

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER L. GRIFFIN, III,

Defendant-Appellant.

UNPUBLISHED

March 3, 1998

No. 196976

Oakland County Circuit

LC No. 95-142740-FC

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c) and (f); MSA 28.788(2)(1)(c) and (f), and one count of larceny in a building, MCL 750.360; MSA 28.592. Defendant was sentenced to thirty to sixty years' imprisonment for the criminal sexual conduct convictions and to two and one-half to four years' imprisonment for the larceny conviction. He now appeals as of right, and we affirm.

On appeal, defendant claims that he was denied the effective assistance of counsel because his trial counsel failed to fully investigate and present an insanity defense. We disagree.

To establish that the right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defense counsel's performance must be evaluated against an objective standard of reasonableness without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Furthermore, effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy or assess counsel's competency with the benefit of hindsight. *People v Barnett*, 163 Mich App 331,

338; 414 NW2d 378 (1987). Whether or not to present an insanity defense can be an issue of trial strategy. *People v Newton (After Remand)*, 179 Mich App 484, 493; 446 NW2d 487 (1989); *People v Lotter*, 103 Mich App 386, 391; 302 NW2d 879 (1981).

In the present case, defense counsel filed a notice of intent to present an insanity defense and arranged for an independent expert to evaluate defendant at the county's expense. However, there is no evidence to suggest that the independent mental evaluation was ever completed. During trial, defense counsel failed to raise an insanity defense or call any witnesses on behalf of defendant. The record does not reveal the reason for defense counsel's decision not to pursue an insanity defense. However, the only mental evaluation in the record, conducted by a doctor at the Center for Forensic Psychology, concludes that defendant was competent to stand trial and that he was not legally insane at the time of the attack on the victim. According to that evaluation, there was no evidence that defendant was substantially unable to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law as a result of his mental illness. Based on the record, defense counsel would have had no witness to lay a foundation for an insanity defense. Since appellate review is limited to the evidence presented in the record, defendant has failed to establish the existence of sufficient evidence to overcome the strong presumption of his counsel's effective representation.

Furthermore, it does not appear that defendant was prejudiced by his counsel's apparent failure to obtain an additional mental evaluation. To find prejudice, a court must determine that there was "a reasonable probability that absent errors, the factfinder would have had a reasonable doubt respecting guilt." *Pickens, supra* at 312 (citing *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984)). There is no evidence in the record that an additional mental evaluation would have shown that defendant was legally insane. Under these circumstances, defendant cannot show that his counsel's failure to procure an additional mental evaluation denied him a fair trial, and his ineffective assistance of counsel claim must fail.

Affirmed.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly