

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARVEY ALLEN ZEEK,

Defendant-Appellant.

UNPUBLISHED

December 28, 2010

No. 294024

Muskegon Circuit Court

LC No. 09-57391-FC

Before: DONOFRIO, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct involving a child under the age of 13, MCL 750.520b(1)(a), and second-degree criminal sexual conduct involving a child under the age of 13, MCL 750.520c(1)(a). The trial court sentenced defendant to concurrent prison terms of 18 to 35 years for the first-degree CSC conviction and 54 months to 15 years for the second-degree CSC conviction. Defendant appeals as of right. This appeal has been decided without oral argument pursuant to MCR 7.214(E). We affirm.

Defendant's sole claim on appeal is that he was denied the effective assistance of counsel at trial. Whether defendant was denied effective assistance of counsel is a question of constitutional law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court generally reviews a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.* However, in this case we review defendant's ineffective assistance of counsel claim for mistakes apparent in the appellate record because defendant failed to move the trial court for a new trial and the court did not hold a *Ginther*¹ hearing. See *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

To prevail on his claim of ineffective assistance of counsel, defendant must meet the two-part test set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599 - 600; 623 NW2d 884 (2001). First, defendant must show that his counsel's performance was so deficient "that counsel was not functioning as

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 US at 687. To do so, defendant must show that his counsel’s performance “fell below an objective standard of reasonableness” under prevailing professional norms. *Id.* at 687-688. This Court presumes that counsel rendered adequate assistance. *Id.* at 690. Second, defendant must show that his counsel’s deficient performance prejudiced his defense. *Id.* at 687. To do so, “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

As to the deficiency component of the *Strickland* test, defendant contends that his trial counsel’s cross-examination of the victim and other prosecution witnesses was professionally unreasonable because it was repetitive of direct examination testimony, failed to support his case, and actually strengthened the prosecution’s case. We disagree.

It is well established that a trial lawyer’s decision on how to cross-examine a witness is a matter of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). This Court will find counsel’s representation ineffective on the basis of strategy only if the strategy employed was unreasonable. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). Failure of trial strategy does not render counsel’s assistance ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defense counsel’s trial strategy is evident from his cross-examination of the prosecution’s witnesses. Counsel attempted to create reasonable doubt for the jury by attempting to make the victim’s story sound far-fetched and fabricated. It was professionally reasonable for counsel to attempt to obtain testimony that indicated that the victim’s story may be fabricated, particularly given the victim’s claim that her grandfather also perpetrated criminal sexual conduct on her in a similar manner. Counsel’s performance was not deficient under *Strickland* merely because his strategy failed.

We reject defendant’s argument that he was denied the effective assistance of counsel because his attorney elicited testimony on cross-examination that ultimately did not support his case. The record clearly indicates that counsel obtained the complained-of testimony in an effort to advance his trial strategy. Whether counsel would have been better off strategically by not asking some of the questions that he did is not for this Court to consider in hindsight and is not a sufficient basis for this Court to conclude that counsel’s performance was deficient. See *People v Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (“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.”). Accordingly, defendant has not shown that counsel’s performance was deficient under the first prong of the *Strickland* test.

Assuming that counsel’s cross-examination was deficient, defendant has not demonstrated a reasonable probability that the jury would have had a reasonable doubt as to his guilt absent the deficiency. The cross-examination bout which defendant complains was largely counsel’s elicitation of testimony previously stated by the prosecution’s witnesses on direct examination. Even if counsel had not obtained this testimony during cross-examination, it was already in evidence. Moreover, defendant elected not to testify on his own behalf and did not call any witnesses. Defendant has not pointed to any additional evidence that he believes counsel failed to present at trial. Thus, despite counsel’s alleged deficiency, the jury had before

it all of the evidence put forth by the prosecution, which was substantial and fully supported defendant's conviction.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald