

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ANTHONY CHAMBERLAIN,

Defendant-Appellant.

UNPUBLISHED

January 19, 1999

No. 200576

Osceola Circuit Court

LC No. 96-002436 FC

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of child sexually abusive activity, MCL 750.145(c)(2); MSA 28.342a, for which he was sentenced to a prison term of four to twenty years. We affirm.

Defendant first argues that he was denied effective assistance of counsel. A defendant that claims that he has been denied the effective assistance of counsel must establish that (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. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995).

Defendant first argues that trial counsel was ineffective for failing to move for a speedy trial under the 180-day rule. See MCL 780.131; MSA 28.969(1); MCR 6.004(D). Because the 180-day rule was not violated, we find that counsel was not ineffective. Defense counsel was not required to raise a meritless motion. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant next asserts that trial counsel was ineffective failing to move to dismiss the complaint. However, defendant does not adequately explain what the substance of such a motion would have been. Defendant's failure to address the merits of his claim in his brief on appeal constitutes abandonment of this issue. *People v McClain*, 218 Mich App 613, 615; 554 NW2d 608 (1996).

Defendant also argues that trial counsel was ineffective because he failed to move for a *Walker*¹ hearing regarding statements that defendant made to the police. Because defendant did not request a *Ginther*² hearing, this Court's review is limited to the record. See *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). Defendant admitted on the stand that he agreed to waive his rights and speak with the police. There is no record evidence to support a charge that defendant's waiver of his rights was involuntary or done unknowingly. *Harris, supra* at 154. Defendant has failed to establish that the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms. Moreover, defendant also does not show how the failure to move for a *Walker* hearing prejudiced him, as the trial judge said that he gave no weight to the statements defendant allegedly made to the police.

In addition, defendant maintains that counsel was ineffective for failing to cross-examine several witnesses. Although trial counsel did not cross-examine the child victim at the preliminary examination, such a decision could be considered sound trial strategy in this case. The decision to cross-examine or call a witness to testify is regarded as a matter of trial strategy. *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Defendant makes no argument that trial counsel's failure to cross-examine the two witnesses at trial deprived him of a substantial defense. See *Hopson, supra*. Thus, defendant has failed to overcome the presumption that trial counsel was effective in these instances. See *Stanaway, supra*.

Defendant next claims that he was denied effective assistance of counsel when counsel waived the preliminary examination 14-day rule. Defendant does not explain why this made trial counsel ineffective. Defendant's failure to address the merits of his claim in his brief on appeal constitutes abandonment of this issue. See *McClain, supra*.

In his next claim, defendant asserts that trial counsel was ineffective for failing to move to enforce a plea agreement between defendant and the prosecutor regarding eight unrelated criminal charges. Defendant's first attorney had written the prosecutor and requested that he "agree to make no further charges related to the type of charges set forth above." Insofar as we are able to determine from the record before us, the prosecutor agreed to this. However, the current charge of child sexually abusive activity was wholly unrelated to the prior charges. Hence, this plea bargain did not even relate to the current charge, and a motion to enforce it would have been futile. Counsel is not deemed ineffective for failing to argue a meritless motion. *Gist, supra*.

Defendant additionally argues that counsel was ineffective for stipulating to the late endorsement of a witness for the prosecution. However, "[t]he prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a; MSA 28.980(1)(4). In *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1993), this Court held that it was not an abuse of discretion to allow the prosecutor to endorse a witness in the middle of trial. In the case at bar, trial counsel stipulated to the late endorsement a week before trial. There is no indication that the lower court would have denied the prosecution's request, and

defendant has failed to state how he was prejudiced by the late endorsement. See *People v Lino (After Remand)*, 213 Mich App 89, 93; 539 NW2d 89 (1995), overruled in part on other grounds in *People v Carson*, 220 Mich App 662; 560 NW2d 657 (1996).

Finally, defendant argues that he was denied effective counsel when his counsel agreed to a bench trial rather than a jury trial because a jury would have “easily” acquitted him where the instructions for this crime were so “convoluted.” However, we will not entertain such a claim of ineffective assistance of counsel where defendant agreed on the record to waive his right to a jury trial. See *People v Johnson (On Rehearing)*, 208 Mich App 137, 142; 526 NW2d 617 (1994).

In sum, trial counsel’s actions were neither objectively unreasonable nor outcome determinative. Defendant has failed to show that trial counsel’s actions or omissions denied him a fair trial.

Defendant also argues that the trial court erred in denying his motion for directed verdict. In reviewing a trial court’s decision regarding a motion for a directed verdict, this Court views the evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proved beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

Defendant argues that because the victim testified that she was only scratching herself when the photograph was taken, there is no evidence of a sexually abusive activity. However, because the purpose of MCL 750.145(c)(2); MSA 28.342a is to protect children from sexual exploitation, the intent of the victim is irrelevant. See *People v Woods*, 206 Mich App 38, 42-43; 520 NW2d 363 (1994). Moreover, the photographs at issue are close-ups of the victim’s pubic area and therefore qualify as “child sexually abusive materials” under MCL 750.145c(1)(i); MSA 28.342a(1)(i). Accordingly, there was sufficient evidence for a rational factfinder to find the essential elements of the crime proved beyond a reasonable doubt, and the trial court did not err in denying defendant’s motion for a directed verdict.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Stephen J. Markman
/s/ Michael R. Smolenski

¹ *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).