STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAKRAM WADE HAMD,

Defendant-Appellant.

UNPUBLISHED
April 16, 2009

No. 282618
Oakland Circuit Court
LC No. 2007-214212-FH

Before: Zahra, P.J., and O'Connell and K. F. Kelly, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years old), and was sentenced to five years' probation and one year incarceration. Defendant appeals as of right. We affirm.

Defendant first argues on appeal that he was denied effective assistance of counsel arising from his trial attorneys' decision to hold the preliminary examination, their failure to recognize the prosecution's evidence and its admissibility, and their failure to interview any defense witnesses before trial and question one in a specific manner. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008). "This Court reviews a trial court's factual findings for clear error and reviews de novo questions of constitutional law." *Id.* "[B]ecause the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

"An accused's right to counsel encompasses the right to the 'effective' assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007), citing US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Generally, to establish ineffective assistance of counsel, "a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The fact that a chosen strategy "ultimately failed does not constitute ineffective assistance of counsel." *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant first argues that the decision to hold the preliminary examination[1] constituted ineffective assistance because it resulted in the prosecution adding a second count of second-degree criminal sexual conduct. This argument is without merit.

It is true that defendant was initially charged with one count of second-degree criminal sexual conduct. In addition, defendant admitted that the police report of Officer Mark Van Poppelen, which described two instances of sexual touching, was provided to trial counsel before the preliminary examination. At the preliminary examination, the victim, AD, testified that two incidents occurred. He stated that defendant told him to come into the bed, and when AD did so, defendant grabbed AD's genitals with his hand while he rubbed his genitals against AD's backside. At the end of the preliminary examination, the trial court granted the prosecution's motion to amend the General Information to change the date of the incident to January 2007 and to add a second count of second-degree criminal sexual conduct.

In spite of the addition of the second count, defendant has failed to overcome the presumption that conducting the preliminary examination was sound trial strategy. At the preliminary examination, defense counsel Joseph Sefa used information from Officer Van Poppelen's report to try to impeach AD. For example, he pointed out where AD's testimony differed from the report, such as whether defendant had taken off his own boxer shorts and whether the incident occurred in a bedroom or in a basement full of people. In fact, at the end of the examination, Sefa asked for the charges to be dropped because "the report is night and day to his testimony today." Although the trial court refused this request, we will not second-guess matters of trial strategy on appeal, even if the strategy is ultimately unsuccessful. *Matuszak*, *supra* at 58; *Kevorkian*, *supra* at 414-415. Moreover, as noted in the trial court's opinion and order, the preliminary examination gave defendant a transcript containing sworn testimony, which he used to impeach AD's trial testimony. Thus, defendant cannot show that the decision to proceed with the preliminary examination fell below an objective standard of reasonableness.

In addition, defendant cannot satisfy the second prong of the *Strickland* test by showing prejudice. Defendant argues that the mere fact that the second count was added to the information following the preliminary examination establishes ineffective assistance. However, "[b]oth MCL 767.76 and MCR 6.112(H) authorize a trial court to amend an information before,

[1] Defendant contends that Assistant Prosecutor Elisa Ramunno told his appellate counsel that the prosecution would have waived the preliminary examination, but no such affidavit was submitted with the motion for new trial, and as such, this unsupported claim is not part of the record to be considered by this Court. See *Wilson*, *supra* at 352.

during, or after trial." *People v McGee*, 258 Mich App 683, 686; 672 NW2d 191 (2003). Although under the statute, "a new offense may not be added to an information by a motion to amend," *id.* at 688, MCR 6.112(H) has no such restriction unless the proposed amendment would unfairly surprise or prejudice the defendant.

As admitted on appeal, and as evident from the preliminary examination transcript, defendant had access to the police report alleging two instances of sexual touching. Therefore, he cannot show that he was unfairly surprised by the addition of the second count. Moreover, the count that was added was exactly the same as the count on which defendant was preparing to go to trial. The defense at trial was the same for both counts: defendant presented witnesses who contradicted AD's testimony and defense counsel highlighted the inconsistencies in AD's statements during cross-examination and closing arguments in order to establish that no sexual contact occurred. Thus, defendant cannot show that the mere addition of a second count prejudiced his defense and, therefore, he cannot establish ineffective assistance of counsel.

Defendant next argues that his trial attorneys were ineffective because, despite having received proper notice from the prosecution, they mistakenly believed that Officer Van Poppelen was the witness under MRE 803A, which concerns hearsay exceptions regarding a child's statement about a sexual act. As a result, defendant argues, they deliberately elicited hearsay information from the officer regarding the allegations that AD made. Defendant contends that this information was prejudicial because it showed that AD's statements were consistent over time. We disagree.

Under MRE 803A,

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.
>
> A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and

the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

This rule applies in criminal and delinquency proceedings only.

It is indeed clear from the transcript that trial counsel was confused regarding which document constituted the required notice. As a result, defendant's counsel misidentified the MRE 803A witness. Defense counsel Gerald R. Goulet eventually admitted that he might have missed the amended information notifying him that AD's teacher, to whom he had initially come with the report of sexual abuse, was the correct MRE 803A witness. As such, defense counsel's actions may have fallen below an objective standard of reasonableness. However, defendant still cannot show that any error was outcome-determinative.

As in the preliminary examination, the introduction of the content of the police report at trial enabled defendant to impeach AD's testimony. Sefa focused on the following differences between AD's initial statement and his testimony at trial during his cross-examination of AD: (1) confusion over the month in which the incident occurred; (2) confusion regarding whether defendant lured him into a bedroom or engaged in the improper contact in the basement; (3) discrepancies regarding where other people were located during the incident; and (4) confusion regarding whether defendant removed his own boxer shorts. Indeed, the prosecutor challenged defense counsel's introduction of the information from the police report.[2] Sefa also drew attention to these and other inconsistencies in AD's statements during his closing arguments.

Even if one were to agree with defendant's argument on appeal that the report showed that AD was being *consistent* with regard to his testimony, defendant still cannot establish outcome-determinative error as a result of the introduction of the police report because "the testimony of a victim need not be corroborated in prosecutions under 520b to 520g." MCL 750.520h. Thus, defendant could have been convicted on AD's trial testimony alone.

Defendant additionally argues that his trial counsel seemed unaware that the written statement that defendant gave to Detective Kreilach was admissible under MRE 801(d)(2),[3] despite whether defendant testified. Because this statement contradicted the testimony of the defense witnesses, defendant contends that his trial counsel had no reasonable, strategic reason for presenting such witnesses and, thus, failed to provide effective assistance.

It is true that defense counsel protested the admissibility of defendant's statement, incorrectly claiming that the statement was not admissible because defendant did not testify. It is also true that defendant's statement corroborated parts of AD's testimony and contradicted his

[2] The judge overruled the objection, stating that the information was not offered to prove the truth of the matter asserted.

[3] Under MRE 801(d)(2)(A), a statement is admissible if it is offered against a party and is "the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles."

own witnesses. Defendant stated that the parents were not home when he and the other boys woke up on Sunday morning (which the parents and all the siblings denied), that he spent most of the day in the basement (as opposed to only 20 to 25 minutes, as Tarek and Nadeem Bouharfouch claimed), that he laid on the blanket (which all the siblings denied), and that he was wearing boxer shorts and a tank top, as AD had claimed.

Even if it were unreasonable to present such defense witnesses because of ignorance of the admissibility of defendant's written statement, defendant cannot show prejudice. Had defendant called no witnesses, as discussed above, defendant still could have been convicted based solely on AD's trial testimony because "the testimony of a victim need not be corroborated in prosecutions under 520b to 520g." MCL 750.520h. Although counsel's strategy of presenting witnesses who contradicted AD was unsuccessful, we will not second-guess it. *Matuszak*, *supra* at 58, *Kevorkian*, *supra* at 414-415.

Finally, defendant claims that his trial attorneys were ineffective because they failed to interview any of the defense witnesses before trial or to question Fatin Harfouch regarding being on the mat with defendant and AD, although AD's sister, KD, had testified that this had occurred. We disagree.

Although defendant submitted an affidavit from Fatin with his motion for new trial, stating that she would have testified that she was never on the mat with AD and defendant, as KD had testified, "[t]he questioning of witnesses is presumed to be a matter of trial strategy." *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we make an assessment of counsel's competence with the benefit of hindsight. *Matuszak*, *supra* at 42. Moreover, defendant cannot show that neglecting to question Fatin in this specific manner affected the outcome of the trial. As it stands, defense counsel *did* elicit testimony from Fatin that she *never* saw defendant on the mat. This contradicts KD's claim that she saw Fatin, AD, and defendant on the mat.

Defendant further alleges that, based on appellate counsel's interviews with other witnesses, it is clear that had his trial attorneys interviewed the other defense witnesses before trial, they would have uncovered evidence that AD had exhibited bizarre and accusatory behavior toward others long before he met defendant. Defendant claims that his counsel could have used this evidence to argue that AD's accusations were not credible. Defendant asserts that by depriving him of a substantial defense, his trial counsel rendered ineffective assistance. Defendant did not attach affidavits from these witnesses to his new trial motion, however, and as noted above, "because the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record." *Wilson*, *supra* at 352.

We note that "[e]ven the failure to interview witnesses does not itself establish inadequate preparation. It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990) (citations omitted). We also note that KD testified that AD's behavior had changed recently, but the family attributed it to the sexual assault. Therefore, it is unclear whether testimony regarding AD's recent behavioral problems would have helped defendant. The fact still remains that all the defense witnesses gave testimony that contradicted that of AD: they claimed that the parents were home, that defendant

was never on the mat, that the mat was in front of the television and not behind the couch as AD had stated, and that defendant and the other boys were in the basement for only a short time. Because these witnesses attacked AD's credibility, defendant was not deprived of a substantial defense. Therefore, he fails to establish ineffective assistance of counsel.

Next, defendant argues on appeal that the trial court abused its discretion by refusing to grant him an evidentiary hearing. We disagree. We review a trial court's denial of a motion for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), for an abuse of discretion. See *People v Collins*, 239 Mich App 125, 138-139; 607 NW2d 760 (1999). "An abuse of discretion occurs when the result is outside the range of principled outcomes." *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008).

An evidentiary hearing is appropriate where a claim of ineffective assistance of counsel depends on facts not of record. *Ginther, supra* at 442-443. The trial court should hear testimony if there is a factual dispute. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005), citing *Ginther, supra* at 442. Defendant does not specify the factual disputes on which his claim for an evidentiary hearing rests. Instead, he merely concludes that the trial court abused its discretion in denying the hearing because "[a]n unprejudiced person would conclude [d]efendant should have been given the opportunity to create a record about why the attorneys did what they did and why they failed to do what they failed to do." However,

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. [*LME v ARS*, 261 Mich App 273, 286-287; 680 NW2d 902 (2004), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Because defendant fails to establish this claim of error, we need not consider it further. However, we note that the facts necessary to analyze the first two grounds on which defendant bases his claim of ineffective assistance of counsel are wholly contained within the record. Defendant first protests the addition of a second count of second-degree criminal sexual conduct as a result of the preliminary examination hearing, claiming defense counsel should have waived the hearing based on the information contained in Officer Van Poppelen's report. However, defendant concedes that his trial counsel was given a copy of the report during discovery (and it is also evident from the transcript of the preliminary examination that this occurred). Therefore, there is no issue of fact to be developed at an evidentiary hearing.

Second, defendant claims that his counsel was confused regarding the identity of the MRE 803A witness. As noted, this claim is painfully obvious from the record, most notably when Goulet admitted in open court that he might have "missed" the amended information with the updated witness list. It is also apparent from the record that defense counsel believed defendant's written statement to be inadmissible.

Finally, the argument that defense counsel did not properly question Fatin regarding KD's allegations—part of defendant's third ground for asserting ineffective assistance—was also apparent from the record because it concerned questioning at trial. The only issue on which there could conceivably be a factual dispute would be the issue whether any defense witnesses

were interviewed before trial. Defendant asserts that his counsel's failure to interview the witnesses beforehand resulted in the failure to discover that AD had previously exhibited bizarre and accusatory behavior, which could have been used to attack AD's credibility. Defendant's motion for a new trial did not include affidavits from any witnesses besides Fatin (and her affidavit addressed the claim whether she was on the mat with AD and defendant) nor did defendant assert in the motion that the witnesses had this specific information regarding AD's behavior. Because this argument was not raised at trial, the trial court could not have abused its discretion in denying the evidentiary hearing on this ground. All the other issues that were properly raised by defendant could be decided by facts on the record. Thus, the trial court did not abuse its discretion when it denied defendant's motion for an evidentiary hearing.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly