

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MICHAEL BRALEY,

Defendant-Appellant.

UNPUBLISHED

June 2, 1998

No. 197878

Menominee Circuit Court

LC Nos. 96-002171 FC

96-002172 FC

96-002173 FC

96-002174 FC

Before: Markman, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by jury of six counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2). Defendant was sentenced to twelve to twenty-five years for each conviction, to run concurrently. We affirm.

Defendant raises the claim of ineffective assistance of counsel. “[T]o find that a defendant’s right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show 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, 302-303; 521 NW2d 797 (1994), or “a trial whose result is reliable.” *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Trial counsel is presumed to have been effective. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A defendant may show that counsel “has not performed at a minimal level of competence,” *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980), but counsel’s performance must be measured by a standard of objective reasonableness without consideration of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *In re Oakland Co Prosecutor*, 191 Mich App 113, 120; 477 NW2d 455 (1991).

Defendant argues that his trial counsel was ineffective in five different respects. Each will be addressed separately.

A

Defendant first argues that trial counsel's waiver of the preliminary examination was ineffective because it denied him an opportunity to gather potentially inconsistent statements from the complainants that could have been used to impeach them during cross-examination. However, as the trial court noted, electing to waive the preliminary examination can be considered sound trial strategy in a criminal sexual conduct case involving young children because it forecloses an opportunity for them to become more comfortable and relaxed in a trial setting. Furthermore, at the *Ginther*¹ hearing, defense counsel testified that he had the complainants' videotaped statements and transcripts of those statements. He testified that he and defendant went over both the tapes and written statements to look for inconsistencies to be used at trial. Although there was a question as to who decided to waive the preliminary examination, we are not convinced that this was an unsound trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Thus, we conclude that trial counsel was not ineffective in this regard.

B

Defendant next argues that trial counsel was ineffective because prior to trial he failed to interview the complainants and witnesses who were familiar with them and failed to contact an expert to testify regarding reasons why the complainants might be lying. Trial counsel did not think he needed to interview the complainants prior to trial because he had the videotaped statements, as well as the transcripts of the statements, and believed that these sufficiently prepared him for trial. Trial counsel said that he did interview other people in the neighborhood, some of whom he called as witnesses at trial. Trial counsel admitted that he did not talk to anyone about the complainants' reputations for honesty or dishonesty, but no evidence was offered at the *Ginther* hearing to show that any of the complainants had a reputation for dishonesty. Regarding an expert witness, the Michigan Supreme Court has ruled that experts in criminal sexual conduct cases may not comment on the credibility of a child complainant. See *People v Beckley*, 434 Mich 691, 729; 456 NW2d 391 (1990). Therefore, even if trial counsel had retained an expert, at best he could have only talked in generalities without making any conclusions about these complainants. In regard to this argument, defendant has failed to establish prejudice or overcome the presumption that counsel was effective.

C

Defendant also alleges that trial counsel was ineffective in failing to object to the admission of other acts evidence. In this case, evidence was presented that there were many instances of criminal sexual conduct but no specific dates for the charged incidents were given. We hold that counsel was not ineffective in failing to object to the other acts evidence because the evidence was admissible and thus the objection would have been futile. *People v Amrstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989); *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

The seminal case regarding the admissibility of other acts evidence is *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). In *VanderVliet*, our Supreme Court adopted the rule set forth in *Huddleston v United States*, 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988). The rule consists of four parts: (1) under MRE 404(b), the evidence must be offered for a proper purpose; (2) it must be relevant under MRE 104(b); (3) it must be more probative than prejudicial under MRE 403; and (4) if requested, a limiting instruction must be given. *VanderVliet*, *supra* at 74, quoting *Huddleston*, *supra* at 691-692. Here, no objection was made and therefore the prosecution did not have to justify the prior acts evidence under *VanderVliet*. In any event, the testimony was admissible for a proper purpose -- to establish defendant's common plan, scheme, or modus operandi. See *People v Miller*, 186 Mich App 660; 465 NW2d 47 (1991); *People v Sabin*, 223 Mich App 530; 566 NW2d 677 (1997); *People v Wright*, 161 Mich App 682; 411 NW2d 826 (1987). Moreover, the testimony was relevant under MRE 402 in that it went to the circumstances surrounding each girl's particular incident of abuse. Finally, after a thorough review, we are not convinced that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. MRE 403. Therefore, defendant has failed to show that the failure to object to this evidence was a deficiency in performance or that it was so prejudicial as to affect the outcome of defendant's trial.

D

Defendant next argues that trial counsel's alleged error in objecting to CJI2d 20.28 (an instruction which limits the use of "other acts" evidence) was so prejudicial that it denied defendant his Sixth Amendment right to counsel. We disagree. Assuming *arguendo* that counsel's performance in this regard fell below an objection standard of reasonableness, we hold that under the circumstances of this case the error was not so prejudicial as to deprive defendant of his right to a fair trial. In view of the totality of the evidence presented, we conclude that it is not reasonably probable that "but for trial counsel's errors, the result of the proceeding would have been different." *Strickland*, *supra* at 694. Accordingly, we reject defendant's claim of ineffective assistance of counsel.

E

Finally, defendant claims trial counsel's overall performance was ineffective. Specifically, defendant argues trial counsel's failure to move to sever the trials or to seek a bill of particulars with regard to the exact dates of the offenses. However, given that the offenses were related, defendant would not have been entitled to severance under MCR 6.120(B) and it is unlikely that it would have been granted in the court's discretion under MCR 6.120(C). Moreover, "[i]n criminal sexual conduct cases, especially those involving children, time is not usually of the essence or a material element." *Sabin*, *supra* at 532. After thoroughly reviewing the record, we hold that defense counsel's failure to seek a bill of particulars did not prejudice defendant nor did it rise to the level of denying defendant his Sixth Amendment right to counsel.

Affirmed.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).