

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

KIRK WILDER PERLEY, JR.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED

August 25, 2000

No. 206317

St. Clair Circuit Court

LC No. 96-000733-FC

Before: Owens, P.J., and Jansen and R. B. Burns*, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and one count of attempted second-degree criminal sexual conduct, MCL 750.92(2); MSA 28.287(2), MCL 750.520(c)(1)(a); MSA 28.788(3)(1)(a). After a *Ginther*¹ hearing, the trial court vacated defendant's first-degree criminal sexual conduct convictions. Defendant appeals as of right and plaintiff cross-appeals. We affirm in part, reverse in part, and remand for resentencing and correction of defendant's presentence information report.

Defendant first argues that the trial court erred when it denied his motion for a new trial based on ineffective assistance of counsel at his second trial. We review a trial court's decision on a motion for new trial for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 27; 592 NW2d 75 (1998). Our review of a claim of ineffective assistance of counsel is limited to the facts contained in the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prove a claim of ineffective assistance of counsel mandating reversal of a conviction, defendant must show that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) the representation so prejudiced the defendant as to deprive him of a fair trial.

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

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

People v Pickens, 446 Mich 298, 309; 521 NW2d 797 (1994). In applying this test, the reviewing court presumes that counsel's conduct fell within a wide range of reasonable professional assistance and defendant bears a heavy burden to overcome this presumption. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Under the first prong of the test, the alleged errors must be so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Mitchell*, *supra* at 164-165. If defendant succeeds in proving that counsel's performance was objectively unreasonable, he must then show that, but for the unprofessional errors, the result of the proceeding would have been different. *Id.* at 167; *Snider*, *supra* at 424.

Defendant claims that his trial counsel erred by allowing admission of prior consistent statements of the victim. However, the trial court properly found that a new trial was not warranted on the basis of these actions. At the *Ginther* hearing, defense counsel stated that she chose to allow admission of the victim's hearsay statements to the police so that she could impeach the victim's testimony. She pursued this risky strategy because the death of the victim prior to trial prevented her from conducting cross-examination. Counsel admitted that she was aware that the victim's statements to the police would include corroborative statements, however, she weighed this risk against the risk of allowing the victim's testimony to go completely uncontradicted. Although counsel could not say for certain why she did not object to the hearsay statements of the physician who examined the child, the fact that she cross-examined him regarding the victim's statements supports the trial court's finding that counsel's decision was based on trial strategy. Decisions regarding what evidence to present are presumed to be matters of trial strategy. *Rockey*, *supra* at 76. Not only did defense counsel's decision to admit this evidence appear to be trial strategy, but it was reasonable trial strategy. We will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight. *People v Rice*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant also alleges that counsel erred in failing to argue that the testimony of the physician was exculpatory. We disagree. Defense counsel testified at the evidentiary hearing that she considered the proffered theory but rejected it. It is apparent that counsel's lack of argument regarding the timeline of the injuries and the alleged abuse was not an oversight, but a strategic decision. Again, because this matter involves trial strategy, it is inappropriate for this Court to second-guess defendant's counsel. *Rice*, *supra* at 445.

Finally, defendant argues that counsel should have requested a limiting instruction regarding the victim's prior consistent statements. Defense counsel stated that she did not request a limiting instruction because, in her opinion, such instructions simply call the jurors' attention to the prior inconsistent statements. Again, this alleged error does not appear to be an oversight, but instead was a strategic decision based on counsel's reasonable concern. Defendant has once more failed to overcome the presumption that trial counsel's decision was objectively reasonable. *Mitchell*, *supra* at 156.

Moreover, defendant has failed to show that, but for the errors, the outcome would have been different, in light of the overwhelming evidence against him. The jury heard the victim's unequivocal and detailed testimony that defendant engaged in sexual contact with her, the testimony of an expert on

childhood sexual abuse who opined that the victim sustained injuries to her genitals that were consistent with penetration, and the testimony of two police officers to whom defendant had admitted to some, if not all, of the sexual contact.

Defendant next argues that the trial court should have stricken statements in the presentence information report regarding defendant's perceived lack of remorse. We agree. Although the court indicated that it was not considering defendant's lack of remorse in passing sentence, it erroneously refused to strike the information from the report. MCL 771.14(6); MSA 28.1144(6); MCR 6.425(D)(3)(a); *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 47 (1985).

However, we reject defendant's contention that the trial court improperly considered the defendant's right to assert his innocence and his right to trial when the court imposed sentence. Review of the court's statements before imposing sentence at the March 4, 1999, resentencing shows no evidence of improper considerations. This claim is without merit.

On cross-appeal, plaintiff argues that the trial court erred when it vacated defendant's convictions for first-degree criminal sexual conduct based on the court's finding that defendant received ineffective assistance of counsel at the preliminary examination. We agree that the trial court abused its discretion when it vacated defendant's first-degree criminal sexual conduct conviction based on oral/vaginal contact.

Evidence is sufficient for the district court to bind over the defendant if the court finds that the charged offense was committed and that there is probable cause to believe that defendant committed the offense. MCR 6.110(E). In this case, the victim's testimony that defendant kissed her private parts was sufficient for the district court to find both that the crime of first-degree criminal sexual conduct by cunnilingus occurred and that defendant committed it. *People v Legg*, 197 Mich App 131, 132-134; 494 NW2d 797 (1992). Thus, the record did not support the court's finding that, but for defense counsel's cross-examination of the witness, defendant would not be bound over on this offense. Therefore, we reverse the trial court's vacation of this conviction and remand for resentencing.

However, the court did not err in vacating defendant's first-degree criminal sexual conduct conviction based on penile/vaginal penetration. The record shows that defendant's counsel was aware that, when the preliminary examination began, defendant was only charged with one count of second-degree criminal sexual conduct. Further, counsel was on notice that if testimony regarding penetration was introduced at the preliminary examination, the prosecutor would seek to amend the information to add a second count alleging first-degree criminal sexual conduct. During the prosecution's direct examination, the victim did not testify to any acts of penetration. However, when defendant's counsel cross-examined the victim, he specifically asked her if defendant penetrated her vagina with his penis, and she responded that penetration had occurred. At both the preliminary examination and the evidentiary hearing, counsel stated that the only reason he asked the victim about penetration was because of concern that allegations of penetration would be used by the probation officer in determining the sentencing guidelines, should his client be convicted.

It appears that defense counsel had a strategy regarding the questioning; however, it was not an objectively reasonable strategy. Defense counsel was aware that the prosecution was prepared to present only two witnesses at the preliminary examination. One of witnesses was the victim and the other was a police officer who would not be able to testify regarding penetration. Defense counsel had reason to know that if he cross-examined the victim about penetration and she claimed that it occurred, he would be putting his client in jeopardy of increased charges with more serious offenses. Despite this extreme risk, he chose to pursue this testimony for the sole purpose of alleviating possible sentencing repercussions, which is not a reasonable basis for taking such a risk.

Under these circumstances, the court did not err in finding that, absent defense counsel's cross-examination, no evidence of penetration would have been introduced. Because no other evidence at the preliminary examination supported first-degree criminal sexual conduct by penile/vaginal penetration, the trial court did not err in concluding that, but for his counsel's objectively unreasonable strategy, defendant would not have been bound over on this charge.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Kathleen Jansen

/s/ Robert B. Burns