

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GRANT IVAN LETTS, JR.,

Defendant-Appellant.

UNPUBLISHED

April 15, 1997

No. 185211

Recorder's Court

LC No. 94-005726

Before: Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c). He subsequently pleaded guilty of being an habitual offender, third offense, MCL 769.11; MSA 28.1083, and was sentenced to a prison term of fifteen to thirty years. Defendant appeals as of right. We affirm.

Initially, defendant argues that he was denied the effective assistance of trial due to two alleged errors by his trial counsel. We disagree. A defendant who claims 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) that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *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, the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first claims that his counsel erred by eliciting testimony from a prosecution witness concerning a previous accusation of sexual assault made against defendant. The record reveals that the witness's statement was an unresponsive answer to defense counsel's otherwise proper question. Following the witness's statement, defense counsel made every attempt to mitigate the damage caused

by the unresponsive statement. From this record, we conclude that defendant's trial counsel did not err in this regard.

Next, defendant claims that his trial counsel erred by failing to advise defendant not to wear prison-issue slippers to trial. A defendant's timely request to be allowed to wear civilian clothing at trial must be granted. *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). However, a trial court's denial of such a request is not grounds for a new trial where the prison clothing does not mark defendant as a prisoner. *Id.* at 152. Here, defendant has not made any showing that the prison slippers marked him as a prisoner. The only marking on the slippers was a black "X". Hence, we conclude that defense counsel did not err by failing to advise defendant not to wear the slippers.

Defendant also claims that the trial court erred by denying his motion for a continuance to retain an expert witness to testify with respect to a test performed on the victim after the alleged assault that indicated the presence of semen. We disagree. A trial court's decision whether to grant or deny a motion for adjournment is reviewed for an abuse of discretion. *Lansing v Hartsuff*, 213 Mich App 338, 350; 539 NW2d 781 (1995). To make that determination, this Court considers whether the defendant (1) was attempting to assert a constitutional right; (2) had a legitimate basis for asserting that right; (3) was not negligent in asserting that right; (4) requested and was granted prior adjournments; and (5) has demonstrated prejudice in the failure to receive an adjournment. *Id.* at 351.

Approximately two hours after the sexual assault, the victim was treated at Wyandotte Hospital. As part of the examination, a procedure known as a vaginal wash was done and a sample collected. At trial, the prosecution presented testimony from a doctor employed by the hospital. That doctor indicated that tests performed on the vaginal wash sample indicated the presence of a protein found only in semen. According to the doctor, this result indicated that the victim had had sexual intercourse with a man within the previous two to six hours. The doctor further testified that the protein was generic in character and could not be used to narrow the field of potential sources. Both before and after the doctor's testimony, defense counsel moved for a continuance to retain an expert to testify with respect to the test results and possibly to further test the vaginal wash sample. The trial court denied defendant's requests.

Clearly, defendant was attempting to exercise his constitutional right to call witnesses for his defense. U.S. Const, Am VI; Const 1963, art 1, § 20. Moreover, defendant had a legitimate reason to assert that right. However, though he had not previously received any adjournment of trial, defendant was negligent in waiting until the final day of trial, after the jury had heard two days of testimony, to request a continuance. *Lansing, supra* at 351. Even at that late date defendant did not have any idea whom he might retain or what the testimony would establish. Finally, defendant has failed to demonstrate any prejudice from the denial. Defendant still has not shown what the expert testimony might have established, nor has defendant established that the hospital sample even existed at the time to accommodate further testing. We have held that reversal is not required where the trial court denied a defendant the opportunity to conduct DNA testing where the possibility that such testing would yield exculpatory evidence is highly speculative. *People v Sawyer*, 215 Mich App 183, 192; 545 NW2d 6 (1996). In light of the evidence that further testing could not reveal any exculpatory evidence,

defendant's assertion is

similarly speculative. Weighing all these factors, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a continuance.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald

/s/ Michael R. Smolenski