of complainant's clear testimony implicating defendant in sexual misconduct, and defendant's own inculpatory statements to the police, the asserted opportunity to divert responsibility from defendant to complainant's cousin gave rise to no "reasonable probability" that privileged records would be "essential" to the defense. *Stanaway, supra.*

C. Potential Witnesses

Defendant asserts that defense counsel should have endeavored to bring an expert witness to testify to the possibility that a child would indulge a figment of the imagination, transfer her identification of an offender to a non-offender, or falsely accuse a person for nefarious purposes. However, the trial court noted that it had, in this bench trial, considered such defenses, but that they did not hold much sway in light of defendant's inculpatory statements to the police. We agree. Bringing an expert to advise the court of the reasons a child might misidentify a sexual abuser would have been of no consequence.

Defendant asserts that defense counsel should have investigated and called witnesses who would have testified to defendant's good character and that they would have entrusted their children to defendant. However, as the trial court noted, character witnesses may testify only to an accused's "pertinent trait of character." MRE 404(a)(1). A character witness's testimony about defendant's character in general, or that he or she did not believe that defendant committed the charged offenses, would not have related to a pertinent trait of character and would thus not have been admissible. Had a character witness been permitted to testify that he or she would have entrusted his or her children to defendant, that witness would have then been exposed to cross-examination with defendant's inculpatory statements. Because the result of bringing such a witness might have been more damaging than beneficial to defendant's position, we agree with the trial court that the decision not to seek character witnesses was sound strategy. See *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999) (a defendant pressing a claim of ineffective assistance of counsel must overcome a strong presumption that counsel's tactics were matters of sound trial strategy).

Moreover, defendant himself, in the brief on appeal, asserts that his statements to the police detective, the propriety of which we confirmed above, "will surely convict the client if it is presented during trial," thus effectively conceding that the outcome would not have been different had the defense put testimony from additional witnesses in evidence.

D. Cumulative Error

Defendant argues that if no single error on the part of defense counsel itself satisfies the inquiry for ineffective assistance, the totality of all such errors does. This argument is unavailing because defendant has failed to show any error on defense counsel's part.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ William B. Murphy