

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT KIRBY SAUNDERS,

Defendant-Appellant.

UNPUBLISHED

April 21, 1998

No. 194742

Ottawa Circuit Court

LC No. 95-18854-FC

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (penetration of a person under thirteen years of age). The trial court sentenced defendant to 18 to 180 months' imprisonment. We affirm.

At trial, defendant admitted inserting his finger into his son's anus while lying in bed with his son when his son was four or five years old. However, defendant claimed he was asleep at the time and when he woke up and realized what was happening he immediately stopped. The defense theory was that defendant suffered from a sleep disorder that allowed him to act out his dreams, and because his penetration of the victim occurred when he was acting out a dream, it was unintentional and involuntary.

Dr. Lee Marmain testified at trial on behalf of defendant as an expert in sleep disorders. Based upon his interview with defendant, Dr. Marmain diagnosed defendant with a REM behavior disorder. Instead of being paralyzed in their sleep, individuals who suffer from REM behavior disorder have the capability of acting out their dreams. Defendant told Dr. Marmain that he and his first wife, Francis Saunders, engaged in anal intercourse and that he believed he was having a sexual dream about Francis at the time of the incident. Dr. Marmain opined that defendant could have been acting out a dream that he was with his first wife, and then woke up and realized that it was not his wife, but his son. According to Marmain, cases of REM behavior disorder are rare, affecting only a few people in a million.

Defendant first argues he was denied the effective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Eloby*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness

under prevailing professional norms and that counsel's deficient performance prejudiced defendant. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). To show that counsel's performance was deficient, the defendant must overcome a strong presumption that the challenged actions constituted sound trial strategy under the circumstances. *Id.*; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Prejudice is not established unless the court concludes there is a reasonable probability that, but for counsel's alleged errors, the factfinder would have had a reasonable doubt respecting guilt. *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994).

Here, defendant argues counsel was ineffective because he failed to call Francis Saunders, defendant's first wife, and Marilee Saunders, defendant's current wife, as witnesses at trial. Defendant claims there was no tactical justification for failure to call these witnesses, who he claims could have corroborated his history of sleeping problems and rebutted the testimony of Michelle Saunders. We disagree.

Counsel's testimony at the *Ginther*¹ hearings clearly reveals he believed the benefits of calling the witnesses was outweighed by the danger of discrediting defendant and Dr. Marmain's diagnosis, which was the basis of the defense. Counsel's reasoning is well supported in the record. Specifically, Francis denied engaging in anal intercourse with defendant and there was evidence that Marilee could not recall any instances in which defendant acted out sexual activities towards her or in which he related having sexually explicit dreams. This Court will not second guess counsel's decision in this matter of trial strategy. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy may not have worked does not render counsel's assistance ineffective. *Id.*; *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987).

Next, defendant claims he was denied a fair trial when the prosecutor improperly argued during rebuttal that the REM sleep disorder that Dr. Marmain diagnosed defendant as having was so rare that it could not form the basis for reasonable doubt. When viewed in context, the challenged remarks did not deny defendant a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The prosecutor's comments were proper because they were based on evidence presented at trial that the disorder from which defendant allegedly suffered was extremely rare. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Moreover, the trial court's instructions to the jury concerning the reasonable doubt standard and that the lawyer's statements and arguments were not evidence eliminated any possible prejudice. *Id.* at 281. Therefore, defendant was not denied a fair trial.

Finally, defendant argues he was denied a fair trial by the cumulative effect of the errors at his trial. Defendant's argument is without merit. Since we have found no error, it is not possible to find a cumulative effect of several errors.

Affirmed.

/s/ Gary R. McDonald
/s/ Peter D. O'Connell
/s/ Michael R. Smolenski

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).