

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GUADALUPE RUIZ MEYER,

Defendant-Appellant.

UNPUBLISHED

March 15, 2002

No. 225332

Hillsdale Circuit Court

LC No. 99-238531

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

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree child abuse, MCL 750.136b(2). She appeals as of right. We affirm.

Defendant's sole contention on appeal is that she was deprived of her constitutional right to effective assistance of counsel. Generally, a successful claim of ineffective assistance of counsel requires a defendant to show that his or her attorney's representation deviated from an objective standard of reasonableness, resulting in the denial of a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that counsel's actions constituted sound trial strategy under the circumstances. *Id.*, 302. A defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

In support of defendant's contention that she was deprived of her constitutional right to effective assistance of counsel, she notes a number of specific instances where she believes that her trial counsel's performance deviated from objective standards of reasonableness. She also notes that, even if these instances do not individually constitute ineffective assistance of counsel, taken together, they indicate that trial counsel's overall performance was deficient. In reviewing defendant's contentions, we have examined both the trial record and the record of the evidentiary hearing on this question conducted by the trial court pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). We will consider each of defendant's allegations of unprofessional conduct separately.

Defendant argues that trial counsel ineffectively conducted jury voir dire because he failed to inquire whether any jurors had family members who were treated by a physician who appeared as an expert witness for the prosecution. The record demonstrates, however, that the

trial court had already asked this very question of the prospective jurors, and received no affirmative responses; therefore, trial counsel's failure to repeat this question demonstrates not ineffectiveness but attentiveness. Defendant argues that counsel was also ineffective with respect to the voir dire in failing to follow through on the question as to whether any prospective jurors had children. This argument misapprehends the reason for counsel's concern as to whether jurors had children; indeed, he testified at the *Ginther* hearing that his trial strategy was to convince the jury that defendant's conduct was legitimate parental discipline and he believed parents would be more receptive to this argument than non-parents. Moreover, trial counsel testified that he wanted a representative mix of parents and non-parents on the jury panel. This approach represented legitimate trial strategy, and did not constitute ineffective assistance. *Toma, supra* at 302.

Defendant contends that trial counsel was ineffective for failing to try to weaken the credibility of a nurse, who testified that defendant arrived at the hospital some time after the ambulance carrying decedent, by suggesting that she was too busy performing resuscitation to notice when defendant arrived. At the *Ginther* hearing, defense counsel testified that he believed a jury would not think it unreasonable for a parent with a number of other small children to care for to be somewhat delayed in proceeding to the hospital because she would have to arrange for the necessary childcare. We are not persuaded that this was an unreasonable trial strategy.

Defendant also directs our attention to four instances where trial counsel failed to object or failed to pursue evidentiary objections. For example, defendant references trial counsel's failure to object, on hearsay grounds, to a physician's testimony regarding a statement defendant made to her. However, as the trial court correctly noted at the *Ginther* hearing, the statement was offered as that of a party-opponent, and was not inadmissible. MRE 801(d)(2). It is well established that trial counsel is not ineffective for failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Another alleged error occurred when trial counsel objected to the admission of certain photographs, without first requesting the sequestration of the jury. At the *Ginther* hearing, trial counsel testified that he was taken by surprise by the attempt to present photographs because he thought his objections to the photographs were already on record, and was focusing on the immediate need to deal with an unforeseen circumstance rather than with the presence of the jury. The trial court found both his surprise and his reaction to have been understandable because there had been a substitution of prosecuting attorneys. We agree. Therefore, we do not believe that trial counsel's conduct deviated from an objective standard of reasonableness. Moreover, as the trial court found at the *Ginther* hearing, no serious prejudice occurred, because the trial court excused the jury sua sponte as soon as counsel began his objection. Finally, we note that defendant could not have been prejudiced because the photographs were ultimately admitted; therefore, any prejudice caused by hearing a brief reference to what the photographs depicted was subsumed by the jury seeing the actual photographs. Consequently, there is no possibility that, but for counsel's conduct, the result would have been different, thereby precluding a finding of ineffective assistance of counsel. *Toma, supra* at 302-303.4.

The remaining two issues involving evidentiary objections deal with trial counsel's withdrawal of objections to testimony by a law enforcement witness. In both of these instances, trial counsel simply declined to persevere in objections that were, upon further consideration, groundless. Moreover, his objections had already effectively been overruled by the time he

withdrew them. His withdrawal of these objections after realizing that they had no basis did not constitute ineffective assistance. See *Snider, supra* at 425.

Defendant alleges another error by counsel with respect to the officer's testimony about the wrongfulness of tying children down. She asserts that counsel should have cross-examined the officer to elicit an admission that there might be limited circumstances where doing so is acceptable. Defense counsel testified at the *Ginther* hearing, however, that he had an "instinct" that the officer, who had already testified that tying a person down is never right, would not make this admission. We are not persuaded that defendant has overcome the presumption that this was legitimate trial strategy. *Toma, supra* at 302.

Defendant raises several concerns regarding the lack of medical testimony put forward in her defense. She notes that an emergency medical technician witness was unable to testify regarding the propriety of the actions taken by the emergency medical technicians because trial counsel did not discover that the witness was only certified in Maryland and precluded from testifying as an expert witness. We agree that there is little excuse for defense counsel not anticipating this issue. As the trial court correctly found, however, the conduct of the emergency medical technicians was insignificant in the overall context of the trial. Indeed, there was expert testimony that the victim had thirty-one injuries, excluding those that may have been caused by medical professionals. Moreover, there was expert testimony that most of these injuries appeared to be several days old. Accordingly, we do not believe that this one instance of unprofessional conduct was outcome determinative. *Toma, supra* at 302.

Defendant also complains that counsel failed to cross-examine a medical expert concerning the possibility that the child was diabetic and failed to present expert medical testimony that his bruises could have had a cause other than child abuse. However, there was direct and apparently incontrovertible testimony from the forensic pathologist who examined the child that an examination of the organs that secrete insulin showed that he was not diabetic. Counsel also testified at the *Ginther* hearing that he did not pursue these defenses because there was no factual basis for them, and that he had to resist considerable pressure from defendant and her husband to "manufacture" defenses. We note that, not only are counsel not required, in order to be effective, to put forward meritless defenses, but that they are prohibited by the rules of professional conduct from doing so. MRPC 3.3; *Snider, supra* at 425. Accordingly, trial counsel was not ineffective in abiding by this professional obligation.

Defendant also asserts that counsel failed to follow through on all of the witness leads that he was given. Her husband testified at the *Ginther* hearing to this effect, and also testified that counsel told him that the court had limited him to calling only five witnesses. Defense counsel contradicted these statements in his testimony, and the trial court found defendant's husband's testimony not to be credible. In fact, defense counsel presented eleven witnesses for the defense, and asserts that he made considered judgments not to call certain witnesses after interviewing them and determining that their testimony would not be helpful. In addition, he was unable to call certain other witnesses because defendant provided him incomplete contact information. Accordingly, we find no basis for ineffective assistance of counsel in this regard.

Finally, defendant asserts that counsel was ill at the onset of trial, and presented the testimony of two witnesses that he had complained of feeling ill. At the *Ginther* hearing, trial counsel denied having been ill, and the trial court believed him. In any event, counsel's

performance can only be evaluated by an objective standard. Measured by that standard, it is clear on a review of the record that his performance was zealous and skillful. He cross-examined prosecution witnesses assiduously, offered numerous evidentiary objections, a number of which were sustained, as was his objection to a jury instruction requested by the prosecution, presented the evidence of the eleven witnesses he called for the defense, and presented a cogent opening statement and forceful closing argument. As such, we believe that defense counsel's overall performance did not deviate from objective standards of reasonableness. Nor are we persuaded that, but for the one aforementioned instance of unprofessional conduct, the outcome of the proceedings would have been different. Indeed, there was strong evidence of defendant's guilt.

Affirmed.

/s/ Patrick M. Meter

/s/ Jane E. Markey

/s/ Donald S. Owens