

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN JAMES POKORNY,

Defendant-Appellant.

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UNPUBLISHED

February 6, 2007

No. 264649

St. Joseph Circuit Court

LC No. 03-011592-FC

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of two counts of criminal sexual conduct in the first degree (CSC I), the victim being under 13 years of age, MCL 750.520b(1)(a), and one count of criminal sexual conduct in the third degree (CSC III), involving incest, MCL 750.520d(1)(a), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues first that the trial court abused its discretion when it admitted evidence that he had a criminal record and used methamphetamine.

Evidence of other acts is admissible if it was admitted for a proper, non-character purpose, MRE 404(b)(1); it was relevant, MRE 402; and any unfair prejudice did not substantially outweigh the probative value. MRE 403. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). The list of proper purposes in MRE 404(b)(1) is not exhaustive; the evidence merely must be relevant for some purpose other than character. *People v Sabin*, 463 Mich 43, 56; 614 NW2d 888 (2000). It must make any fact of consequence more or less probable, MRE 401; the fact must be “within the range of litigated matters in controversy,” but need not be an element of the crime or a defense, *People v Mills*, 450 Mich 61, 67; 537 NW2d 909, modified 450 Mich 1212 (1995), quoting *United States v Dunn*, 805 F2d 1275, 1281 (CA 6, 1986); see also *Sabin, supra* at 57.

In the present case, the prosecutor asked defendant whether he said he opposed contacting the police because he had been in prison, and defendant’s ex-wife testified that she assumed that the reason defendant did not want to contact the police was because of his record. This evidence was offered to prove that defendant was lying when he testified that he told his ex-wife to turn him in and agreed that he welcomed an investigation. It was also offered to explain why the ex-wife did not contact the police in light of defendant’s testimony, and that she did not

believe her daughter's allegations. These are proper non-character purposes, MRE 404(b)(1), and the evidence was relevant for these purposes, MRE 401. This probative value was not substantially outweighed by the unfair prejudice of the vague references to a record, which the trial court explained was unrelated to criminal sexual conduct. MRE 403. The potential prejudice was further reduced by the trial court's limiting instructions.

The probative value of the drug-use evidence was lower, and the risk of prejudice was higher. This evidence was offered to impeach defendant's claim that his ex-wife asked him to move out so she could move her boyfriend in. Plaintiff argues on appeal that this evidence was relevant to give the jurors the full context of events and to suggest defendant was less able to properly perceive and remember events, citing *People v Scholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). The latter reason was not supported by the record; there was no suggestion in the trial court that defendant was ever on drugs during the alleged abuse or was no longer able to remember the past. He did not remember the incidents differently; he denied they happened at all. In contrast, in *Scholl*, the defendant allegedly used drugs before the sexual encounter, which the victim claimed was forced and the defendant claimed was consensual. *Id.* at 740-741.

It was within the trial court's discretion to find that the references to defendant's record and drug use were offered for a non-character purpose under MRE 404(b)(1) and were relevant under MRE 401. The issue, therefore, is whether this probative value was substantially outweighed by unfair prejudice, MRE 403. There is generally a risk that juries will be prejudiced by evidence of other bad acts. *People v Crawford*, 458 Mich 376, 383, 384; 582 NW2d 785 (1998). There was also a danger that the jurors in the present case would be less likely to view defendant as a loving father and victim of a bitter custody dispute after they learned that he had a record and spent thousands on methamphetamine. The evidence was introduced to impeach defendant's claim that his ex-wife forced him to leave their home to move another man in and to provide context to defendant's suggestion that the present charges stemmed from the divorce proceedings. Arguably, this evidence was introduced for a proper purpose, MRE 404(b)(1), and was relevant, MRE 401. Whether the probative value was substantially outweighed by unfair prejudice was a close evidentiary question, and therefore, the trial court did not abuse its discretion in allowing the evidence. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Even if we were to hold that admission of the evidence was error, we would conclude that any error in this regard was harmless given the evidence offered against defendant and the trial court's limiting instructions to the jury. The trial court instructed the jury to consider the evidence only for the limited purpose for which it was offered, and not to consider it evidence that defendant was a bad man or more likely to have committed a crime. The trial court also explained that the previous legal difficulties were unrelated to criminal sexual conduct and did not tell the jury that defendant was convicted of a serious crime. Juries are generally presumed to follow instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). It was a close question whether the probative value was sufficient enough that it was not outweighed by the risk of unfair prejudice, especially regarding the drug use evidence. However, a trial court does not abuse its discretion when an evidentiary decision is close; therefore, this Court should not disturb the trial court's decision. *Hine, supra* at 250.

Defendant also argues that he was denied effective assistance of counsel. The trial court conducted an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). The right to counsel, which is guaranteed by the federal and state Constitutions, US

Const, Am VI; Const 1963, art 1, § 20, includes the right to effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). This right is violated only when the attorney's performance fell below an objective level of reasonableness, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and the defendant was so prejudiced that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To show sufficient prejudice, the defendant must establish a reasonable probability that the outcome of the proceeding would have been different had the attorney not erred. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The defendant must overcome the presumption that his attorney's actions constituted sound trial strategy, *Toma, supra* at 302, even if the strategy failed, *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

A defendant's right to counsel includes the right to have all substantial defenses that might have changed the outcome prepared and presented. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A decision whether to call witnesses is presumed to be sound trial strategy, and the defendant must establish that the failure to call a witness deprived him of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Witnesses who heard a purported victim recant could provide a substantial defense. However, in this case, the victim admitted recanting. Further, there is no evidence regarding how any potential witnesses might have testified. A defendant claiming ineffective assistance must provide evidentiary support for his claim in the trial court, including evidence that potential witnesses would have been credible and made a difference in the trial. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997).

Defendant also cites his attorney's failure to obtain an expert witness as constituting ineffective assistance. The decision to call an expert is generally presumed to be permissible strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Defendant's attorney explained reasonably that he was unable to find an expert who could counter the basic concepts to which the prosecution expert testified. Defendant and his attorney disagreed about the amount of time the attorney spent preparing for this case. We defer to the lower court's judgment of credibility. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Defendant's allegations that his attorney lost an important notebook and unsuccessfully moved for adjournment because he was unprepared were not supported by the lower court record.

Finally, defendant argues that his attorney erred when he failed to request a change of venue. However, defendant failed to explain why a venue change was justified. See *People v Jendrzejewski*, 455 Mich 495, 500-501; 566 NW2d 530 (1997). An attorney has no duty to make a meritless argument. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

The attorney's decisions, viewed individually or cumulatively, did not fall below an objective level of reasonableness and did not deny defendant a fair trial. Defendant was not denied his right to the effective assistance of counsel. *Toma, supra* at 302; *Pickens, supra* at 302-303.

Affirmed.

/s/ Stephen L. Borrello  
/s/ Kathleen Jansen