

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH M. ROWLS,

Defendant-Appellant.

---

UNPUBLISHED

August 17, 1999

No. 208498

Oakland Circuit Court

LC No. 96-146339 FC

Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant-appellant Kenneth M. Rowls appeals as of right his jury trial conviction of first-degree criminal sexual conduct (sexual penetration with a person under thirteen years old), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). The trial court sentenced defendant to fifteen to forty years' imprisonment. We affirm defendant's conviction and remand for proceedings consistent with this opinion.

I. Basic Facts

Between December, 1988, and March, 1990, defendant lived with the complainant's mother. She and defendant had one child together. The complainant's mother and defendant also lived with her other child, the complainant. The complainant was born on July 22, 1982, and thus was seven-years-old in March 1990.

According to the complainant, during the time he and his mother lived with defendant, defendant would wake him up at night to give him a bath and would wash the complainant's posterior and penis. Defendant would then take the complainant into defendant's room and make him perform fellatio on defendant. According to the complainant, defendant would also perform fellatio on him and attempt to perform anal sex on him. According to the complainant, defendant told him not to tell anyone. Ultimately, the complainant's mother filed a police report and defendant was charged with first-degree criminal sexual conduct.

## II. Standard Of Review

### A. Other Acts Evidence

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Hoffman*, 225 Mich App 103, 104; 570 NW2d 146 (1997); *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

### B. Effective Assistance Of Counsel

Defendant did not properly preserve this issue for appeal by requesting a new trial or seeking an evidentiary hearing before the trial court. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). Therefore, this Court must review this issue on the basis of the existing record. *Id.* To justify reversal under the state and federal constitutions for ineffective assistance of counsel, a defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997); *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). The first prong requires that counsel have made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Mitchell, supra*, 454 Mich 164-165. The second prong requires that counsel's ineffective assistance must be found to have been prejudicial in order to reverse an otherwise valid conviction. *Id.* at 165. Furthermore, the defendant must overcome the presumption that the challenged action or inaction was sound trial strategy. *Leonard, supra*, 224 Mich App 592.

### C. Failure To Admit Guilt

This Court reviews sentencing decisions for an abuse of discretion. *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988).

### D. Errors In The PSIR

This Court reviews challenges to the presentence investigation report ("PSIR") that were made at sentencing de novo. See *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993).

## III. Other Acts Evidence

Defendant argues that the trial court erred in allowing the complainant to testify regarding other acts of sexual abuse committed by defendant. We disagree. Evidence of other acts is admissible under MRE 404(b) as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident

when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

Evidence of another crime may be admitted if (1) it is offered for a purpose other than to prove the defendant's character or propensity to commit the crime, (2) it is relevant to an issue or fact of consequence at trial, (3) it is sufficiently probative to prevail under the balancing test of MRE 403, and (4) the trial court may provide a limiting instruction. *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994); *Hoffman, supra*, 225 Mich App 105. Relevant other acts evidence does not violate MRE 404(b) unless it is offered *solely* to show the criminal propensity of an individual to establish that he acted in conformity therewith. *VanderVliet, supra*, 444 Mich 65. "Rule 404(b) permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory." *VanderVliet, supra*, 444 Mich 65 (emphasis in the original).

In *People v Dermartzex*, 390 Mich 410; 213 NW2d 97 (1973), the Michigan Supreme Court ruled that the ten-year-old complainant could testify to other instances of sexual abuse by the defendant which led up to the charged offense. *Id.* at 415. The Michigan Supreme Court reasoned that limiting the complainant's testimony to the specific act charged and excluding testimony of the defendant's prior acts would seriously undermine the complainant's credibility. *Id.* at 414-415. The Michigan Supreme Court found this to be true because "[c]ommon experience indicates that sexual intercourse and attempts thereat are most frequently the culmination of prior acts of sexual intimacy." *Id.* at 415.

Similarly, here the prosecution introduced the complainant's testimony regarding other acts to bolster the complainant's credibility and to establish that defendant had a system in performing these acts upon the complainant or forcing the complainant to perform the acts on defendant. MRE 404(b); *VanderVliet, supra*, 444 Mich 65. We find that the evidence was not offered solely to show defendant's propensity to commit this crime. *Id.*

The fact the evidence was offered for an appropriate purpose and was relevant does not end the inquiry. *People v Gibson*, 219 Mich App 530, 532; 557 NW2d 141 (1996). The trial court must also determine whether the danger of unfair prejudice substantially outweighed the probative value of the evidence under MRE 403. *Gibson, supra*, 219 Mich App 532. Granted, the evidence was prejudicial, but all evidence offered by the parties is prejudicial to some extent. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). However, "[i]t is only when the probative value [of the evidence] is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *Id.* at 75 (emphasis in the original).

Here, we find that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *Mills, supra*, 450 Mich 75. In his testimony, the complainant did not go into detail about each specific act, but recounted the events in a general way. The jury was not, therefore, presented with the repugnant specifics of the prior acts. Further, the trial court gave a limiting instruction to the jury that the other acts "ha[ve] nothing to do with his guilt or innocence in relation to this particular charge and whether it occurred on the time that is alleged in the Information." On balance, we find that the admission of the contested evidence had a greater probability of leading to the

truth than would its exclusion. *People v Miller*, 198 Mich App 494, 497; 499 NW2d 373 (1993). Accordingly, we hold that the trial court did not abuse its discretion in allowing the complainant to testify regarding other instances of sexual abuse by defendant.

Defendant also argues that the trial court's limiting instruction denied him a fair trial. However, defendant requested a limiting instruction and failed to object after the trial court instructed the jury. Moreover, a review of the limiting instruction reveals that it adequately protected defendant's rights in that it was, in essence, a recital of MRE 404(b) and consistent with the case law in this area. *People v Starr*, 457 Mich 490, 503; 577 NW2d 673 (1998).

#### IV. Effective Assistance Of Counsel

Defendant argues that he was denied effective assistance of counsel because his attorney elicited testimony from defendant regarding defendant's prior convictions. We disagree.

Defendant argues that, because his prior convictions were misdemeanor convictions for assault, they were inadmissible for impeachment purposes. From this argument, defendant concludes that defense counsel was ineffective because not only should trial counsel have refrained from introducing evidence of the convictions at trial, he should have filed a motion in limine to exclude their admission.

However, defense counsel's introduction of defendant's prior criminal history may constitute a matter of trial strategy. *People v Murph*, 185 Mich App 476, 479; 463 NW2d 156 (1990), modified on other grounds 190 Mich App 707; 476 NW2d 500 (1991); *People v Hunter*, 141 Mich App 225, 230; 367 NW2d 70 (1985).

Even the intentional introduction by defense counsel of a prior criminal record does not constitute a serious mistake of counsel depriving defendant of a fair trial or of effective assistance of counsel where the record was introduced as a trial tactic. [*Id.*, quoting *People v Karasek*, 63 Mich App 706; 234 NW2d 761 (1975).]

From a review of the record, we find that defense counsel introduced evidence of defendant's prior convictions as a matter of trial strategy. *Murph*, *supra*, 185 Mich App 479; *Hunter*, *supra*, 141 Mich App 230. Defense counsel introduced evidence of a prior conviction in connection with an altercation with the complainant's mother. Defendant's testimony did not specifically state what he was convicted of, but indicated that it involved an altercation with the complainant's mother as a result of her accusing defendant of running around with other women. Defendant also testified regarding this prior conviction when he described his meeting with Sergeant O'Hala of the Auburn Hills Police Department. Defendant explained that he thought Sergeant O'Hala wanted defendant to go to the police station to discuss the prior altercation with the complainant's mother and that he was confused throughout most of the interview. We believe it to be readily apparent that defense counsel introduced evidence of this prior conviction in an attempt to attack the credibility of the complainant's mother and to diffuse the significance of defendant's tape recorded interview with Sergeant O'Hala. During closing argument, defense counsel implied that most of defendant's drug problems, and even defendant's misdemeanor conviction, were caused by the complainant's mother. Defense counsel argued that she had an agenda

against defendant and that was what was behind the complainant's charges. Defense counsel also argued that defendant did not even know what Sergeant O'Hala was talking about during the interview.

Defense counsel also introduced evidence of defendant's two prior convictions in an attempt to portray defendant as a compassionate person and a law abiding citizen. In closing argument, defense counsel stated that defendant simply pleaded no contest to the assault and battery charge involving the complainant's mother because he did not want to put her through a trial, not because he was admitting any guilt. Defendant also testified regarding another assault and battery misdemeanor conviction. Defendant testified that he merely turned himself in and pleaded no contest because that is what he was advised to do. During closing argument, defense counsel argued that, besides these two misdemeanor convictions in which defendant pleaded no contest, defendant had never been convicted of a felony, but had always done the right thing.

"A defense attorney must enjoy great discretion in the trying of a case – especially with regard to trial strategy and tactics." *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). Defense counsel's strategic choice should not be presumed error simply because it was unsuccessful. *Id.* Moreover, "[t]his Court will not substitute its judgment for that of trial counsel in matters of trial strategy." *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Accordingly, we hold that defendant has failed to overcome the presumption that the alleged error was a matter of sound trial strategy. *Leonard, supra*, 224 Mich App 592.

#### V. Failure To Admit Guilt

Defendant argues that the trial court impermissibly held defendant's failure to admit guilt and insistence upon his constitutional right to a jury trial against defendant during sentencing. We disagree.

The sentencing court may not base its sentence on the defendant's refusal to admit guilt, but may consider defendant's lack of remorse in determining the defendant's potential for rehabilitation. *People v Wesley*, 428 Mich 708, 718-719; 411 NW2d 159 (1987) (Archer, J.). In determining whether the trial court was improperly influenced by the defendant's failure to admit guilt, this Court considers: the defendant's maintenance of innocence after conviction; the trial court's attempt to get the defendant to admit guilt; and the appearance that had the defendant admitted guilt, his sentence would not have been so severe. *Id.* at 713.

Upon review of the record, it does not appear that the trial court attempted to get defendant to admit guilt or that the trial court indicated that it would have lessened defendant's sentence if defendant had admitted guilt. The trial court focused on defendant's refusal to admit guilt as it bore on his avoidance of responsibility. *People v Stewart (On Remand)*, 219 Mich App 38, 44-45; 555 NW2d 715 (1996). The trial court also focused on the fact that defendant continued to blame Sergeant O'Hala for defendant's own confession. Furthermore, defendant never objected to the information in the PSIR or the trial court's conclusion at sentencing or following sentencing. *Wesley, supra*, 428 Mich 716. Moreover, defendant's sentence is within the sentencing guidelines' range as calculated, and, therefore, is presumptively proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Defendant is not entitled to resentencing based on this argument.

## VI. Errors In The PSIR

Defendant argues that the trial court did not resolve his challenges to the accuracy of the PSIR. We agree. The use of inaccurate information at sentencing could violate a defendant's right to due process. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990). Accordingly, MCL 771.14(5); MSA 28.1144(5), as in force at the time of defendant's sentencing, and MCR 6.425(D)(3) both provided an opportunity for a defendant to challenge the accuracy of the information relied upon at sentencing. A defendant has the opportunity to challenge any information contained in the presentence investigation report, and the trial court *must* make findings on defendant's challenges or decide to disregard the challenged information, on the record. MCR 6.425(D)(3); *Hoyt, supra*, 185 Mich App 535. If the trial court finds the challenged information to be inaccurate or irrelevant or decides that it will not take the challenged information into account, it *must* strike that information from the presentence investigation report before sending it to the Department of Corrections. MCR 6.425(D)(3); *Hoyt, supra*, 185 Mich 535.

The Department of Corrections "Evaluation & Plan" contained in the PSIR indicated that Lisa Madzia of the Oakland County Prosecutor's Office submitted an affidavit to the Department of Corrections concerning a threat that defendant allegedly made to the complainant. Specifically, the "Evaluation & Plan" states:

Further, writer was advised via a signed Affidavit submitted by Lisa Madzia of the Oakland County Prosecutor's Office advising that on July 21, 1997, at approximately 2:00 p.m., the defendant was being led away by Oakland County Sheriff's Deputies after being convicted of the instant offense, the defendant was about two feet away from the victim and was heard saying to the victim, "You'll pay for this."

At sentencing, the trial court asked defendant if he made that threat and defendant denied making any threats. The trial court stated:

Well, I don't know. I guess that's the problem we have, too. I'm not going to make a separate trial, but that's what the information is here. And I assume that they got that information from the parties.

*Without resolving the issue*, the trial court imposed sentence and stated that it thought defendant was a threat to society. Because the trial court failed to resolve the issue, we remand to the trial court for further proceedings. *People v Landis*, 197 Mich App 217, 219; 494 NW2d 865 (1992). On remand, the trial court shall clarify whether the disputed matter played a role in its sentencing decision. *Id.* If the disputed matter did play a role in the trial court's decision, the trial court shall resolve the challenge pursuant to MCR 6.425(D)(3) and resentence defendant. *Landis, supra*, 197 Mich App 219. If the disputed matter did not play a role, defendant's sentence shall be considered to be affirmed and the trial court need only strike the disputed matter from the presentence report. *Id.*

Defendant's conviction is affirmed. However, this case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ Michael J. Talbot