

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ERIC LEE, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC LEE,

Defendant-Appellant.

UNPUBLISHED

December 26, 2000

No. 217159

Wayne Juvenile Court

LC No. 96-343631

Before: Bandstra, C.J., and Fitzgerald and D. B. Leiber*, JJ.

MEMORANDUM.

Defendant was charged with first-degree criminal sexual conduct. MCL 750.520b (1)(f)(i); MSA 28.788(2)(1)(f)(i). He was adjudicated responsible of the lesser offense of third-degree criminal sexual conduct, MCL 750.520d(1)(a), (b); MSA 28.788(4)(1)(a), (b), and placed on probation. Defendant appeals as of right and we affirm.

Defendant's sole claim on appeal is that he was denied effective assistance of counsel. To establish that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). The defendant must also overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Stanaway, supra*. Because defendant failed to preserve this issue by moving for a new trial or an evidentiary hearing below, our review is limited to mistakes apparent on the record. *Price, supra*; *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

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

Matters of trial strategy will not support a claim of ineffective assistance of counsel. *People v Campbell*, 165 Mich App 1, 7; 418 NW2d 404 (1987). The decisions whether to call defendant to testify, to argue one defense over another, and to concede guilt on a lesser offense in the hope of gaining acquittal on a more serious charge are matters of trial strategy. *People v Johnson*, 168 Mich App 581, 586; 425 NW2d 187 (1988); *Hedelsky, supra*; *People v Wise*, 134 Mich App 82, 99; 351 NW2d 255 (1984). The fact that counsel's chosen strategy did not work does not constitute ineffective assistance of counsel. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). Even if defendant had not testified, it is unlikely that the outcome would have been different. Because this was a bench trial, the court could consider lesser included offenses. *People v Darden*, 230 Mich App 597, 599; 585 NW2d 27 (1998). The court determined that defendant sexually penetrated the victim and that the penetration was accomplished through the use of physical force and those findings, which were not clearly erroneous, *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991), proved the necessary elements of third-degree criminal sexual conduct.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Dennis B. Leiber