

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTON JOSEPH JURICK,

Defendant-Appellant.

---

UNPUBLISHED

August 22, 2000

No. 215541

Ottawa Circuit Court

LC No. 98-021873-FH

Before: White, P.J., and Talbot and R. J. Danhof\*, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (sexual contact with a person under thirteen years of age). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, and second sexual offense offender, MCL 750.520f; MSA 28.788(6), to serve an enhanced prison term of seven to twenty years. We affirm.

Defendant first argues that prejudicial error occurred because he was absent from a pretrial evidentiary hearing at which the trial court adjudicated several defense motions. We disagree. Reversal of an otherwise valid conviction on this basis is unwarranted unless there exists a reasonable possibility that the defendant's absence was prejudicial. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977); *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995). Although the record does not reveal the reason for defendant's absence, we find the possibility that, if defendant had been physically present, a witness could have identified him in person, and those present could have noted the unusual appearance of his eye, does not create a reasonable possibility that his absence was prejudicial. Thus, reversal is unwarranted.

Defendant next contends that he was entitled to counsel at two photographic showups involving other children that he allegedly accosted earlier because the police admitted that they were using these showups to help build their case against defendant involving the present victim. The trial court rejected defendant's argument on the ground that, at the time of the showups, defendant was uncharged and not

---

\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

incarcerated, and there was nothing unusual about the investigation. A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Kurylczak*, 443 Mich 289, 303 (Griffin, J), 318 (Boyle, J); 505 NW2d 528 (1993).

There generally is no right to counsel during a pre-custody, pre-questioning, mere suspicion phase of an investigation. *Id.* at 301, 318; *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994). It is true that the police testified that, at the time of the Underhill showups, defendant was their only suspect, and they were using the showups to help build their case involving the present victim. Defendant relies on *McKenzie*, *supra* at 472, in which this Court noted that, in *Kurylczak*, the Michigan Supreme Court did not explain the "unusual circumstances" entitling a defendant to counsel at a photographic showup. By way of dictum, this Court in *McKenzie*, *supra* at 472, opined that the "unusual circumstances" would have to be similar to those existing in *People v Cotton*, 38 Mich App 763; 197 NW2d 90 (1972), or "where the witness has previously made a positive identification and the clear intent of the lineup is to build a case against the defendant." In *Cotton*, the defendant had been released from custody after two corporeal lineups were conducted with counsel present, and the subsequent photographic showup was conducted without the presence of counsel. The Court in *Kurylczak*, *supra* at 299-300, noted that, in *Cotton*, this Court held that the defendant had a right to counsel at the showup based upon the unusual circumstances of the case. However, because the circumstances in the present case are substantially different from those existing in *Cotton*, we do not believe that they are "unusual" in the sense of entitling defendant to the presence of counsel at the Underhill showups. The trial court correctly so ruled.

Defendant also argues that the photographic showups were unduly suggestive. A photographic identification procedure can be so suggestive as to deprive the defendant of due process of law. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The fairness of an identification procedure is evaluated in light of the totality of the circumstances. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). The test is whether the procedure was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. *Kurylczak*, *supra* at 306, 318. Factors to consider include the opportunity of the witness to view the perpetrator at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the perpetrator, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972).

Nothing in the present record supports the conclusion that there was a substantial likelihood of misidentification at the photographic array as a result of any suggestive influences, and defendant has therefore not demonstrated clear error by the trial court. Because the trial court ruled correctly, defendant's discussion of an "independent basis" for an in-court identification is moot.

Defendant next claims that the trial court erred by allowing the admission at trial of evidence that he had earlier accosted other children in the same location. The admissibility of prior acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Sabin (After Remand)*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (No. 114953, decided 7/27/2000), slip op at 10; *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

To be admissible under MRE 404(b)(1), prior acts evidence must satisfy three evidentiary safeguards: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id.*, slip op at 11-15; *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

Considering the evidence in light of the above factors, and mindful of the fact that the trial court instructed the jury regarding the limited use of the evidence, we are persuaded that the trial court did not abuse its discretion. The challenged evidence related to defendant's identity and to his common plan or scheme to sexually assault children at the location in question. See *Sabin, supra*, slip op at 18-25.

Defendant further maintains that the trial court committed prejudicial error by denying his request for an instruction informing the jury that, if the prosecution had produced surveillance videotapes covering the time periods involved, they would have been favorable to defendant. Certain surveillance camera videotapes were not available to the police after the assault on the victim. However, police viewed the tapes that were available as well as those covering an earlier incident, but observed no person on those tapes matching defendant's description and, therefore, returned the tapes for reuse. During his closing argument, defense counsel discussed the fact that the police had not seen anyone resembling defendant on the videotapes, and that these tapes had not been preserved. The trial court denied defendant's request for an instruction to the effect that if the videotapes had been produced, they would have been favorable to defendant, but noted that it was the proper subject of argument.

We find no abuse of discretion by the trial court in refusing defendant's request. The jury was made amply aware that the police saw no one fitting defendant's description on any of the tapes they viewed. Defense counsel argued this fact during his closing argument. Accordingly, no error occurred.

As his next allegation of error, defendant contends that his sentence is disproportionate. We disagree. Provided that permissible factors are considered during sentencing, appellate review of a sentence is limited to whether the sentencing court abused its discretion. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). A sentence must be proportionate to the seriousness of the crime and the defendant's prior record, and a sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

The agent who compiled defendant's presentence investigation report recommended an eight-to fifteen-year prison term in view of the fact that defendant had a previous sex-offense conviction. Because of his prior conviction, defendant was subject to a mandatory minimum sentence of at least five years. MCL 750.520f; MSA 28.788(6). Also, the trial court was authorized to enhance defendant's sentence pursuant to his status as a second habitual offender, MCL 769.10; MSA 28.1082. Considering these facts, and the fact that defendant obviously poses a danger to children in general society, his sentence of seven to twenty years is proportionate to the offense and the offender and does not constitute an abuse of discretion.

Defendant next contends that he was denied the effective assistance of counsel at trial in several particulars. Because defendant failed to move for an evidentiary hearing with respect to most of the matters raised on appeal, this Court's review is limited to the facts contained on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Regarding counsel's failure to call Charles P. Toms as a witness, we agree with the trial court's conclusion following an evidentiary hearing that counsel's decision not to call the witness was a matter of trial strategy. We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant's remaining claims of ineffective assistance of counsel were not raised in the trial court. Limiting our review to the record, we conclude that defendant has not established entitlement to relief due to ineffective assistance of counsel. *Stanaway, supra; Hedelsky, supra.*

Defendant also argues that he was denied a fair and impartial trial because the prosecutor made a false statement and failed to elicit exculpatory evidence at a pretrial motion hearing. Defendant additionally claims that the trial court erred by allegedly giving a jury instruction regarding evidence that was broader than the purpose for which the evidence was admitted. Defendant did not preserve these issues with an appropriate objection at trial. Where, as here, unpreserved error is alleged, defendant must show a plain error that affected substantial rights. Additionally, this Court will reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Because neither of defendant's allegations of error satisfy the *Carines* standard, reversal is unwarranted.

Affirmed.

/s/ Helene N. White  
/s/ Michael J. Talbot  
/s/ Robert J. Danhof