

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERRY LAMONT DORSEY,

Defendant-Appellant.

UNPUBLISHED

June 23, 2000

No. 208395

Macomb Circuit Court

LC No. 96-001516-FC

Before: Owens, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct predicated upon personal injury and the use of force, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), for which he was sentenced to eight to twenty years in prison. He appeals as of right. We affirm.

Defendant first contends that the trial court erred in denying his motion for a new trial based on an alleged violation of his right to confrontation. US Const, Am VI; Const 1963, art 1, § 20. The record indicates that the issue of Dr. Bastian's testimony was addressed at a pretrial proceeding on June 17, 1997, of which no transcript was prepared.

Addressing the merits of defendant's claim, we find that defendant's right of confrontation was not "impermissibly compromised." *People v McCurdy*, 185 Mich App 503, 507; 462 NW2d 775 (1990). The prosecution conducted the telephonic deposition of the emergency room physician with the consent of defense counsel, who was present at the deposition and cross-examined the witness. Although defendant was not present and denies that he had notice of the deposition, at trial, defendant concurred in counsel's stipulation to waive the appearance of the physician and instead have the deposition testimony read into the record, as a matter of defense strategy. Before the deposition was read into the record, defendant had the opportunity to present any objections to the testimony. Portions of the deposition testimony were redacted on that basis. Thus, defendant stipulated to the admission of the deposition testimony and may not now assign error to action he and his counsel deemed proper at trial. *Id.*

Defendant next contends that he was denied the effective assistance of counsel primarily because his trial attorney failed to protect his right of confrontation. Generally, effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). “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 the defendant as to deprive him of a fair trial.” *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). The defendant must overcome a strong presumption that counsel’s assistance constituted sound trial strategy and show that there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Even assuming defendant’s right to confront a prosecution witness at a deposition was violated, it did not result in prejudice to defendant because the trial court ordered the prosecution to produce the witness at trial, and defendant’s subsequent waiver of the witness’ production precludes a determination whether the outcome of the trial was affected. Assuming counsel was ineffective for advising defendant to waive production of the witness, defendant could not have been prejudiced unless the witness’ deposition testimony would have been excluded and the absence of that testimony would have affected the outcome of the trial. The deposition testimony of the witness, who resided in California, was admissible under MRE 804(b)(5). *Lombardo v Lombardo*, 202 Mich App 151, 155; 507 NW2d 788 (1993). Moreover, it does not appear that the exclusion of the testimony would have affected the outcome of the trial, considering that the case was primarily a credibility contest between the victim and defendant. Defendant’s remaining allegations of ineffective assistance are unconvincing. Therefore, defendant failed to meet his burden of proof regarding ineffective assistance of counsel and the trial court did not err in denying his motion for a new trial.

Affirmed.

/s/ Donald S. Owens

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald