

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSSELL DETZLER,

Defendant-Appellant.

UNPUBLISHED

March 19, 1999

No. 201585

Ingham Circuit Court

LC No. 96-070821 FC

Before: Hoekstra, P.J., and Doctoroff and O’Connell, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by jury of two counts of first-degree criminal sexual conduct (CSC I) involving the use of force and causing personal injury, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Defendant was sentenced to 96 to 180 months in prison. We affirm.

Defendant argues that the trial court erred in denying his motion for new trial, which was based on a claim that he was denied the effective assistance of counsel. Generally, the denial of a motion for new trial is reviewed for an abuse of discretion. *People v Winstanley*, 20 Mich App 528, 529; 174 NW2d 170 (1970). However, in making that determination here, this Court must evaluate counsel’s effectiveness, making our review essentially de novo.

The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). A reviewing court presumes effective assistance of counsel, and defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To successfully prove ineffective assistance of counsel, defendant must first show that counsel performed below “an objective standard of reasonableness under prevailing professional norms” and “overcome a strong presumption that counsel’s assistance constituted sound trial strategy.” *Id.* Second, he must “show that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *Id.* at 687-688. A defendant can overcome the presumption by showing that counsel failed to perform an essential duty leading to a failure that prejudiced defendant, *People v Carr*, 141 Mich App 442, 451; 367 NW2d 407 (1985), but counsel’s performance must be evaluated without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant cites counsel's apparent lack of understanding and misapplication of the Michigan Rules of Evidence at trial as evidence of counsel's deficient performance. Assuming *arguendo* that counsel's difficulty with evidentiary procedure indicated deficiencies in performance, counsel's performance was otherwise objectively reasonable. In particular, counsel's closing argument highlighted inconsistencies and impossibilities in the victim's testimony, as well as a motive for the victim to lie. While the transcripts reflect that counsel did not always follow the proper procedure in eliciting testimony or in presenting evidence, we are not persuaded that the "errors [were] so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant has failed to show that but for the deficiencies, a different result would have been reached. In no instance that defendant cites as demonstrating ineffective assistance of counsel was admissible evidence not admitted, even though counsel was sometimes instructed with regard to the proper procedure before it was admitted. Because the same evidence would have been placed before the jury regardless of any deficiency, the outcome would presumably have been the same, and defendant has not shown that he was prejudiced as a result of counsel's performance.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell