

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL SCOTT BEAUREGARD,

Defendant-Appellant.

UNPUBLISHED

October 1, 2009

No. 284889

Otsego Circuit Court

LC No. 07-003819-FC

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

MEMORANDUM.

Defendant appeals as of right from his conviction by a jury of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age), and two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a) (victim under 13 years of age). Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 210 months to 50 years for each count of CSC I, and 11 years to 22½ years for each count of CSC III. For the reasons set forth in this memorandum, we affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant's sole argument on appeal is that he received ineffective assistance of counsel, by being misled by his trial counsel not to testify. Because we do not have the benefit of a *Ginther* hearing in this matter,¹ review is limited to the existing record. *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008). To prove ineffective assistance of counsel, defendant must prove "that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

"The privilege of a criminal defendant to testify is the other side of the coin on which appears the privilege against self-incrimination. . . . If he does not elect to testify, he must be deemed to have waived his privilege to do so." *People v Simmons*, 140 Mich App 681, 685;

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

364 NW2d 783 (1985).² In this case, the record clearly indicates that defendant knowingly and voluntarily waived his right to testify. It is counsel's duty to provide reasoned and knowledgeable legal advice, MRPC 1.4(b) (communication), 2.1 (advisor), and it is defendant's duty to decide how to act in light of that advice. Based on the circumstances surrounding defendant's prior criminal history we cannot find that counsel's advice not to testify fell below a standard of reasonableness, nor can we conclude that had defendant testified the outcome would have been different or that it deprived defendant of a substantial defense.³ Accordingly, defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello

² Quoting *United States v Ives*, 504 F2d 935, 939-940 (CA 9, 1974), vacated on other grounds 421 US 944; 95 S Ct 1671; 44 L Ed 2d 97 (1975) (vacated and remanded for consideration of the defendant's competence to proceed in light of *Drope v Missouri*, 420 US 162; 95 S Ct 896; 43 L Ed 2d 103 (1975)).

³ See, *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).