STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRED TIQUAN WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
November 21, 2019

No. 345324
Calhoun Circuit Court
LC No. 2017-003124-FC

Before: BORRELLO, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(f). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 450 to 900 months' imprisonment. We affirm.

On July 11, 2017, 14-year-old KG went to the home of her mother's 37-year-old ex-boyfriend. KG and her mother had a falling out and defendant texted KG stating that she could stay the night at his house if she needed. KG went to defendant's house in Battle Creek, Michigan, and she and defendant drank alcohol while watching television. KG testified that defendant told her to come over by him on the couch so he could tell her a secret. KG went over to defendant and he kissed her on the cheek. KG went into the bathroom because she felt uncomfortable. After a while, defendant came to check up on her and she left the bathroom. When she came out of the bathroom, defendant grabbed her by the wrists and pulled her into his bedroom, pushed her on the bed, pulled down her shorts, and penetrated her vagina with his penis. KG did not push defendant off of her because she was scared and defendant was bigger than her. KG reported the incident to a friend's mother, and then to the police.

On appeal, defendant argues that he was denied the effective assistance of counsel. Although defendant moved for remand in this Court, because this Court denied the motion and no evidentiary hearing has been held, review "is limited to mistakes apparent from the record." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). Whether effective assistance of counsel has been denied is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews questions of constitutional law

de novo, and factual findings, if any, for clear error. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

"Both the United States and Michigan constitutions provide that the accused shall have the right to counsel for his defense." *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009), citing US Const, Am VI; Const 1963, art 1, § 20. This right encompasses a defendant's right to effective representation. *Id*. However, it is the defendant's burden to prove that counsel did not provide effective assistance. *People v Anderson*, 322 Mich App 622, 628; 912 NW2d 607 (2018). To prove that defense counsel was not effective, the defendant must show that: (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant, i.e., that but for counsel's errors, the result of the proceeding would have been different. *Id*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 628, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674(1984).

Counsel is presumed to be effective, and a defendant bears a heavy burden of demonstrating otherwise. See *Anderson*, 322 Mich App at 628. "Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (citation omitted). Decisions as to what questions to ask and what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court does not substitute its judgment for counsel's judgment regarding trial strategy and the fact that "the strategy [counsel] chose ultimately failed does not constitute ineffective assistance of counsel." *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001) (citation omitted). Nevertheless, "a court cannot insulate the review of counsel's performance by calling it trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012).

Defendant argues that defense counsel was ineffective for six reasons. First and foremost, we note that defendant has provided no authority to support five of the six allegations of ineffective assistance of counsel. "An appellant may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims; this Court is not required to search for authority to sustain or reject a position raised by a party without citation of authority." *Mettler Walloon, LLC v Melrose Tp*, 281 Mich App 184, 220; 761 NW2d 293 (2008) (citations omitted); see also MCR 7.212(C)(7) ("As to each issue, the argument must include a statement of the applicable standard or standards of review and supporting authorities . . . ."). Thus, this Court may properly reject defendant's arguments as abandoned on appeal. In exercising our discretion, we will nevertheless briefly address all of defendant's claimed allegations of ineffective assistance of counsel.

Defendant first claims that counsel was ineffective for failing to question KG about a purported sexual encounter that she had with another man at defendant's house on the night of the incident. We disagree.

KG testified that defendant "pulled my shorts down and raped me." KG gave specific details about where and how the action occurred. The jury also heard a police officer testify that he interviewed defendant and that defendant first stated that KG never came to his house, then

admitted she came to his house but did not come inside, and finally, that she went inside his house. Defendant testified that on July 11, 2017, he met KG in his driveway after she texted him and that he let her in the house. He then left. Defendant testified that when he returned, he saw KG drinking alcohol with a man on the couch, and then he saw KG having sex with the man in his bedroom.

Defense counsel questioned KG about how much she had to drink and many other details regarding her testimony. However, he chose not to question KG about defendant's allegations. Defense counsel's decision not to confront KG was a matter of trial strategy. Whether KG had consensual sex with someone other than defendant on the night of the incident does not negate any possibility that defendant committed the crime of CSC I. Moreover, defense counsel's decision to not open the door to testimony concerning the inconsistencies in defendant's stories and not to give KG the opportunity to deny defendant's testimony was a reasonable choice of trial strategy. See *Rockey*, 237 Mich App at 76.

Defendant next argues that defense counsel was ineffective for failing to argue that another male's DNA was found on KG's perianal/anal swab and for failing to question the DNA expert about how easily DNA can be transferred from one person in another. Preliminarily, defendant's argument fails because the expert testified extensively about how DNA is transferred from a person's body. She also testified about how each body is different and sheds cells at a different rates, and how bodily fluids, including semen, contain more DNA than DNA left on the surface of something.

Additionally, defendant's assertion that KG had DNA from another contributor on her swab misconstrues the testimony. The DNA expert testified that there was a minor contributor to a portion of KG's sample and that she could not determine who it was from because there was not enough DNA present. The expert did not testify that the sample contained DNA from another male; she simply testified that part of the sample was inconclusive. Defense counsel likely strategically did not want to highlight the testimony in order to leave open the opportunity for the jurors to infer that it was another man's DNA. And, despite defendant's assertion to the contrary, defense counsel asked the expert about the second contributor and the inconclusive results. He asked, "So you mean there wasn't enough DNA?" The expert testified, "Right, I—the DNA types weren't high enough for me to say that they came from Mr. Williams." Defense counsel followed up with, "So if I were to ask you was [defendant's] DNA found in sample number one, your answer would be 'no,' is that correct?" The expert replied, "Correct." Defense counsel's decision on how to question the witness was trial strategy. See *Rockey*, 237 Mich App at 76.

Defendant next argues that defense counsel was ineffective for not highlighting the lack of evidence that KG's wrists were bruised or otherwise injured. We disagree.

Defendant was charged with CSC-I, an element of which is that "[t]he actor causes personal injury to the victim . . . ." See MCL 750.520b(1)(f). Presumably, defendant is arguing that a lack of bruising on KG's wrists would aid his case because it would make it harder for the prosecutor to prove this element. However, KG testified that defendant pulled her by her wrists into the bedroom, that he pushed her onto the bed, that her wrists hurt afterward, that she had a bruise on her wrist, and also that she had vaginal bleeding and experienced a lot of pain in her

vagina for several days after the assault. The examining nurse corroborated this testimony by stating that she saw bruising on KG's wrists and that KG reported to her that she had bleeding and was experiencing a lot of pain in her vagina. There was thus sufficient evidence from which the jury could conclude beyond a reasonable doubt that defendant injured KG. Moreover, it was a reasonable trial strategy for trial counsel to avoid engaging in a more lengthy cross-examination of KG or the nurse on this topic, a conversation that could have brought *more* attention to the testimony concerning KG's injuries and pain.

Defendant next argues that defense counsel went against his defense strategy by suggesting in closing arguments that KG and defendant had consensual sex. In his brief, defendant does not cite to the specific portion of the record wherein counsel made such a suggestion. See MCR 7.212(C)(7) ("Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court."). We surmise that defendant is referring to counsel's statement that, "I guess there's an argument that could be made that [KG] was exaggerating what happened and making it worse than it really was and that it's possible that she and [defendant] had voluntary sex and she doesn't want to admit it. That would be CSC three. Even [the prosecutor] tells [the jury] she doesn't believe that, so I'm—I'm not going to belabor the point." The remainder of defense counsel's closing argument was in agreement with defendant's stated defense strategy.

KG testified that a sexual act transpired between her and defendant. Further, defendant's DNA was found on the perianal/anal swab of KG, which is a small, intimate area of her body. In the face of significant evidence that a sexual encounter with defendant occurred, defense counsel's single statement in closing argument to suggest a consensual interaction indicates a strategic attempt (albeit an incorrect one[1]) to allow the jury to convict defendant of a lesser-included offense. While use of this statement may have been below an objective standard of reasonableness, given the evidence presented at trial, even absent this fleeting statement by defense counsel, there is no reasonable probability that the result of the proceeding would have been different.

Next, defendant claims that defense counsel was ineffective for failing to object to the introduction of the evidence that he was on a tether at the time of the charged offense because the evidence was not relevant and any probative value was substantially outweighed by the unfair prejudice to defendant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. While we do somewhat question the relevancy of this evidence, defendant did initially tell the police that KG was not at his home and that he had run some errands that day. The tether evidence showed defendant's locations on the date of the incident and thus showed he had the opportunity to commit the CSC-I at the time KG stated the incident occurred. Moreover, it is not apparent that the jury gave the fact that defendant was on a tether undue weight, or that the evidence affected the outcome of the trial, particularly where the

[1] The 14-year-old victim was not old enough to give consent to sexual intercourse with defendant. See MCL 750.520b(1)(b).

jury was not advised why defendant was on a tether. The evidence related to the tether not being outcome determinative, it forms no basis for a new trial.

Finally, defendant argues that counsel was ineffective for failing to object to the admission of the serology report when it constituted hearsay and violated his constitutional right to confrontation. This is the only claim for which defendant cited to relevant authority to support his position. Nonetheless, this claim fails.

Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(d). Here, the DNA expert testified that she personally conducted the DNA analysis and generated the serology report that was entered into evidence. She testified that the report relates only to what she did with respect to the case. The report was not, then, hearsay as defendant asserts, nor did it violate his right to confrontation given that defense counsel had the opportunity to cross-examine the DNA expert about her methods, findings, and report.

Further, contrary to defendant's claim, the expert did not testify that the DNA she analyzed and found to match defendant's DNA came from semen. The expert testified that the serologist is the first person to get a piece of evidence and decides which piece of evidence would be best for DNA analysis. The serologist then takes a "cutting" from the evidence, such as a swab or item of clothing, and places it in a tube for the DNA expert's analysis. The DNA expert testified that, for this case, she received one item for DNA analysis from the serologist who suggested there was a "possible presence of seminal fluid" on the item. The DNA expert testified that, from the "sperm fraction or male fraction" of the sample, she was able to determine that it matched defendant's profile. Defendant does not contest the contents of the report and he has presented no meritorious argument that counsel was ineffective for failing to object to the admission of the report or the DNA expert's testimony.

Defense counsel thoroughly questioned all the witnesses and presented a comprehensive defense. Defendant has not established that defense counsel's performance fell below an objective standard of reasonableness. See *Anderson*, 322 Mich App at 628. Even had defense counsel's performance fallen below objective standards of reasonableness for any of the reasons stated by defendant, the likelihood that it would have prejudiced defendant is minute because the jury was able to observe KG, defendant, and the other witnesses and determine the credibility of their testimony. The jury also heard expert testimony regarding the behavior of sexual assault victims and the fact that defendant's DNA was found in KG's perianal/anal swab. "It is the jury's task to weigh the evidence and decide which testimony to believe." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008) (quotation marks and citations omitted).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto