STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 21, 2011
v	No. 298351 Wayne Circuit Court
STEPHEN DANIEL PORTER, Defendant-Appellant.	LC No. 09-026718-FC

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of six counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) and (b), and six counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) and (b). He was sentenced to concurrent prison terms of 108 months to 20 years for each first-degree CSC conviction and 29 months to 15 years for each second-degree CSC conviction. He appeals as of right, and for the reasons set forth in this opinion, we affirm.

Defendant was convicted of sexually molesting a family relative during a four-year period from 2002 to 2006. Evidence of additional uncharged sexual acts against the victim was admitted pursuant to MRE 404(b)(1). At trial, the victim testified to an ongoing pattern of sexual abuse over a period of several years, beginning when the victim was approximately eight years old and continuing until he was approximately fifteen years old.

I. PUBLIC TRIAL

Defendant first argues that he was denied his right to a public trial when the trial court closed the courtroom to the public during jury voir dire. Judge Gregory Bill conducted the jury voir dire in this case.[1] At the beginning of voir dire, Judge Bill stated:

> *THE COURT:* . . . I have to excuse everyone from the courtroom. Only prospective jurors can be in for this process; okay?

[1] Judge Bill conducted voire dire and Judge Cynthia Hathaway presided over defendant's trial.

What's your projection for the length of trial, going to be inclusive of jury selection – exclusive of jury selection?

Defendant did not object when the trial court announced its intention to excuse everyone from the courtroom other than the prospective jurors.

A criminal defendant has a constitutional right to a public trial, US Const, Am VI; Const 1963, art 1, § 20, and that right extends to jury selection. *Presley v Georgia*, 558 US ___; 130 S Ct 721, 725; 175 L Ed 2d 675, 681 (2010). However, this Court has held that a defendant may relinquish his right to a public trial by failing to object to the trial court's decision to close the courtroom to the public during jury selection. *People v Vaughn*, ___ Mich App ___; ___ NW2d ___ (Docket No. 292385, issued December 28, 2010), slip op at 6-7. This case is distinguishable from *Presley* because, unlike the defendant in *Presley*, defendant here did not object to the closure of the courtroom during voir dire. In *Vaughn*, this Court stated that "the failure to timely assert the right to a public trial forecloses the later grant of relief," and held that because the "defendant's trial counsel did not object to the trial court's decision to close the courtroom to the public during the selection of his jury[,] . . . the error does not warrant relief." *Vaughn*, ___ Mich App ___ (slip op at 6). Like the defendant in *Vaughn*, defendant here, with knowledge of the closure of the courtroom, failed to object. Therefore, relief is not warranted. *Id.*

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that trial counsel was ineffective for declining an instruction consistent with CJI2d 20.28 regarding the limited purpose of the other-acts evidence. Because defendant failed to raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defense counsel stated on the record that, after consulting with defendant, they had decided not to request an instruction based on CJI2d 20.28, which advises the jury on the limited permissible purpose of other-acts evidence. Contrary to defendant's argument that there can be no strategic reason for not requesting such an instruction, our Supreme Court in *People v DerMartzex*, 390 Mich 410, 416-417; 213 NW2d 97 (1973), recognized that there may be legitimate reasons for not requesting the instruction, e.g., "it might be counterproductive to emphasize to the jury that the prior acts, besides establishing a chain leading up to the charged offense, also constituted separate criminal offenses." The record clearly establishes that the decision to forego an instruction based on CJI2d 20.28 was made as a matter of trial strategy, and defendant has not met his burden of overcoming the presumption that counsel's strategy was sound. Accordingly, defendant has not shown that he was denied the effective assistance of counsel.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro