

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 19, 2011

v

ANGELOS FITZPATRICK,

Defendant-Appellant.

No. 297688
Washtenaw Circuit Court
LC No. 08-000151-FH

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(b), for which he was sentenced to 15 months to 15 years in prison. We affirm.

Defendant and the victim met at a bar. Defendant was talking to Dan Orcutt, a friend of the victim, when the victim joined their conversation. On his way home from the bar, defendant noticed the truck that Orcutt was driving pull into a driveway. Defendant saw that the victim was in the passenger seat. Defendant turned around and returned to the place the truck was parked, but the truck was already gone. Defendant knocked on the door, and the victim opened the door and invited him in for a drink. The victim testified that she watched television with defendant for a while, and then realized that defendant was not Orcutt's close friend, as she had assumed. The victim testified that she became very afraid and that she believed defendant had followed her home. The victim testified that she told defendant she was going to bed after the television show ended. The victim testified that after she indicated she was done hanging out, defendant approached her on the couch and performed oral sex on her without her consent. She testified that defendant then forced her to perform oral sex on him, and finally, that defendant forced her to have vaginal intercourse with him. The victim testified that she struggled, repeatedly told defendant to stop, and asked him to leave. Defendant testified that all the sexual encounters between him and the victim were consensual. Defendant admitted that while they were having vaginal intercourse the victim asked him to stop, but defendant testified that he stopped immediately after the victim asked him to stop.

On appeal, defendant contends that trial counsel was ineffective for several reasons. A criminal defendant has the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 685-686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In order to prevail on an

ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994). To demonstrate that defense counsel was deficient, a defendant must overcome the strong presumption that the alleged deficiency constituted trial strategy. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). To demonstrate prejudice, a defendant must show a "reasonable probability that, but for counsel's . . . errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. Because the trial court denied defendant's motion for a *Ginther*¹ hearing or a new trial, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant first argues that defense counsel was ineffective for failing to adequately investigate the matter before trial. Specifically, defendant argues that defense counsel should have subpoenaed additional e-mails between the victim and her coworkers and that defense counsel should have subpoenaed the victim's medical records. "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). "A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments." *Grant*, 470 Mich at 486. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id.* at 485.

In this case, defense counsel's decision not to subpoena the victim's e-mails and medical records was a strategic decision concerning which evidence should be presented to the jury. Moreover, defense counsel's strategy was reasonable. Defense counsel was informed that the prosecution had already turned over all relevant e-mails relating to the alleged assault; thus, defense counsel had no reason to believe a subpoena would lead to additional relevant e-mails. And even if defense counsel performed deficiently by failing to subpoena all the victim's e-mails, defendant cannot demonstrate that any deficiency in this regard was prejudicial. The additional e-mails, which were subpoenaed by counsel on appeal and presented to the trial court with defendant's motion for a new trial, were not exculpatory and tended to corroborate the victim's claims. Defense counsel was similarly not ineffective for failing to subpoena the victim's medical records. The victim testified at trial regarding her medical reports, and these medical records, also obtained by appellate counsel, did not contain any relevant information that was not revealed during trial. Defense counsel's decision not to subpoena the medical records was a reasonable decision not to present cumulative evidence. There is no reasonable probability that but for counsel's actions the result of the proceedings would have been different.

Defendant next argues that defense counsel rendered ineffective assistance by stipulating to the fact that the victim received therapy. We find that defense counsel's decision to stipulate

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

to the fact that the victim received therapy was a reasonable trial strategy and did not constitute ineffective assistance. “Defense counsel is given wide discretion in matters of trial strategy.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). It was reasonable for defense counsel to stipulate to the fact that the victim received therapy in order to avoid the potentially damaging testimony that the therapist would have given if called to testify at trial.

Defendant also argues that defense counsel was ineffective for failing to cross-examine the prosecution’s expert witness. However, defense counsel did challenge the expert’s qualifications when the prosecution moved to have the expert qualified, and defense counsel objected to the expert after conducting extensive voir dire. The fact that defense counsel decided not to cross-examine the expert was a reasonable trial strategy. See *Horn*, 279 Mich App at 39. The expert’s testimony was confined to articulating the behaviors of sexual assault victims after an assault. Specifically, the expert testified that victims of sexual assault frequently delay reporting the assault and that it is not uncommon for victims of sexual assault to engage in normal activities after the assault occurs. The expert did not testify concerning anything else and her testimony was very brief. Defense counsel may have wanted to limit the expert’s testimony and avoid highlighting it through extensive cross-examination. Further, defendant has not shown how cross-examination of the expert would have changed the outcome of the trial, and does not identify any questions that defense counsel should have asked on cross examination. Defendant has failed to establish a reasonable probability that cross-examination of the prosecution’s expert would have changed the result of the proceedings.

Defendant additionally argues that defense counsel was ineffective for failing to call an expert witness and for failing to call character witnesses on defendant’s behalf. “[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). In this case, defendant’s defense was consent. Defendant testified regarding the incident and was therefore able to present his defense of consent without an expert witness or character witnesses. Defendant has failed to show that he was deprived of a substantial defense. Further, we note that counsel’s decision not to call character witnesses was likely strategic. While MRE 404(a)(1) permits an accused to call character witnesses, the prosecution is allowed to introduce evidence to rebut those witnesses. Counsel may well have wished to avoid any such rebuttal evidence from the prosecution.

Defendant also argues that defense counsel was ineffective for failing to inform him that he had a right to counsel and a right to remain silent when he voluntarily went to the police station to take a polygraph test. Defendant also argues that defense counsel was ineffective for failing to move for a *Walker*² hearing in order to suppress statements that he made to police after the polygraph test. But defendant cannot establish that counsel was ineffective in this regard because defendant was not prejudiced by the use of the statements he made to the police. Thus, even if counsel performed deficiently by failing to inform defendant of his rights or by failing to

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

move to suppress the statements, defense counsel's failure did not affect the outcome of the proceedings.

Defendant told the police during his interview that when he pulled into the victim's driveway he "had come up with the idea of saying to [the victim] that he would like to buy some of her Adderall pills." During trial, the prosecution impeached defendant with his statement about the Adderall pills. The prosecution asked defendant whether he came up with a reason to explain why he was at the victim's house and defendant stated that he did not have any specific reason or plan. The prosecution then asked, "Have you ever said anything different about that? About coming up with a reason about buying or using Adderall when you went up to the front door[?]" Defendant replied that he never wanted to buy or use Adderall, but that he "did think it was a way to use as an icebreaker if [the victim] asked what was going on." There was no further use of defendant's statements to the police during trial.

Defendant did not admit to the sexual assault while talking to the police, and none of his statements was overtly incriminating. Further, the use of defendant's statements to the police during trial was limited. Accordingly, defendant cannot establish that but for counsel's failure to inform him of his right to remain silent (which allegedly resulted in defendant talking to the police after the polygraph test), the result of the proceedings would have been different. *Strickland*, 466 US at 694. Furthermore, defendant's statement about having a plan to break the ice with the victim was consistent with his testimony that he stopped by to hang out and that everything that occurred thereafter was consensual. Lastly, the prosecution's impeachment of defendant with his statement concerning the victim's Adderall did not significantly suggest that defendant was lying. Defendant has failed to demonstrate that counsel's failure to advise him of his rights and counsel's failure to move for a *Walker* hearing to suppress the statements affected the outcome of the proceedings.

In his statement of the questions presented, defendant challenges the trial court's denial of his request for a *Ginther* hearing regarding his claims of ineffective assistance of counsel. However, defendant has failed to address this claim in the body of his brief on appeal. When a defendant raises an issue in his statement of the questions presented but fails to argue the merits of the issue in his brief, the issue is abandoned. *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995).

Finally, defendant argues that his Fifth and Sixth Amendment rights were violated by the use of his statements to the police after his polygraph test. Defendant failed to object to the use of these statements in the trial court. Therefore, we review defendant's claim for outcome-determinative plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). In this case, defendant cannot demonstrate that his substantial rights were affected by the use of his statements because, as discussed previously, the limited use of his statements to the police during trial did not affect the outcome of the proceedings. Therefore, defendant is not entitled to relief.

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Pat M. Donofrio