

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH GEORGE BADDER,

Defendant-Appellant.

UNPUBLISHED

April 21, 1998

No. 191104

Cheboygan Circuit Court

LC No. 91-000589 FC

Before: O’Connell, P.J., and White and Bandstra, JJ.

PER CURIAM.

Defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, in the suffocation death of his eighteen-month-old stepdaughter and was sentenced to a term of life in prison. He appeals as of right. We affirm defendant’s conviction and the length of his sentence but remand to correct the amount of sentence credit awarded.

Prior to trial, defendant wrote a letter to the trial court seeking substitute counsel. Defendant complained that there was a breakdown in the attorney/client relationship and, more specifically, that his counsel had not adequately sought a competent expert pathologist to testify that the child’s death was by natural causes and that his counsel was limiting his character witnesses. On appeal, defendant argues that the trial court abused its discretion in refusing to grant him substitute counsel. We disagree. Defendant has failed to demonstrate good cause for the substitution of counsel. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). See, also, *People v Staffney*, 187 Mich App 660, 667; 468 NW2d 238 (1991). Although defendant argues that a legitimate difference of opinion developed between his attorney and him regarding trial tactics, particularly the presentation of evidence that death was by natural causes, that is not the case. Trial counsel contacted eleven pathologists in the state in an attempt to find a witness that would testify that the death was by natural causes, but the attorney’s attempt was unsuccessful. The only two pathologists who would review the case agreed with prosecution witnesses that the death was not by natural causes. This testimony would have supported the prosecutor’s theory of the case. As to the testimony of Dr. Kallet, the defense pathologist from the first trial, on a separate record prepared at the request of the trial court, trial counsel set forth legitimate

reasons for refusing to present the testimony of that witness. Further, although defendant argues that the trial court did not adequately explore his complaints, the record does not support that argument.¹

Defendant next argues that trial counsel was ineffective for failing to present the testimony of the defense expert from the first trial, for failing to object to cross-examination of defendant's former wife regarding her and defendant's marital status, and for questioning defendant's former wife regarding defendant's treatment of the child thereby reviving testimony that the trial court had previously refused to permit. Because defendant failed to move for a new trial or a hearing below, our review is limited to the existing record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). Defendant must demonstrate that "counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Having reviewed the record, we conclude that trial counsel did not err in failing to have the testimony of the defense expert from the first trial read into the record.² *People v Mitchell*, 454 Mich 145, 166; 560 NW2d 600 (1997). Trial counsel demonstrated that he had serious concerns about the competence of the witness and further demonstrated that the witness was greatly compromised by cross-examination. Defendant has not overcome the strong presumption that trial counsel's action was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant has also not overcome this presumption regarding the questioning of defendant's former wife regarding defendant's treatment of the child. Although it opened the door for rebuttal testimony regarding his mistreatment of the child, such questions were clearly a matter of trial strategy for which this Court will not substitute its judgment. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Defendant has abandoned his claim that trial counsel was ineffective for failing to object to the prosecutor's questioning of defendant's former wife because he has cited no authority for the proposition that such questions were objectionable. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995).

Defendant argues that his conviction should be reversed because he was not present for the in-chambers questioning of certain jurors. We disagree. The test for whether defendant's absence from a part of his trial requires reversal of his conviction is whether there is any reasonable possibility that defendant was prejudiced by his absence. *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995). Defendant has not demonstrated any prejudice as a result of this procedure. Further, his counsel was present and, therefore, "there [were] no rights held by the defendant which his presence would have afforded him that his counsel [could not] exercise in his absence." *People v Carroll*, 396 Mich 408, 413; 240 NW2d 722 (1976). In addition, counsel's failure to object to defendant being excluded from discussions held outside the courtroom does not constitute ineffective assistance of counsel as defendant has failed to show how he was deprived of a fair trial. *Pickens, supra*.

Defendant argues that the trial court abused its discretion in admitting rebuttal testimony regarding defendant's mistreatment of the child several days before her death. The rebuttal testimony was properly admitted to contradict the testimony of defendant's former wife that defendant had a

wonderful relationship with the child. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

Finally, defendant argues that the trial court erred in failing to give him an additional forty-one days' credit at sentencing. Pursuant to MCL 769.11b; MSA 28.1083(2), defendant was due credit for all the time spent in prison or jail prior to his sentencing. Because sentencing was held later than the credit calculations done by the probation department, defendant is entitled to credit for 1,513 days rather than 1,472 days. Therefore, on remand, the trial court should enter a corrected judgment of sentence reflecting the new number of days of credit.

Defendant's conviction and the length of his sentence are affirmed, but the matter is remanded for correction of the judgment of sentence to reflect 1,513 days of sentence credit. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Richard A. Bandstra

¹ It appears from defendant's appellate brief that he is no longer raising the argument that trial counsel limited his character witnesses. In any event, the record indicates that the problem was not with counsel, but rather, with the fact that defendant did not provide the character witnesses' names to counsel. Furthermore, although defendant complained below that his trial counsel told him that only three or four character witnesses could be called, the trial judge informed defendant that only two or three character witnesses would be allowed.

² Even if we assumed that it was error not to present the testimony of Dr. Kallet, we are not convinced that there is a "reasonable probability" that but for the error the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). We arrive at this conclusion after reviewing all the evidence in this case, especially the testimony of the various medical witnesses, and considering the fact that Dr. Kallet's testimony had been compromised and weakened by the prosecutor's cross-examination at the first trial.