

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
September 29, 2011

v

L. W. PITTMAN, JR.,

Defendant-Appellant.

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No. 298680  
Wayne Circuit Court  
LC No. 09-024303-FC

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

PER CURIAM.

Following a bench trial, defendant was convicted of eight counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). The trial court sentenced defendant to eight consecutive prison terms of 25 to 75 years. He appeals by right. We affirm.

Defendant's convictions arise from an attack on the 11-year-old daughter of defendant's sexual partner while the victim's mother was not in the house. The victim promptly reported both the assault and defendant's identity as the perpetrator to a neighbor, her mother, a nurse, and a police officer. A physical examination revealed recent physical trauma to the victim's vagina. Defendant denied molesting the victim, but claimed that she told him that another one of her mother's sexual partners had "messed with" her.

Defendant argues on appeal that defense counsel was ineffective for eliciting from both the victim's mother on cross-examination and from defendant on direct examination information concerning defendant's prior plea-based conviction for attempted second-degree criminal sexual conduct. Defendant contends that defense counsel's questioning "opened the door" for the prosecutor to further pursue the subject, thereby eliciting damaging details about the prior offense and bolstering the victim's testimony.

Because defendant did not raise this ineffective assistance of counsel issue in the trial court or move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973), our review is limited to errors apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The ultimate constitutional issue whether

an attorney's assistance deprived a defendant of his Sixth Amendment right to counsel is reviewed de novo. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

To establish a claim of ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. A counsel's performance was deficient if it fell below an objective standard of professional reasonableness. The performance prejudiced the defense if it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. [*People v Fyda*, 288 Mich App 446, 450; 793 NW2d 712 (2010).]

A defendant must overcome the presumption that defense counsel's action was sound trial strategy under the circumstances. *LeBlanc*, 465 Mich at 578.

Defendant's ineffective assistance of counsel claim involves defense counsel's examination of witnesses. In general, the questioning of witnesses is a matter of trial strategy that this Court will not second-guess. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The record clearly demonstrates that defense counsel made a strategic decision to question the victim's mother and defendant about the circumstances surrounding defendant's prior conviction. The context of the questioning indicates that defense counsel was attempting to use the prior accusations and conviction to explain defendant's behavior on the night of the charged offense. Whether this strategy may be considered sound depends on the apparent benefit to be gained compared to the potential prejudice that might result.

In this case, the risk that the trier of fact would improperly use the information to evaluate defendant's guilt for the charged offense was minimal. First, defendant was tried before the court, and not a jury. A trial court "is less likely to be deflected from the task of fact-finding by prejudicial considerations that a jury might find compelling." *People v Edwards*, 171 Mich App 613, 619; 431 NW2d 83 (1988). Second, the trial judge was already aware of the conviction because it was the subject of a pretrial motion by the prosecutor and a police report containing detailed information about the prior case was attached to the motion. Defense counsel's decision to explore the subject during trial did not cause the court to become aware of the conviction, but rather gave defendant the opportunity to assert his innocence of that offense, provide a reason for his plea, and use the information to explain his conduct associated with the present case. Defendant has not overcome the presumption that defense counsel's decision to address the prior conviction during questioning was sound trial strategy under the circumstances. *LeBlanc*, 465 Mich at 578.

Furthermore, defendant cannot show prejudice. There is no reasonable probability that the prior conviction, which defendant explained and which involved a much younger victim, had an effect on the outcome of the present case. The occurrence of a sexual assault was corroborated by the victim's physical examination. Defendant's identity as the perpetrator depended primarily on the victim's credibility and defendant's undisputed access to the victim during the period immediately before the assault was reported. The trial court found the victim's

testimony to be “compelling and truthful,” and there is no reason to believe that the testimony concerning defendant’s prior conviction had any effect on the trial court’s determination that the victim and other prosecution witnesses were all credible.

We affirm.

/s/ Deborah A. Servitto

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly