

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD K. ROUSSEAU,

Defendant-Appellant.

UNPUBLISHED

November 21, 1997

No. 197365

Oakland Circuit Court

LC No. 94-135576-FC

Before: Jansen, P.J., and Doctoroff and Gage, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of three counts of child sexually abusive activity, MCL 750.145c(2); MSA 28.342a(2). Defendant was subsequently found guilty of being a fourth habitual offender, MCL 769.12; MSA 28.1083. Defendant was sentenced to 1-~~1~~¹/₂ to 20 years' imprisonment as an habitual offender. He appeals as of right and we affirm.

Defendant first argues that he was deprived of a fair trial because he was denied effective assistance of trial counsel. Defendant alleges that his attorney failed to investigate the charges against him and adequately prepare the case for trial.

Because defendant did not move for an evidentiary hearing or a new trial on this basis, this Court reviews a claim of ineffective assistance of counsel only if the alleged deficiencies are apparent from the record. *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991). To prove a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

In the present case, we are not persuaded that defense counsel was not adequately prepared or failed to investigate the case. In fact, the record suggests the contrary. Counsel thoroughly cross-examined each witness and was prepared with detailed and probing questions for each witness. Moreover, in light of the overwhelming evidence of defendant's guilt, further investigation would not likely have revealed any information that could have contributed to an acquittal. Finally, defendant has

not shown that counsel's decisions were not sound trial strategy, or that he was prejudiced as a result of the alleged deficiencies. Therefore, we find that counsel's alleged inefficiencies are not apparent from the record. Accordingly, defendant had not shown that he was denied the effective assistance of counsel.

Defendant next asserts that counsel was ineffective because he failed to object to an inaccurate statement contained in the presentence investigation report. Defendant insists that this failure resulted in him receiving a harsher sentence by the sentencing court, and stricter consideration by the parole board.

On appeal, defendant objects to the following statement in the presentence report:

Another negative factor is the rather serious nature of the instant offense, in which the defendant was involved in the sexual exploitation of juveniles for profit.

After defendant was sentenced, he filed a motion in the trial court alleging that the presentence investigation report contained several statements that were false and misleading. Defendant specifically claimed that the statement in the report indicating that he was a leader in a sexual assault was erroneous. Defendant requested that the court correct the inaccuracies in the report and submit a revised copy to the Department of Corrections. The trial court denied defendant's motion. The trial court determined that the presentence report fairly and accurately described both the positive and negative aspects of defendant's background and family. Moreover, the court concluded that the report did not unjustly impose responsibility on defendant for any acts other than those in which he participated.

Like the trial court, we conclude that the presentence investigation report was accurate because it is supported by the record and there was no basis for an objection to the statements contained therein. Accordingly, counsel was not ineffective for not objecting to any statements in the presentence report.

Defendant's final argument was that the verdict was impermissibly compromised by an unwarranted charge of conspiracy to commit first-degree criminal sexual conduct.¹

Defendant filed a motion to quash the information on the basis that the prosecution failed to show probable cause that defendant conspired with anyone to commit the alleged crimes. Specifically, defendant contested the court's finding that an agreement with another person existed primarily because all of the charges against the alleged co-conspirators were dismissed at the preliminary examination. After a hearing on this matter, the court denied defendant's motion holding that there was sufficient evidence introduced at the preliminary examination to establish probable cause that defendant committed the alleged offenses.

The specific charge to file against a defendant is a decision that rests within the prosecutor's discretion. *People v Yeoman*, 218 Mich App 406, 413; 554 NW2d 577 (1996). This Court reviews a charging decision under an abuse of power standard, questioning whether a prosecutor has acted in contravention of the constitution or the law. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). "[T]he trial court's authority over discharge of the prosecutor's duties is limited to

those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires. . . . Put differently, a trial court does not have authority to review the prosecuting attorney's decisions outside this narrow scope of judicial function." *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995).

At trial, the prosecution emphasized that its focus was on the agreement between defendant and another individual to solicit the young boys to engage in an illegal and immoral sexual activity for profit. The prosecution did not allege, nor attempt to prove, that the boys actually did engage in sexual encounters with defendant. Indeed, the prosecution conceded that no sexual penetration occurred. However, the charge of conspiracy to commit first-degree criminal sexual conduct does not mandate that the prosecution prove that sexual activity actually occurred. Rather, the crux of the prosecution's case was the alleged conspiracy, which only requires that there be an agreement to commit such unlawful activity. The fact that the trial court ultimately dismissed this claim because the prosecution failed to satisfy its burden at trial does not imply that there was insufficient evidence to file the charge initially. Based on the facts and evidence produced at trial, the trial court found, and we agree, that there was sufficient evidence to support a charge of conspiracy to commit first-degree criminal sexual conduct. Therefore, we hold that the prosecutor's decision to charge defendant with this offense was not unconstitutional, illegal, or ultra vires.

Finally, we find defendant's argument that the prosecution, by filing this charge, coerced him to plead guilty to lesser offenses, or that the trial court was influenced to convict of lesser crimes, is without merit. Regardless of the conspiracy to commit first-degree criminal sexual conduct charge, there was overwhelming evidence sufficient to justify the charges and convictions of the other offenses, and they were not the result of a compromise by defendant or the court. Therefore, defendant's request for a new trial is denied and his convictions are affirmed.

Affirmed.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff

I concur in result only.

/s/ Hilda R. Gage

¹ We note that defendant, in his brief on appeal, misstates the offense for which he was originally charged as first-degree criminal sexual conduct. Defendant was actually charged with conspiracy to commit first-degree criminal sexual conduct.