

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VILLARD T. BOGARD,

Defendant-Appellant.

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UNPUBLISHED

January 8, 2009

No. 282393

Allegan Circuit Court

LC No. 06-014928-FC

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of three counts of criminal sexual conduct in the first degree, MCL 750.520b(1)(b).<sup>1</sup> We affirm.

Defendant's convictions arose from repeated instances of sexual contact between defendant and the then 14-year-old complainant, while defendant was residing with the complainant and her mother. Defendant denied that he had sexual contact with the victim.

Defendant first maintains that the trial court erred when it presented the following instruction, which was based on CJI2d 4.4:

There has been some evidence that the defendant left the State of Michigan after being charged with a crime and this matter was pending trial.

This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of guilt.

You must decide whether the evidence is true, and, if true, whether it shows that the defendant had a guilty state of mind.

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<sup>1</sup> Defendant was acquitted of a charge of extortion, MCL 750.213.

A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Here, trial counsel twice approved of the instructions as given. Defendant has waived review of the propriety of the flight instruction.

Defendant also argues that trial counsel rendered ineffective assistance by failing to object to the flight instruction. We disagree.

In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther* hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If the defendant fails to preserve the issue, appellate review is “limited to mistakes apparent on the record.” *Id.* “If the record does not contain sufficient detail to support defendant’s ineffective assistance claim, then he has effectively waived the issue.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant did not move for a new trial or a *Ginther* hearing on this ground before the trial court, our review of his ineffective assistance claim is limited to mistakes apparent on the record.<sup>2</sup> “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A court first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

“Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise.” *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). “In order to overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.*

Here, trial counsel’s decision to not challenge the flight instruction fell well within the realm of reasonable trial strategy. The police officer who interviewed complainant testified that defendant left Michigan in October of 2006, after his preliminary examination. The officer later received information from complainant about defendant’s location. He stated that defendant was “found in Florida and brought back” in May of 2007.

Defendant testified that he was released from jail. He alleged that he asked about the fact that he had charges pending against him, but was told that he was free to leave.<sup>3</sup> Defendant thought that the charges had been dropped. He then moved to Florida. He initially maintained that he returned to Michigan voluntarily, but later admitted that he waived extradition in Florida.

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<sup>2</sup> Defendant moved in this Court to remand for a *Ginther* hearing, but this Court denied the motion.

<sup>3</sup> The parties agree that defendant was released from jail by mistake.

Given this evidence, as well as the prosecutor's questioning of defendant as to whether his sudden move to Florida was due to consciousness of guilt, and his own repeated denials, trial counsel's decision to not object to the instruction was objectively reasonable. While the instruction indicated that flight could reflect consciousness of guilt, it also stated that such evidence did not prove guilt and that a person might leave the state for innocent reasons. This fell squarely within defendant's claim that he believed that the charges against him had been dropped when he was inadvertently released from jail. Trial counsel reasonably could have concluded that the jury might view the instruction as providing a rationale to find that defendant's conduct was not necessarily indicative of guilt, and that this outweighed any negative inferences arising from the rather obvious fact that flight could also reflect consciousness of guilt. Defendant has not shown that trial counsel provided ineffective assistance.

Defendant also argues that trial counsel provided ineffective assistance by failing to call two witnesses listed on defendant's witness list. Defendant asserts that these witnesses would have supplied testimony that directly contradicted the claims made by complainant.

Decisions as to whether to call witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). A defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Here, defendant has failed to attach any offer of proof or any affidavits sworn by the proposed witnesses. Defendant has failed to demonstrate that the witnesses would have been available to testify at trial and that they would have offered exculpatory testimony. Under these circumstances, defendant has failed to rebut the presumption of sound trial strategy accorded trial counsel's decision to not subpoena the witnesses.

Affirmed.

/s/ Brian K. Zahra  
/s/ Peter D. O'Connell  
/s/ Karen M. Fort Hood