

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GABRIEL FERRIS,

Defendant-Appellant.

UNPUBLISHED

August 6, 1999

No. 193744

Saginaw Circuit Court

LC No. 95-010303 FC

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

SMOLENSKI, P.J. (dissenting).

I respectfully dissent and would affirm defendant's conviction.

I disagree with the majority's conclusion that the prosecutor knew that Mays gave false testimony at defendant's trial when he stated that he had no expectations of leniency and that the prosecutor had an affirmative duty to disclose these expectations. The prosecutor made only vague, non-specific comments regarding Mays' treatment in his pending criminal case. Mays had neither an actual promise for leniency in his pending criminal case nor a reasonable expectation of leniency. Rather, Mays had nothing more than a hope for leniency after he testified. A mere future possibility of leniency does not require disclosure. *People v Atkins*, 397 Mich 163, 174; 243 NW2d 292 (1976).

I also disagree with the majority's conclusion that the trial court improperly admitted evidence of defendant's prior abuse of his former wife pursuant to MRE 404(b)(1). The victim in this case was allegedly strangled and raped. The prosecution's evidence that defendant grabbed his former wife around the throat, choked her and either raped or attempted to rape her was relevant with respect to a *modus operandi* theory to prove the perpetrator's identity in this case. See *People v VanderVliet*, 444 Mich 52, 66; 508 NW2d 114 (1993). Therefore, the trial court did not abuse its discretion in admitting this evidence pursuant to MRE 404(b)(1).

I further disagree that defense counsel was ineffective for failing to investigate or pursue the sterility issue at defendant's trial. To justify a reversal due to ineffective assistance of counsel, defendant must establish that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced him as to deprive him of a fair trial. *People v Pickens*, 446

Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that counsel's action was sound trial strategy and, as a result, deprived him of a substantial defense that would have affected the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defense counsel was forced to make difficult strategic decisions in a case involving twenty-year-old evidence. Given that the medical examiner could not conclusively testify that the substance found inside the victim was semen or that the perpetrator was sterile, that the state had lost scientific evidence gathered in the case, that counsel feared that defendant was sterile, and counsel's statement that defendant failed a polygraph test, it does not appear unreasonable for counsel to avoid creating additional scientific evidence in the form of a semen test which, at best, could rebut the medical examiner's inconclusive testimony. Under the facts of this case, I cannot conclude that defense counsel's representation deprived defendant of a substantial defense that would have affected the outcome of the trial.

Finally, I disagree with the majority's conclusion that the cumulative effects of the errors at trial deprived defendant of a fair trial.

/s/ Michael R. Smolenski