

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACKIE AARON ERWIN,

Defendant-Appellant.

UNPUBLISHED

December 13, 1996

Nos. 178144 and 183137

LC No. 94-8094-FC

Before: Fitzgerald, P.J., and Cavanagh and N.J. Lambros,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct with a person under age thirteen, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and two counts of first-degree criminal sexual conduct with a person who is at least thirteen but less than sixteen years old, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b). Defendant was sentenced to four terms of twenty-to-forty-year years' imprisonment. Defendant appeals as of right from his convictions and sentences. We affirm.

Defendant first raises several claims of ineffective assistance of counsel. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den ___ US ___; 115 S Ct 923; 140 L Ed 2d 802 (1995). Defendant failed to move for a *Ginther*¹ hearing; therefore, the claim is limited to errors apparent on the trial court record. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993).

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant argues that his trial counsel did not act as a lawyer with average skill when he consented to trying the seven counts against defendant in one trial. Defendant has submitted an affidavit on appeal in support of his claim, asserting that his counsel gave him inaccurate advice regarding severance of the counts against him. On appeal, we will not consider allegations contained in affidavits outside the record. *People v Sorna*, 88 Mich App 351, 361-362; 276 NW2d 892 (1979).

Defendant nonetheless argues that there was no conceivable strategy for counsel's failure to move for severance of the counts against him. We disagree. The strategy at trial was to argue that defendant was not present at the time some of the acts had allegedly been committed and thereby attack the complainant's credibility with regard to all the counts. This strategy was not necessarily ineffective, as the jury was unable to reach a verdict on three of the seven counts against defendant. In any case, this Court will not attempt to second guess counsel's trial strategy. The fact that counsel's strategy may not have worked does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 196451, issued 9/17/96), slip op p 2.

Moreover, as defendant admits in his appellate brief that a motion for severance would not necessarily have been granted, he has not demonstrated that he was prejudiced by counsel's failure to make such a motion. See *Pickens, supra*. After reviewing the issue, we conclude that defendant was not entitled to severance under MCR 6.120(B), as the charged offenses describe "a series of acts . . . constituting parts of a single scheme or plan." The complainant testified that when her mother was at work, defendant would send her brothers to the store and then force her to engage in sexual acts. These facts indicate a single plan or scheme on the part of defendant to sexually molest the complainant when the opportunity presented itself. Cf. *People v Miller*, 165 Mich App 32, 45; 418 NW2d 668 (1987). That being the case, counsel was not ineffective. Counsel was not required to argue a meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant also asserts that counsel failed to obtain a psychological evaluation of the complainant. However, the trial court denied counsel's pre-trial motion for a psychological evaluation. Counsel renewed the motion during trial, but the trial court again denied it. Counsel then moved for a new trial on the grounds that a psychological exam of the complainant was needed, but the trial court denied the motion. Defendant has not shown that counsel was ineffective on this basis.

Defendant further contends that his counsel was ineffective in his cross-examination of witnesses and "by otherwise failing to demonstrate any recognizable signs of life during the trial process." However, defendant has failed to cite to the record to indicate where counsel allegedly failed to cross-examine witnesses effectively or to "demonstrate any recognizable signs of life." Because defendant has failed to argue the merits of these allegations of error, these issues are not properly presented for review. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Defendant also contends that his sentence violates the principle of proportionality. This Court reviews a sentencing court's decision under an abuse of discretion standard. *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995).

To the extent that defendant's claim is based on the sentences imposed for the underlying convictions, this issue is moot, as those sentences were vacated prior to the imposition of a sentence on the habitual offender conviction. Defendant argues that the trial court erred in sentencing defendant at the high end of the guidelines; however, the guidelines do not apply to habitual offenders. *People v Gsatewood (On Remand)*, 216 Mich App 559, 560; ___ NW2d ___ (1996). Defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Thus, the trial court did not abuse its discretion in sentencing defendant.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).