

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EUGENE LUTTRELL, JR.,

Defendant-Appellant.

UNPUBLISHED

April 30, 1999

No. 203129

Mason Circuit Court

LC No. 96-001351 FC

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(ii); MSA 28.788(2)(1)(b)(ii), for which he was sentenced to fourteen to thirty years in prison. The trial court denied his motion for a new trial on the ground of ineffective assistance of counsel. Defendant appeals as of right. We affirm.

The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish that his right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Defendant must also overcome a strong presumption that counsel's assistance constituted sound trial strategy and show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant first contends that counsel was ineffective for failing to object to testimony that he was a suspect in the murder of his lover, the victim's grandmother. Although such evidence was not relevant to the elements of the crime charged, it was relevant to two aspects of the defense: (1) to explain the basis for a statement by defendant's sister that it was not a good idea for the victim to stay with him after his lover's death because it would look bad to the police; and (2) to support defendant's explanation for leaving his truck to the victim. There being a sound trial strategy for the admission of

such evidence, counsel was not ineffective for failing to object to the evidence when it was mentioned by the prosecution's witness. That being the case, witness Coley's testimony that the victim believed defendant had killed her grandmother, even if inadmissible as cumulative evidence under MRE 403,¹ could not have had such an impact that it affected the outcome of the trial and thus did not warrant a new trial.

The prosecutor's cross-examination of defendant regarding his adulterous relationships was proper to impeach defendant's testimony on direct examination that he had never had an extramarital affair, *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995); *People v Cross*, 202 Mich App 138, 144-145; 508 NW2d 144 (1993), and, accordingly, counsel was not ineffective for failing to object to it. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Assuming that counsel was ineffective for failing to object to evidence that defendant began his relationship with the victim's grandmother when he was seventeen, the court's instruction that the jury was not to consider evidence of other improper sexual conduct except as it related to credibility was sufficient to dispel any prejudice. Cf. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Therefore, the admission of such evidence was not likely to have affected the outcome of the trial and did not warrant a new trial.

Accordingly, defendant failed to show that he was denied the effective assistance of counsel.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Jeffrey G. Collins

¹ The testimony was not hearsay as defendant contends because it was not offered to prove the truth of the matter asserted, i.e., that defendant had in fact killed the victim's grandmother. MRE 801(c).