STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WAXMAN,

Defendant-Appellant.

UNPUBLISHED
July 19, 1996

Nos. 171629; 172196; 172197
LC Nos. 93-000389-FH;
93-000390-FH;
93-000391-FH

Before: Fitzgerald, P.J., and Sawyer and Young, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of six counts of second-degree criminal sexual conduct. MCL 750.520c; MSA 28.788(3). He was sentenced to six concurrent terms of six to fifteen years in prison. He now appeals and we affirm.

Defendant first argues that the trial court erred by allowing an expert on child abuse to testify. We disagree. The trial court properly admitted the testimony to explain that any delay in the reporting of the abuse by the victims was consistent, rather than inconsistent, with abuse having occurred. *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995).

Next, defendant argues that the trial court erred in conducting certain proceedings off the record. However, defendant failed to preserve this issue for appeal by objecting in the trial court. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994).

Defendant next argues that the trial court erred by admitting similar acts testimony. Defendant, however, has failed to preserve this issue for appeal by objecting at trial. *People v Jones*, 203 Mich App 384; 513 NW2d 175 (1994).

Defendant's next argument is that he was denied a fair trial by the prosecutor's misconduct. Defendant raises several allegations under this issue, including a number of complaints concerning statements by the prosecutor during opening statement and closing argument. However, none of those

complaints were preserved for appeal by a timely objection below. *People v Gonzalez*, 178 Mich App 526; 444 NW2d 228 (1989). Defendant also complains of the testimony elicited from the expert witness, which we noted above was, in fact, proper. Defendant did arguably preserve for review his complaint on the examination by the prosecutor of the mother of one of the victims. However, the prosecutor did not attempt to elicit improper testimony from the witness once an objection was sustained, any such statement by the witness having been nonresponsive in nature.

Next, defendant argues that the trial court erred in refusing the jury's request for a copy of the transcript. We disagree. During deliberations, the jury requested a copy of the transcript. The trial court instructed the jury that the transcript had not been prepared at that time, it would take some time to do, and that they should try to see if they could recall from the memories and notes what the testimony was. The trial court further instructed that if they still needed further direction, they should send out another note. Thereafter, the jury requested a transcript of the testimony of a particular witness. Again, the trial court informed the jury that the transcript could not be immediately provided and asked them to continue deliberating while the court explored how the request could be handled.

The decision to supply the jury with a rereading of a witness' testimony is within the sound discretion of the trial court. *People v Williams*, 134 Mich App 639; 351 NW2d 878 (1984). Although the trial court may not simply deny the request, it may ask the jury to resume deliberations with the knowledge that the request will be reviewed again if necessary. *Id.* This is precisely what the trial court did in the case at bar, asking the jury to continue deliberating while the court further considered the request. This was an appropriate exercise of the trial court's discretion.

Defendant next argues that the trial court erred by communicating ex parte with the jury. However, defendant did not object below. Therefore, he is deemed to have acquiesced in the propriety of the administrative communications and waived any claim of error with respect to any housekeeping communications. *People v France*, 436 Mich 138; 461 NW2d 421 (1992). Not only was there no objection, after the trial court summarized the communications on the record, defense counsel affirmatively stated that she had no objection.

We next consider defendant's claim that he was denied the effective assistance of counsel. To establish a denial of the effective assistance of counsel guaranteed under the state and federal constitutions, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. Moreover, the defendant must overcome the presumption that the action was sound trial strategy, and the deficiency must be prejudicial to the defendant. *Stanaway, supra*; *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Defendant raises a number of points concerning the examination of witnesses. However, in no case does defendant demonstrate that defense counsel's handling of these witnesses did not constitute sound trial strategy. Defendant also raises a number of claims regarding failures to object. The decision whether to object obviously is an issue of trial strategy. Not only has defendant failed to demonstrate that defense

counsel did not employ sound trial strategy, defendant has failed to demonstrate any prejudice, nor with respect to some of the issues raised, that the matter was even objectionable.

Defendant also complains that defense counsel failed to present adequate expert testimony. Defendant, however, fails to indicate what sort of expert testimony should have been offered or why it was required. Similarly, defendant's complaint that defense counsel should have ensured that "crucial bench conferences" should have been conducted on the record is without merit because the record does not establish the nature of those conferences or how defendant was prejudiced. Finally, defendant claims that defense counsel should have insisted that the jury be provided with the requested copy of a witness' testimony. However, as indicated above, the trial court properly exercised its discretion on that issue and, therefore, defendant was not prejudiced.

Finally, we turn to defendant's argument that the sentence imposed, which exceeds the sentencing guidelines, was disproportionate. See *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). In imposing sentence, the trial noted that the guidelines did not adequately reflect abuse of an authority position in these assaults or the number of assaults which took place. We are satisfied that the sentence imposed is proportionate to this offense and this offender.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.