

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 17, 2016

v

DESHARIO LEE JOHNSON-ROSSER,

Defendant-Appellant.

No. 328760
Kent Circuit Court
LC No. 15-001801-FC

Before: SAWYER, P.J., and MARKEY and O'BRIEN, JJ.

PER CURIAM.

Defendant, Deshario Lee Johnson-Rosser, was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and sentenced as a fourth-offense habitual offender, MCL 769.12, to 30 to 60 years in prison. On appeal, defendant raises only a claim of ineffective assistance, arguing that he was deprived of his constitutional right to the effective assistance of counsel based on trial counsel's failure to confront the six-year-old victim regarding her "lies" on the witness stand. Because trial counsel's performance did not fall below an objective standard of reasonableness as well as because defendant has not demonstrated that he was prejudiced by the alleged shortcomings, we affirm.

The victim, who was six years old at the time of trial, testified that defendant, who she occasionally refers to as "daddy," put "his private" or "wiener" in her mouth. According to the victim, defendant invited her into the kitchen, told her that they would be playing "a game," instructed her sister "to stay in the living room," put a pillow behind her back, and put his penis in her mouth. The parties stipulated that the victim disclosed the sexual assault to her foster sister shortly after it occurred. The victim was eventually interviewed at the Children's Assessment Center, and the only disparity between her interview statements and trial testimony related to whether a hat was pulled over her eyes while defendant's penis was in her mouth. Under either scenario, however, the victim was clear in testifying that she observed defendant's penis go into her mouth.

Defendant's defense theory was that the victim had fabricated the entire incident. To support this theory, he presented, in pertinent part, evidence regarding a previous accusation made by the victim against her brother. Specifically, a foster care worker testified that the victim had disclosed possible sexual abuse perpetrated by her brother to law enforcement, and a detective confirmed that there had been multiple investigations regarding sexual abuse

allegations involving the victim's family, one of which related to an incident between the victim and her brother. However, at trial, the victim denied having accused her brother of sexual assault:

Q. Has [your brother] ever humped you?

A. No.

* * *

Q. Do you remember ever telling your foster mom that [he] humped you?
If you don't, you can say no. It's okay.

A. I don't know.

After cross-examining the victim for several more minutes, defense counsel proceeded to cross-examine the foster care worker and the detective, and both admitted the victim had accused her brother of having humped her in direct contradiction to her trial testimony. During defense counsel's closing argument, he expressly referred to the victim's inconsistent statements regarding her accusations of sexual abuse against her brother:

She was investigated originally a week into her being placed in foster care. She felt safe enough to make a statement that her brother humped her. It was investigated, questioned. She was . . . and it was identified that it happened, and then when she was questioned here today she said it didn't happen. Why would she change her story? She's safe. She told her story, and she wasn't punished for it.

On appeal, defendant's claim of ineffective assistance of counsel is premised on what he describes as defense counsel's "fail[ure] to confront the [six-year-old victim] with these lies" to see "whether the whole house of cards would have tumbled." Therefore, he claims, a new trial is required. We disagree.

A defendant's claim of ineffective assistance of counsel presents a mixed question of fact and law. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). A trial court's findings of fact are reviewed for clear error, but the underlying constitutional issue, i.e., whether defendant was deprived of his constitutional right to the effective assistance of counsel, is reviewed de novo. *Id.* To demonstrate ineffective assistance of counsel, a defendant must first show that trial counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). In doing so, a defendant must overcome a strong presumption that trial counsel's assistance was effective when it comes to matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). A defendant must also show that he or she was prejudiced by trial counsel's shortcomings, i.e., that, but for trial counsel's deficient performance, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Failing to call or question a witness only constitutes ineffective assistance when it

deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

In this case, trial counsel's performance did not fall below an objective standard of reasonableness, and defendant was not prejudiced by the alleged shortcomings. While it is true, as defendant points out, that defense counsel did not ask additional questions of the victim after she testified that her brother had not humped her, it cannot be overlooked that defense counsel thoroughly challenged her recollection of the sexual assault and successfully impeached her testimony regarding the allegations against her brother shortly thereafter. Specifically, he cross-examined two witnesses, the foster care worker and the detective, and both testified that the victim had, in fact, accused her brother of humping her. Defense counsel then used that impeachment testimony in his closing argument, specifically pointing to the fact that the victim had "change[d] her story" regarding accusations of sexual abuse in the past. Thus, it cannot be said that defendant was deprived of a substantial defense based solely on defense counsel's failure to cross-examine the victim further regarding this apparent inconsistency in her statement and testimony. Indeed, it is certainly conceivable that defense counsel may have deemed it better strategy to impeach the six-year-old victim's testimony through the testimony of a foster care worker and a detective rather than by repeatedly questioning the child regarding the multiple instances of sexual abuse that had been committed against her.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Colleen A. O'Brien