

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

REGINALD JEROME RIGGINS,

Defendant-Appellant.

UNPUBLISHED

November 14, 2006

No. 263047

Wayne Circuit Court

LC No. 05-001277-01

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of two counts of first-degree criminal sexual conduct, MCL 750.520b. He appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

The victim testified that defendant, her stepfather, began to sexually abuse her when she was fourteen years old in the summer of 2002 after she finished eighth grade. The sexual abuse occurred in the victim's home where defendant resided as well. Even though the victim is not biologically related to defendant, she testified that she thinks of defendant as her father and calls him "dad." Defendant first performed digital penetration on the victim for two to three months. After two to three months of digital penetration, defendant began engaging in oral sex with the victim. When the victim was in ninth grade, defendant began having intercourse with her. Defendant last had sexual intercourse with the victim in November 2004. The victim revealed to her mother in a letter on December 30, 2004 that defendant had sexually abused her. Lieutenant Bilal Muhammad testified that he interviewed defendant on February 25, 2005, after charges had been filed against defendant in the case. According to Lieutenant Muhammad, defendant confessed that he had oral sex and intercourse with the victim and that she had initiated all of their sexual encounters. The interview was entirely oral with nothing preserved in writing.

At trial, defendant denied all of the charges. Defendant alleged that the victim fabricated her testimony because in October 2004 defendant saw an email from the victim that revealed her sexual preference for females. Defendant asserts that the victim was mad at him for telling her that she had to tell her mother about the email or stop using the phone; and therefore, the victim fabricated the story that defendant had sexually assaulted her. Following trial, a jury found defendant guilty of two counts of first-degree criminal sexual conduct but not guilty of a third count. On March 28, 2006, defendant filed his original brief on appeal. On June 16, 2006,

defendant filed a Standard 4 supplemental brief in propria persona in accordance with Administrative Order 2004-6.¹

Defendant raises several claims of ineffective assistance of counsel on appeal. Specifically, defendant alleges that defense counsel was ineffective for failing to request a *Walker*² hearing to determine the admissibility of Lieutenant Muhammad's testimony, to question defendant regarding whether the interview with Lieutenant Muhammad in fact occurred and whether defendant confessed therein to the allegations, to move to suppress Lieutenant Muhammad's testimony regarding defendant's confession, to appear at defendant's polygraph examination, to raise a remand motion for an evidentiary hearing on whether defendant's confession was obtained in violation of his Sixth Amendment right to counsel, to raise issues on appeal requested by defendant and refusal to give defendant copies of his trial transcript, which in turn precluded defendant from raising the issues in his supplemental brief. Defendant failed to move for a new trial or evidentiary hearing on any of these issue, therefore, our review is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error and its constitutional determination is reviewed de novo. *Id.* At 579. A finding is clearly erroneous where, after reviewing the entire record, the reviewing court has a definite and firm conviction that a mistake has been made. *People v Atkins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). Under de novo review, a court gives no deference to the trial court. *People v Howard*, 233 Mich App 52, 54; 595 NW2d 497 (1998).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 326-327; 521 NW2d 797 (1994). To overcome this presumption, the defendant must meet a two-pronged test. The 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. *Strickland, supra*, 466 US at 687-688; *Pickens, supra*, 446 Mich at 312-313. Second, the 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. *Strickland, supra*, 466 US at 687-688; *Pickens, supra*, 446 Mich at 309; *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma, supra*, at 302. Decisions regarding what evidence to present and whether to question witnesses are presumed to be matters of trial strategy that this Court "will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

¹ Defendant labeled his brief "Standard 11 Supplemental Brief." However, pursuant to Administrative Order No. 2004-6, Standard 11 briefs are now to be referenced as Standard 4 briefs.

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

In his original brief, defendant argues that he was denied the effective assistance of counsel when trial counsel did not request a *Walker* hearing to determine the admissibility of Lieutenant Muhammad's testimony. To preserve an assertion that a statement should be excluded because it was obtained at an improper custodial interrogation, a defendant must establish a factual record in support of the claim. *People v Howard*, 226 Mich App 528, 537, 575 NW2d 16 (1997). There is no evidence on the record that the police engaged in misconduct when Lieutenant Muhammad interviewed defendant or that defendant's confession was not voluntary. Therefore, defendant has not established that counsel was ineffective on these grounds.

Defendant also argues that trial counsel should have questioned him on the stand regarding whether the interview with Lieutenant Muhammad in fact occurred and whether he had confessed to the allegations. On cross-examination of Lieutenant Muhammad and in closing argument, defense counsel called into doubt the existence and credibility of defendant's confession by emphasizing that defendant never signed a written statement, that the jury only had the Lieutenant's oral statement to rely on, that the Lieutenant was aware that defendant had denied all the allegations against him in a written statement just two months previously, and that the only thing in writing was defendant's denial of the charges. It was a matter of trial strategy to discredit the validity of defendant's confession to Lieutenant Muhammad and minimize its impact by only questioning Lieutenant Muhammad and not defendant. Further, it is possible that trial counsel knew the statement was properly taken and, therefore, had no reason to challenge it. Defendant has failed to show that trial counsel's performance was deficient on this issue.

In his Standard 4 brief, defendant argues he was denied the effective assistance of counsel when his trial counsel failed to move to suppress Lieutenant Muhammad's testimony regarding his confession, which was allegedly obtained outside the presence of defense counsel in violation of his Sixth Amendment right to counsel. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." US Const, Amend VI. The right to counsel attaches and represents a critical stage "only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment." *People v Anderson*, 446 Mich 392, 402; 521 NW2d 538 (1994) (quoting *People v Bladel [After Remand]*, 421 Mich 39, 52; 365 NW2d 56 [1984]). However, the right is invoked only by requesting counsel. *Id.* Therefore, after formal adversarial proceedings have begun and the defendant asserts the right to counsel either at questioning or arraignment, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. *Id.*

In the facts section of his supplemental brief, defendant does not cite the court record in his assertions that he requested his attorney be present or that Lieutenant Muhammad told defendant that his attorney was on the way. In addition, there was no objection in the trial court that the confession was obtained in violation of defendant's Sixth Amendment right to counsel and defendant has failed to support his bald assertion on appeal that his confession was obtained illegally without the presence of counsel with any record citations. A party's unsupported assertion is not a sufficient basis for granting appellate relief. See *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993); MCR 7.212(C)(7).

Additionally, defendant asserts that he received ineffective assistance of counsel when his attorney failed to appear at his polygraph examination. Defendant has abandoned appellate review of this issue because he failed to raise it in his statement of questions presented, as required by MCR 7.212(C)(5). *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

Defendant also contends in his Standard 4 brief that it was ineffective assistance of counsel when his appellate counsel failed to file a remand motion for an evidentiary hearing on whether defendant's confession was obtained in violation of his Sixth Amendment right to counsel. Defendant argues that this evidentiary hearing was necessary to develop a record for appellate review. Hence, defendant contends he received ineffective assistance of counsel when counsel did not move for the hearing or raise the issue on appeal.

An appellate attorney's failure to raise an issue may result in counsel's performance falling below an objective standard of reasonableness if that error is sufficiently egregious and prejudicial. *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993), affirmed 449 Mich 375; 535 NW2d 496 (1995). However, appellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Counsel must be allowed to exercise reasonable professional judgment in selecting those issues most promising for review. *Reed, supra*, 198 Mich App at 646-647. Thus, to permit proper review in cases where 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. *Id.* at 647, citing *Ginther, supra*, at 443.

There is no evidence on the record besides defendant's bald assertions in his supplemental brief that his Sixth Amendment right to counsel was violated. In addition, appellate counsel questioned Lieutenant Muhammad about the circumstances of defendant's confession on appeal and argued that it was ineffective assistance of counsel for trial counsel not to have requested a *Walker* hearing. It is possible that appellate counsel found this argument stronger than pursuing an evidentiary hearing on remand. Defendant has failed to overcome the presumption that appellate counsel's decision regarding which claims to pursue might be considered sound appellate strategy. Further, assuming that defendant's right to counsel was violated, appellate counsel's failure to seek a remand on the issue was not a deficiency so prejudicial as to be outcome determinative. Trial counsel cast significant doubt on Lieutenant Muhammad's credibility, the victim testified in detail against defendant, the letter that the victim wrote to her mother was introduced into evidence, and the victim's mother testified that her daughter told her the same version of events. The failure to move for a remand to preserve the issue for appeal was not outcome determinative and does not amount to ineffective assistance of counsel.

Finally, defendant argues in his Standard 4 brief that he received ineffective assistance of counsel when he requested his appellate counsel to raise certain issues, appellate counsel refused to raise these issues, and further, refused to give him copies of his trial transcript, which in turn precluded defendant from raising the issues in his supplemental brief. Under MCR 6.433(A), an indigent defendant may request transcripts, and the court must order the preparation of transcripts unless they have already been ordered pursuant to MCR 6.425(F)(2). In this case,

appellate counsel requested and received transcripts from the court, satisfying MCR 6.433(A). Defendant claims in his Standard 4 brief that, had his appellate counsel given him access to the trial transcripts, he could have raised several issues on appeal, including:

1) whether the prosecution proved the elements of the wrong subsection of the statute under which defendant was charged;

2) whether the trial judge received letters from defendant in advance of trial requesting substitute counsel, thereby affecting his Sixth Amendment right to counsel;

3) whether the jury sent a note to the trial judge regarding the read-back of Lieutenant Muhammad's testimony; and

4) whether the jury was instructed without defendant or his counsel present.

Upon review of the trial court record, all of defendant's above claimed issues have no substantive basis in the record and, therefore, are not preserved for appeal.

Affirmed.

Karen M. Fort Hood
Christopher M. Murray
Pat M. Donofrio