STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLEOTHA WOODS,

Defendant-Appellant.

UNPUBLISHED
April 14, 1998

No. 199255
Recorder's Court
LC No. 96-001360

Before: Saad, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of six counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e-f); MSA 28.788(2)(1)(e-f), and one count of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279. He was sentenced to twenty-five to fifty years' imprisonment for each CSC I conviction and five to ten years' imprisonment for the assault with intent to do great bodily harm conviction, the sentences to run concurrently. We affirm in part but vacate two of defendant's CSC I convictions.

I

Defendant first argues that he was denied his constitutional right to present a defense when the trial court refused to admit evidence concerning his history of mental illness, and his trial counsel was ineffective for failing to adequately investigate and present the defenses of diminished capacity and insanity. We disagree with both contentions.

Whether defendant's right to present a defense was violated by the exclusion of evidence is a constitutional question. We review constitutional questions de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). A criminal defendant has a right under the federal constitution to confront witnesses and to present a defense. *People v Whitfield*, 425 Mich 116, 124-125 n 1; 388 NW2d 206 (1986). However, the right to confront witnesses and to present a defense extends only to relevant and admissible evidence. *People v Hackett*, 421 Mich 338, 354; 365 NW2d 120 (1984).

In the present case, defendant has failed to present any argument concerning whether the proffered evidence was relevant to his defenses of insanity and diminished capacity. This issue has therefore been abandoned. *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992). Moreover, the proffered evidence is not relevant to the defenses of insanity or diminished capacity. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 406. The fact that defendant may have received treatment for mental illness at some point in his life does not tend to establish that he was legally insane or under diminished capacity during the precise period of time in question. Because the proffered evidence was not relevant, the constitutional right to present a defense was not implicated by the trial court's exclusion of such evidence.

Defendant's ineffective assistance claim based on his counsel's failure to investigate and present the insanity and diminished capacity defenses is not supported by the record. Because defendant failed to move for a new trial or an evidentiary hearing on this basis below, appellate review is foreclosed "unless the record contains sufficient detail to support defendant's claims, and, if so, review is limited to the record." *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). A defendant claiming ineffective assistance of counsel based upon defective performance has the burden of showing that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the alleged errors the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). Also, the defendant has the burden of overcoming the presumption that the challenged action constituted sound trial strategy. *Id*. at 156.

There is no indication in the record that defense counsel failed to fully investigate and present the defenses of insanity and diminished capacity. Although defendant has appended an affidavit and supporting documentation on this issue to his brief on appeal, we cannot consider such materials because our review is limited to the record as it existed at trial. *Barclay*, *supra* at 672. We note that the record does indicate that an independent analysis apparently did not support defendant's insanity and diminished capacity defenses. Furthermore, defense counsel's cross-examination of witnesses and closing argument demonstrate that he presented the insanity and diminished capacity defenses as best he could under the circumstances. Since there is no indication in the record that counsel's performance fell below an objective standard of reasonableness, defendant's claim for ineffective assistance of counsel must fail. *Mitchell*, *supra* at 157-158.

II

Defendant's second argument is that the trial court abused its discretion by admitting evidence of other bad acts committed by him and that counsel's failure to object to such evidence constituted ineffective assistance of counsel. Most of defendant's allegations of error on this issue are without merit because the purported "evidence" of bad acts was in fact never admitted. The volunteered testimony of one of the victims that defendant had, on a prior occasion, tied her up and left her nude in the basement overnight was stricken from the record. Moreover, contrary to defendant's assertion on appeal, no evidence was admitted indicating that defendant had previously raped and assaulted the victim's

daughter and beaten the victim on a prior occasion. The prosecutor merely asked defendant whether he had done such things, and defendant replied that he had not. No evidence was presented to contradict defendant's denials. The prosecutor's question did not itself constitute evidence. There is no reason to believe that the trier of fact, here the trial court, impermissibly considered matters that were not admitted into evidence when reaching its verdict. Defendant's argument concerning evidence of these bad acts is therefore without merit.

However, evidence was admitted that defendant fled after the crime to St. Louis with false identification, and that he barricaded himself into a house and threatened to kill himself when the FBI intercepted him. We conclude that such evidence was admissible as evidence of flight. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The fact that defendant fled after committing the crime may indicate his consciousness of guilt. *Id*. Moreover, the details of his escape, including criminal actions, were also admissible as part of the res gestae of the escape. *Id*. at 4-5. Use of false identification is a means to avoid detection while a fugitive from justice and is related to defendant's escape. Defendant's act of barricading himself in a home to avoid capture was also part of the res gestae of his flight from the authorities. This evidence was properly admitted.

Defendant's argument that his counsel was ineffective in handling the admission of this evidence fails. Defense counsel objected to the admission of evidence concerning defendant's use of a false name and barricading himself in a home. Counsel's performance with regard to such evidence thus did not fall below an objective standard of reasonableness. As previously noted, the other evidence of bad acts was in fact never admitted. Therefore, even if counsel had objected to the prosecutor's questions, there is no reason to believe that a different result at trial would have been reached.

III

Finally, defendant argues that he received six CSC I convictions for only three acts of sexual penetration and that three of his convictions therefore must be vacated. This issue was not raised before the trial court. However, we may consider this issue because the question is one of law and the record is factually sufficient. *People v Brown*, 220 Mich App 680, 681; 560 NW2d 80 (1996). We review questions of law de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

Under MCL 750.520b; MSA 28.788(2), a person who engages in sexual penetration with another may be convicted of CSC I when any one of several aggravating circumstances exist. The two aggravating circumstances at issue in the present case are the use of a weapon, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and personal injury to the victim when force or coercion is used, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). When enacting the CSC I statute, the Legislature did not intend for a single act of penetration accompanied by more than one aggravating circumstance to result in multiple convictions. *People v Johnson*, 406 Mich 320, 323; 279 NW2d 534 (1979).

Defendant was charged with six counts of CSC I: three counts involving use of a weapon (including one count each for penetration of the victim's mouth, vagina, and anus) and three counts involving personal injury (again including one count each for penetration of the victim's mouth, vagina, and anus). According to the evidence presented at trial, defendant inserted his penis into the victim's

mouth and anus only once. There were three penetrations of the victim's vagina, but only two such penetrations were charged in the information. We therefore conclude that there was only evidence to support four of the six CSC I convictions. We therefore vacate two of defendant's CSC I convictions.

Two of defendant's six CSC I convictions are vacated. The remaining convictions and sentences are affirmed. We remand to the trial court for the ministerial task of correcting defendant's judgment of sentence. The trial court shall ensure that the corrected judgment of sentence is transmitted to the Department of Corrections. *Brown*, *supra* at 685. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Myron H. Wahls
/s/ Hilda R. Gage