

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS GERALD AUSTON,

Defendant-Appellant.

UNPUBLISHED

April 8, 1997

No. 189778

Recorder's Court

LC No. 94-000117

Before: Jansen, P.J., and Reilly and W.C. Buhl*, JJ.

PER CURIAM.

Defendant appeals by leave granted his convictions of two counts of first-degree criminal sexual conduct, MCL 750.520(b)(1)(a); MSA 28.788(2); armed robbery, MSA 28.788(2), MCL 750.529; MSA 28.797; and breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305. Defendant pleaded guilty of being an habitual offender, and was sentenced to four concurrent sentences of twenty to thirty years in prison. We affirm.

Defendant's first argument has two parts. First, defendant argues that the district court erred in failing to grant a continuance at the preliminary examination; and second, that his counsel was therefore ineffective for lack of preparation. We disagree with respect to both arguments. In reviewing whether a lower court abused its discretion in refusing to grant a motion for a continuance, this Court considers whether the defendant was asserting a constitutional right, whether he had legitimate reasons for asserting the right, whether he was negligent, whether prior adjournments of trial were at his request, and whether, on appeal, he has demonstrated prejudice resulting from the court's alleged abuse of discretion. *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). We find that defendant in this case failed to demonstrate any prejudice resulting from the district court's claimed abuse of discretion. Defendant fails to cite any error that would indicate that counsel did not effectively conduct the preliminary examination. We find none. Counsel cross-examined three of the four

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

witnesses, though briefly, and effectively questioned the witnesses' memories and opportunities to observe the defendant under the dark conditions at the victims' house.

Similarly, defendant's assertion that his counsel was ineffective must fail as well. To establish ineffective assistance of counsel based upon unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant having failed to do so, his argument is without merit.

Next, defendant argues that he was denied due process and his right to cross-examine a witness against him when the trial court allowed a witness to testify regarding an out-of-court statement by accomplice Troy Keatts, "I'll even f*** the b****," (expressing intention to have sexual intercourse with one of the complainants.) The obvious relevance of testimony concerning Keatts' statement was not to show the truth of the matter asserted, but to show that the statement was made and that it was heard by defendant, who then "laughed and said he'd help him and they both would." In other words, it was admissible to show defendant's state of mind, which was a relevant issue in this case. Because Keatts' statement was not being offered for the truth of the matter asserted, it was not hearsay. Defendant's right to confrontation was satisfied by the opportunity to cross-examine the witness who established that Keatts spoke those words and that defendant responded to them. The trial court did not abuse its discretion.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ William C. Buhl