# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 9, 2002 |
| V<br><br>JEROME L. FULTON,<br><br>Defendant-Appellant. | No. 230890<br>Wayne Circuit Court<br>LC No. 00-003888 |

Before: Hood, P.J., and Saad and E. M. Thomas,* JJ.

PER CURIAM.

Defendant appeals as of right his conviction of criminal sexual conduct in the first degree, MCL 750.520b(1)(a), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant testified that when she was twelve years old she accepted a ride from defendant after he repeatedly requested that she get into his car. She stated that defendant took her to a house where he engaged in penile-vaginal intercourse with her against her will. Complainant denied that she gave defendant her telephone number or associated with him after the incident occurred. A physician who examined complainant testified that she found no evidence of swelling, tenderness, or disease. Complainant's mother gave testimony that paralleled that given by complainant. Defendant testified on his own behalf, and denied that the incident occurred. He acknowledged that he stopped his car and spoke with complainant on one occasion. He stated that he gave her his telephone number, and that she called him.

The jury began deliberating at approximately 10:30 a.m. on August 31, 2000. The jury took a two-hour lunch break, and stopped deliberating for the day at 2:40 p.m. At 11:47 a.m. on September 1, 2000 the jury sent the court a note indicating that it had taken four votes, and that the number of votes for guilty versus not guilty had not changed. The prosecutor asked that the court read the standard deadlocked jury instruction. Defense counsel stated that she agreed for the purpose of preserving the record. The court remarked that the note from the jury seemed unequivocal and that reading the instruction would probably be a waste of time; nevertheless, the court read the instruction to the jury. The jury resumed deliberating at 11:54 a.m., and after taking a one hour and forty-five minute lunch break, concluded deliberations for the day at 3:40

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

p.m. The jury resumed deliberations on September 5, 2000, after the Labor Day holiday, and at 10:06 a.m. indicated that it had reached a unanimous verdict. The jury found defendant guilty as charged.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that she was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20. Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2000). Counsel is presumed to have afforded effective assistance, and a defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that trial counsel rendered ineffective assistance by agreeing with the prosecutor that the standard deadlocked jury instruction should be read. We disagree and affirm. Defendant speculates that had defense counsel objected to the reading of the instruction, the court would have declined to read the instruction and declared a mistrial. The record does not indicate that the court agreed to give the instruction only because defense counsel did not object. Defendant correctly notes that this case was a credibility contest. Determining the weight of the evidence and the credibility of the witnesses was within the province of the jury. *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998), modified 462 Mich 415; 615 NW2d 691 (2000).

Defense counsel's decision to refrain from objecting to the reading of the instruction can be deemed trial strategy based on an expectation that the court would overrule the objection, and that ultimately the jury would not be able to reach a verdict. We do not substitute our judgment for that of trial counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The jury continued to deliberate, and eventually reached a unanimous verdict. The fact that a strategy may not have worked does not mandate a conclusion that the strategy constituted ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant has not demonstrated that but for counsel's error, it was reasonably probable that the result of the proceedings would have been different, *Carbin*, *supra*, and has not overcome the presumption that counsel rendered effective assistance. *Rockey*, *supra*.

Affirmed.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Edward M. Thomas