

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 156491

LC No. 91-2803-FC

LINSEY SMITH,

Defendant-Appellant.

Before: McDonald, P.J., and O’Connell and M.J. Talbot,* JJ.

O’CONNELL, J. (dissenting).

I respectfully dissent. In an effort to show that defendant was cooperative, defense counsel elicited testimony from Sergeant Smith that defendant voluntarily turned himself in to the police the day after the alleged incident, that defendant offered no resistance, that he was quiet and peaceful, and that he “never said a word” when his *Miranda*¹ rights were read to him. As made clear on remand, defense counsel’s trial strategy was to show that his client made himself available to the police, was cooperative, and, quite simply, was a nice person. This strategy was consistent with defendant’s “accident” defense.

In light of these facts, I agree with the trial court that defense counsel provided effective assistance of counsel. 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. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Murph*, 185 Mich App 476, 479; 463 NW2d 156 (1990), rehearing resulted in remand on other grounds 190 Mich App 707; 476 NW2d 500 (1991). The fact that defense counsel’s strategy failed does not constitute ineffective assistance of counsel.

I would affirm.

/s/ Peter D. O’Connell

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

* Circuit judge, sitting on the Court of Appeals by assignment.