

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL GRESHAM,

Defendant-Appellant.

UNPUBLISHED

April 26, 2002

No. 228723

Kent Circuit Court

LC No. 99-011190-FC

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to twenty-three to seventy-five years' imprisonment for the convictions of two counts of first-degree criminal sexual conduct, two to ten years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant contends that the trial court erred by not permitting him to present the testimony of two witnesses, Lisa Upton and Vickie Clemons. However, the lower court record clearly reveals that the factual predicate for this contention is faulty. The trial court ruled that defendant could call Clemons as a witness if the prosecution did not. As for Upton, before the trial court even had a chance to rule on whether defendant could call Upton as a witness, defendant affirmatively indicated to the trial court that he would not call her as a witness in light of testimony already given in the case by other witnesses. Thus, there was no error by the trial court.

Defendant also argues that the trial court deprived him of a fair trial when it read a stipulation specifically approved by defendant, which revealed the felony conviction that formed the predicate for the felon in possession of a firearm charge. Because defendant specifically approved the form of this stipulation, defendant extinguished any error on appeal. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant also argues that he was denied the effective assistance of counsel. We disagree. Because defendant failed to move for a new trial or a *Ginther*¹ hearing based on ineffective assistance of counsel, our review of this issue is limited to mistakes apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445.

Defendant first claims that he was deprived the effective assistance of counsel when his trial counsel failed to move for a mistrial after the trial court read the stipulation and erroneously informed the jury that defendant had a prior felony conviction for possessing cocaine and improperly instructed the jury about the effect of the stipulation. First, we find that defendant has failed to overcome the presumption that trial counsel's decision to approve the stipulation regarding defendant's prior conviction was sound trial strategy, precluding any finding of ineffective assistance of counsel. *Id.* Counsel could have made the decision that, given that the jury would inevitably know that defendant had a felony conviction, it would be to defendant's benefit for the jury to know that this conviction was for cocaine possession, rather than leaving the jury to speculate as to the nature of defendant's prior conviction. Moreover, we find that defendant was not prejudiced by the stipulation to admit evidence of defendant's prior conviction for cocaine possession because the evidence in the case was permeated by testimony that defendant not only possessed cocaine, but was a cocaine dealer. In fact, defendant's theory of the case was that the victim engaged in consensual sexual relations with him in exchange for cocaine he supplied. Accordingly, defendant was not denied the effective assistance of counsel.

In regard to defendant's argument that trial counsel was ineffective for failing to object to the trial court's erroneous instruction to the jury that it must regard the stipulation as true, we find that defendant has failed to demonstrate that trial counsel's failure to object to this instruction so prejudiced him that, but for counsel's error, the result of the proceedings would have been different. *Noble, supra*. In fact, during jury instructions, the trial court instructed the jury that it was the sole and exclusive judges of the facts. Therefore, defendant has again failed to demonstrate that he was denied the effective assistance of counsel.

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

Defendant next claims that he was denied the effective assistance of counsel because his trial counsel failed to timely disclose and subpoena Upton and Clemons as witnesses prior to trial, when they were known witnesses and their testimony would have exonerated defendant of the charges.² However, “[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Failure to call witnesses constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). With respect to these witnesses, the record only indicates that the content of their testimony would have been cumulative in light of the testimony already presented through other witnesses. Given the cumulative nature of their testimony, the failure to call these witnesses did not deprive defendant of a substantial defense. *Id.*

Last, defendant claims that his counsel was ineffective for failing to object to “obvious hearsay testimony” from Patricia McGowan. However, defendant fails to cite any legal authority in support of his argument. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.” *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Failure to cite any supporting legal authority constitutes an abandonment of this issue. *Id.*

Affirmed.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Christopher M. Murray

² We also note that in support of this argument, defendant has attempted to expand the record on appeal by attaching an investigation memorandum that was not part of the lower court record. We do not consider the information contained in this memo because “it is impermissible to expand the record on appeal.” *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).