

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN RAY WERSTEIN,

Defendant-Appellant.

UNPUBLISHED

December 17, 2009

No. 287471

Wayne Circuit Court

LC No. 08-004430-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced to concurrent prison terms of ten to 15 years for each first-degree CSC conviction and nine to 15 years for the second-degree CSC conviction. We affirm.

Defendant was charged with the above offenses for engaging in sexual activity with his stepdaughter, LF. LF testified at trial and described the various acts of abuse. She testified that she did not disclose the abuse until she and her siblings had been removed from their home and placed with their grandmother. The grandmother testified that LF disclosed “that sometimes her dad would wake her up in the middle of the night, take her out of the bedroom and he would have her lick or put her mouth on his private thing.”

Defendant first contends that defense counsel was ineffective for failing to object to the grandmother’s testimony regarding LF’s statement to her because it did not meet the qualifications for admission under MRE 803A or MRE 803(24). Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish a claim of ineffective assistance of counsel, “defendant must first show that (1) his trial counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted). “Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel’s assistance was sound trial strategy.” *Id.*

The decision whether to object to evidence is a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The failure to object to evidence can constitute ineffective assistance of counsel where the evidence was inadmissible and its introduction was so prejudicial that it could have affected the outcome of the case. *People v Ullah*, 216 Mich App 669, 685-686; 550 NW2d 568 (1996).

The record shows that the prosecutor filed a notice of intent to offer the grandmother’s testimony regarding LF’s statement under MRE 803A. There is nothing in the record to suggest that defense counsel responded to that notice, and the trial transcript establishes that defense counsel did not object to the evidence at trial. It is undisputed that LF’s statement to the grandmother was not admissible under MRE 803A because LF was over the age of ten when the statement was made. MRE 803A(1). We agree with defendant that the statement was also not admissible under MRE 803(24). Under the particular circumstances of this case, the grandmother’s testimony was not more probative than LF’s own nonhearsay testimony on the point for which it was offered because it did not provide information of a kind or to a degree that LF’s own testimony did not. See *United States v Balfany*, 965 F2d 575, 582 (CA 8, 1992). Nevertheless, it appears that defense counsel had a reasonable trial strategy for not objecting to the evidence because the limited disclosure made to the grandmother was inconsistent with LF’s testimony, which was one of the factors cited by defense counsel as a reason for discrediting LF’s testimony. “The fact that defense counsel’s strategy may not have worked does not constitute ineffective assistance of counsel.” *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant next contends that he was denied a fair trial because the manner in which the court instructed the jury on the charge of second-degree CSC was tantamount to a directed verdict for the prosecution. We find that defendant has waived any claim of error because, after the court instructed the jury, defense counsel pronounced himself “[s]atisfied” with the instructions. *People v Carter*, 462 Mich 206, 215-219; 612 NW2d 144 (2000); *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009).

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder