

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY ARTHUR SMITH,

Defendant-Appellant.

UNPUBLISHED

October 22, 2002

No. 232659

Oakland Circuit Court

LC No. 98-163231-FH

Before: Murphy, P.J., and Markey and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of four counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a), involving two young girls. Defendant was sentenced to concurrent terms of ten to fifteen years' imprisonment. We affirm.

Defendant's first issue on appeal is whether the trial court erred in not admitting a statement into evidence after the prosecution had rested and the complainant, who wrote the statement, had been dismissed. This Court reviews a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000).

The trial court ruled that the written statement was inadmissible unless defendant could lay a proper foundation for its admission and that the statement, which was a surprise to the prosecution and not disclosed until after the prosecution rested, could not be authenticated by the complainant's mother. Defense counsel did not lay the proper foundation for its admission when the complainant was on the stand and the trial court noted that the prosecution no longer had the opportunity to call an expert. Defendant does not challenge the trial court's ruling that the statement could not be authenticated without the complainant, but argues that the statement is relevant and material, and that he should have been allowed to recall the complainant in order to authenticate it.

Defendant knew about the statement, allegedly written months prior to trial, when the complainant was on the stand. The complainant admitted that she had written a statement because she was doing everything she could to try to rebuild a relationship with her mother, who

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

was defendant's girlfriend, but testified that she was "not going to sit up here and lie for her so she can be happy." The complainant testified in detail about the sexual activity with defendant, and her testimony was corroborated by the other complainant who witnessed it before being assaulted herself. Defense counsel indicated that he had no further questions of the complainant and did not object to her dismissal, but attempted to admit the written statement on the next day of trial. The prosecutor had never seen the statement. Under these circumstances, the trial court did not abuse its discretion in refusing to let defendant admit the statement after the prosecution rested.

Defendant also argues that the jury should have been instructed on fourth-degree criminal sexual conduct, a cognate lesser included offense of third-degree sexual conduct. Our Supreme Court recently resolved this issue in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), and concluded that MCL 768.32(1), only permits instruction on necessarily included lesser offenses, not cognate lesser offenses. *Id.* 355. Because fourth-degree criminal sexual conduct is a cognate lesser offense of third-degree criminal sexual conduct, and not a necessarily included lesser offense, the trial court did not err in refusing to give the instruction.

Next, defendant argues in propria persona that trial counsel failed to provide him with effective assistance of counsel. Because defendant failed to preserve this issue for review by moving for a new trial or evidentiary hearing in the trial court, our review is limited to the existing record. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). A defendant must demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial, and must also overcome the presumption that the challenged action might be considered sound trial strategy. *Id.* A defense attorney is afforded great discretion in trying a case, especially with regard to trial strategy and tactics. *Pickens, supra*, 446 Mich 325. That the strategy counsel chose ultimately failed does not constitute ineffective assistance of counsel. *Id.*

Defendant claims his trial counsel failed to provide effective assistance by failing to obtain the statement purportedly written by the complainant upon learning of it, failing to turn over the statement to the prosecution before it rested, and by failing to impeach the complainant with the letter.

Defendant has not overcome the presumption that counsel's actions were reasonable or shown that any alleged defects detrimentally affected the result of the trial. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). Defense counsel excused the complainant after she responded to his questions about the letter by reasserting that defendant sexually assaulted her. Her responses may have affected defense counsel's decision to introduce the letter at that time. Defense counsel may have decided, as a matter of trial strategy, not to give the complainant further opportunity to emphasize her testimony about the sexual assault. The appellate court does not substitute its judgment for counsel's judgment regarding trial strategy. *People v Kevorkian*, 248 Mich App 373, 414; 639 NW2d 291 (2001). In any event, defendant has failed to show a reasonable probability that the result of the proceeding would have been different had

the statement been admitted. The complainant's friend testified she saw defendant and the complainant having intercourse. This testimony corroborated the complainant's version of the events. Defendant's ineffective assistance of counsel claim is unsupported by the record.

Finally, defendant argues in propria persona that his appellate counsel failed to provide him with effective assistance of counsel for failing to raise the issue of trial counsel's ineffective assistance. Where, as here, appellate counsel has pursued an appeal as of right and raised nonfrivolous claims, the defendant must make a testimonial record in the trial court in connection with a claim of ineffective assistance of appellate counsel. *People v Reed*, 198 Mich App 639, 647; 499 NW2d 441 (1993). In this case, defendant failed to make a record in the trial court, and therefore, our review is limited to the existing record. The same standards that apply to a claim of ineffective assistance of trial counsel also apply to a claim of ineffective assistance of appellate counsel. *Id.*

Nothing in the record supports defendant's claim that appellate counsel's performance fell below an objective standard of reasonableness. The failure to assert all arguable claims is not sufficient to overcome the presumption that counsel functioned as a reasonable appellate attorney in selecting the issues presented. *Reed, supra*, 198 Mich App 646. In light of our finding that trial counsel was not ineffective, defendant was not prejudiced by appellate counsel's failure to raise an ineffective assistance issue. Defendant has not overcome the presumption that he received effective assistance of appellate counsel.

Affirmed.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Roman S. Gibbs