

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL LASHION DIXON,

Defendant-Appellant.

FOR PUBLICATION

August 24, 2004

9:05 a.m.

No. 246739

Oakland Circuit Court

LC No. 2002-185376-FC

Official Reported Version

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

SCHUETTE, P.J. (*concurring in part and dissenting in part*).

Following a jury trial, defendant was convicted on two counts of first-degree criminal sexual conduct, MCL 750.520b, and was sentenced to concurrent terms of twenty-five to fifty years for these offenses. In addition, defendant was convicted of home invasion in violation of MCL 750.110a(2) and was sentenced for ten to twenty years imprisonment for this crime. Furthermore, defendant was convicted of felonious assault in violation of MCL 750.82 and was sentenced for two to four years for this crime.

My distinguished colleagues in the majority have determined that the performance of defense counsel at trial was ineffective and, as a result, this case should be reversed and remanded for a new trial. Except in one instance as explained below, I do not share the majority's opinion that the trial counsel's performance fell below the standard articulated in *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "A defendant that claims he has been denied the effective assistance of counsel must establish (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Id.*, citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In addition, I would affirm defendant's convictions on the home invasion charge and the felonious assault charge.

On appeal, defendant claims that on five separate occasions trial counsel's performance was ineffective. First, defendant argues that he was denied effective assistance of counsel because he only had a brief opportunity to meet with his attorney before the preliminary examination. Defendant argues that we should find constitutional error without a showing of prejudice pursuant to *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 L Ed 2d 914

(2002), and *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984), because defense counsel's failure to meet with him until immediately before the preliminary examination constituted a "complete denial of counsel" at a "critical stage" of the proceeding.

The United States Court of Appeals for the Sixth Circuit has held that "the pre-trial period constitutes a 'critical period' because it encompasses counsel's constitutionally imposed duty to investigate the case." *Mitchell v Mason*, 325 F3d 732, 743 (CA 6, 2003). Defendant relies on the court's decision in *Mitchell* to support his argument that he was denied effective assistance of counsel at a critical stage of the proceedings. In *Mitchell*, the "defense counsel [] utterly failed his client during the critical pre-trial period," because "no effort to consult with the client was made." *Id.* at 744. However, the instant case is more closely analogous to *Dick v Scroggy*, 882 F2d 192, 197 (CA 6, 1989), cited in *Mitchell*, *supra*, p 744, where "the defendant's ineffective assistance claim was rejected because counsel had, in fact, interviewed the defendant in a thirty to forty-five minute meeting."

Here, defendant concedes that his attorney met with him before the preliminary examination. A review of the preliminary examination transcript reveals that defense counsel had been apprised of the relevant facts of the case, and that counsel asked the victim questions designed to undermine her credibility and call into question her motivation for accusing defendant of the alleged crimes. Defense counsel elicited testimony that the victim did not see the machete, gloves, and mask after defendant first entered the house with them; that although she had broken up with defendant, they continued to have frequent contact; that they had consensual sex one week before the incident; that even though the victim had taken out a personal protection order on defendant, she continued to have contact with him; and that the victim called defendant at 7:00 p.m. on the day of the incident. Defense counsel raised the potential defenses of consent and that the victim only accused defendant of the crimes because she was angry that he did not fix her door. Further, defense counsel called into question the credibility of the prosecution witnesses and followed up on these theories during cross-examination at trial.

While it is true that a "few exceptional circumstances [] are so likely to prejudice the defendant that a reviewing court need not examine the consequences of the lawyer's conduct," and that "one of th[o]se circumstances is the *complete* denial of counsel to a criminal defendant at a critical stage of the proceedings," the instant case does not rise to such a level. *Mitchell*, *supra*, p 748 (emphasis added). Unlike *Mitchell*, *supra*, p 748, where "[t]he undisputed record evidence demonstrate[d] that [the defendant's] counsel never consulted with him," defense counsel in the instant case met with defendant before the preliminary examination, was apprised of the relevant facts of the case, put forth defense theories based on that information, and provided defendant with the assistance of counsel guaranteed by the Sixth Amendment. The instant case does not involve circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, *supra*, p 658. Therefore, defense counsel was not ineffective for failing to meet with defendant for a longer time period before trial.

Next, defendant argues that he was denied the effective assistance of counsel where defense counsel failed to file a notice of intent to introduce evidence of the victim's past sexual conduct with defendant as required by MCL 750.520j.

Defense counsel conceded that she had not complied with the notice requirement set forth in MCL 750.520j(2), but argued that the prosecution was already aware of defendant and the victim's prior sexual relationship pursuant to her testimony at the preliminary examination, and that the purpose of the notice requirement had thus been fulfilled. Defense counsel argued that our Supreme Court's decision in *People v Perkins*, 424 Mich 302, 307-308; 379 NW2d 390 (1986), supported admitting evidence of consensual sex between defendant and the victim one week before the incident, because it was relevant and supported defendant's theory that the sex was consensual in this instance. Defendant argues that defense counsel's failure to comply with the notice requirement fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's error, the outcome of the proceedings would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). However, this Court has held that failure to comply with the notice requirement of MCL 750.520j does not necessarily preclude the admission of evidence of past sexual relations between a victim and a defendant. *People v Lucas (On Remand)*, 193 Mich App 298, 303; 484 NW2d 685 (1992). Further, upon cross-examination of the victim, defense counsel elicited testimony that she and defendant had dated for a year and a half, and had broken up, but continued to see each other frequently. Therefore, the jury was aware of a prior *relationship* between defendant and the victim.

The trial court could have admitted evidence of a past sexual relationship between the victim and defendant pursuant to the holding in *Lucas, supra*, even without the ten day notice requirement of MCL 750.520j. Nonetheless, under the circumstances of this case the jury should have been made aware of recent specific acts of sexual relations between the victim and defendant. Speculation by members of the jury that defendant and the victim's relationship recently might have been sexual is not sufficient. Therefore, I agree that in this instance, trial counsel's conduct was ineffective as it did not meet the standard set forth in *Sabin, supra*, or *Strickland, supra*.

Defendant also argues that defense counsel's failure to lay a proper foundation for the admission of a 911 tape fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's error, the outcome of the proceedings would have been different. While the record reveals that defense counsel was unable to lay a proper foundation for the admission of the 911 tape, she was able to elicit the substance of the conversation between the victim and the 911 operator on cross-examination of the victim, including testimony that the victim did not call 911 until an hour and a half after the incident; that she was not upset when she called 911; that she lied during the call about her house having been broken into; and that she spoke to the 911 operator in an extremely calm voice.

Here, defense counsel attempted to authenticate the 911 tape by using the victim to identify her own voice. The trial court ruled that this was not a proper mode of authentication. However, the trial court should have admitted the 911 tape because the victim was able to vouch for its authenticity and state what it was purported to be, a recording of her call seeking help

after an assault. Defendant did not appeal the trial court's refusal to admit the 911 tape into evidence, but defense counsel's performance met the standard set forth in *Sabin, supra*, and *Strickland, supra*. The facts and circumstance of this case are similar to the case of *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991), in which our Supreme Court held that authentication of taped conversations between a defendant and a victim were to be determined in light of MRE 901.¹ In *Berkey, supra*, tape recordings of conversations between a deceased victim and the defendant were sufficiently authenticated by a neighbor who identified the voices on a tape recording. In the case at bar, the error in not admitting the 911 tape was made by the trial court and not by defense counsel. Under *Berkey*, the trial court should have allowed the victim to authenticate the tape and then allowed the jury to hear the 911 call. However, defense counsel was not ineffective for attempting to use the victim to authenticate the 911 tape and I would not reverse on this issue.

Defendant's two other claims of ineffective assistance of counsel have no merit.

I would affirm defendant's felonious assault and home invasion convictions, but would reverse defendant's first degree criminal sexual conduct convictions solely on the grounds that counsel was ineffective in failing to file a notice of intent to introduce evidence of the victim's past sexual conduct with defendant and not on the basis of defense counsel's actions in attempting to authenticate the 911 call.

/s/ Bill Schuette

¹ MRE 901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."