

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS ANDREW GRANT,

Defendant-Appellant.

UNPUBLISHED

July 23, 1999

No. 207255

Lapeer Circuit Court

LC No. 96-005872 FH

Before: Wilder, P.J., Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). The complainant was defendant's thirteen year old niece. The trial court sentenced defendant to three years' probation with one year in jail. We affirm.

Defendant first contends that the waiver of his right to a jury trial was not understandingly or voluntarily made because it was based on misleading advice from his trial counsel and defendant was provided insufficient time within which to contemplate his decision to waive the right. This Court reviews a trial court's determination that a defendant has validly waived his right to a jury trial for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). The record demonstrates that the trial court not only fully complied with the requirements of MCR 6.402(B) by securing a complete verbal waiver, but the court also obtained a written waiver of defendant's right to a jury trial. This Court finds no error.

Defendant next contends that he was denied the effective assistance of counsel because his trial counsel: (1) failed to properly advise defendant concerning the waiver of his right to a jury trial; (2) failed to present evidence that there was another individual at the house with the opportunity and motive to commit the sexual assault; and (3) failed to present evidence of the dysfunctional relationship that existed between the victim's family and defendant's family.

Because defendant did not move for a new trial or an evidentiary hearing before the trial court on the ground that he received ineffective assistance of counsel, our review is limited to the existing record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). To establish ineffective

assistance of counsel, a defendant must demonstrate that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, that the results of the proceeding were fundamentally unfair or unreliable, and that there is a reasonable probability that, but for counsel's error, the results of the proceeding would have been different. *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996). Trial counsel is presumed to have provided effective assistance, and defendant bears the burden of overcoming this presumption. *People v Carr*, 141 Mich App 442, 451; 367 NW2d 407 (1985). Defendant also bears the burden of overcoming the "strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

After reviewing the record, we conclude that defendant's three allegations of ineffective assistance of counsel concern matters of trial strategy that this Court will not second-guess. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *Id.*

This Court has already held that the trial court complied with the court rule in obtaining a waiver, and defendant's on-the-record statements make it clear that the decision was his own choice. This allegation will not support a claim of ineffective assistance. The trial court correctly determined that a strategy of trying to shift suspicion onto the complainant's grandfather would have been unavailing in light of the complainant's testimony that she could identify defendant because she recognized his voice when he spoke to her and defendant's admission that he had been in the bed with complainant and her cousin. Finally, defendant has not presented any factual support for his claim that complainant's family was "dysfunctional" and this Court therefore considers it abandoned. *People v Howard*, 226 Mich App 528, 537; 575 NW2d 16 (1997). In any event, as the trial court correctly observed, trial counsel did present some testimony suggesting that there was "bad blood" between some members of the family (identified with the complainant) on the one hand and defendant and his mother on the other. The manner in which trial counsel chose to present this evidence is a matter of trial strategy and, therefore, will not support a finding of ineffective assistance. *Stewart, supra* at 42.

Finally, defendant contends that the trial court's finding of unlawful sexual conduct was contrary to the evidence. We disagree. A trial court's findings of fact and conclusions of law in a bench trial will not be set aside unless they are clearly erroneous. MCR 2.613(C); *In re Forfeiture of \$19,250*, 209 Mich App 20, 29; 530 NW2d 759 (1995). Findings are clearly erroneous when, although there is evidence to support them, this Court is left with the definite and firm conviction that a mistake has been made. *Id.* In applying this standard, this Court gives due regard to the trial court's special opportunity to judge the credibility of witnesses. *Id.* A trial court's findings of fact are sufficient if the record shows that the court "was aware of the issues in the case and correctly applied the law." *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992).

Defendant contends that the trial court's factual findings were erroneous because there was no testimony corroborating the complainant's claims and she, due to the inconsistencies in her various statements, lacked credibility. The trial court found the complainant's testimony more credible than defendant's, and, given that her testimony supported a finding of guilt, we defer to the trial court's

superior ability to assess witness credibility. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra