

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON MICHAEL WOOD,

Defendant-Appellant.

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UNPUBLISHED

June 19, 2014

No. 314909

Calhoun Circuit Court

LC No. 2012-003124-FC

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Defendant Aaron Michael Wood appeals as of right his jury trial convictions of five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and one count of assault with intent to commit criminal sexual conduct, MCL 750.520g(1). Defendant was sentenced to concurrent terms of 225 to 480 months' imprisonment for his CSC I convictions and 57 to 120 months' imprisonment for his assault with intent to commit criminal sexual conduct conviction. He was given 54 days' credit. We affirm.

Defendant first argues that he received ineffective assistance of counsel. "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). Where a defendant has failed to move for a new trial or evidentiary hearing,<sup>1</sup> such as here, our review of the issue is limited to mistakes apparent on the record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish a claim of ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (citations omitted). The defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). There is a strong presumption that trial counsel's action was sound trial strategy. *Toma*, 462 Mich at 302. That a particular trial strategy does not work does not render defense counsel's performance deficient. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). "Decisions regarding what evidence to present and whether to call or question

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

witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002) (citations omitted). “[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) (citation omitted). Additionally, the failure to cross-examine a witness only constitutes ineffective assistance if it deprives defendant of a substantial defense. *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). A defendant cannot be deprived of a substantial defense if he was able to assert his offered theory of defense at trial, even if he was unable to call a witness to testify in support of that theory because of counsel’s action. *Dixon*, 263 Mich App at 398.

The prejudice prong is met if the defendant can show that “but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different.” *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012) (citations omitted).

Defendant first asserts that defense counsel provided ineffective assistance because he failed to call two Child Protective Services (CPS) witnesses despite counsel’s reference to them in opening statement and then failed to explain to the jury why he decided not to call the witnesses.

In light of the strong presumption that defense counsel’s action was sound trial strategy, *Toma*, 462 Mich at 302, and the presumption that a decision to call a particular witness is a matter of trial strategy, *Davis*, 250 Mich App at 368, we conclude that defendant has not shown that “his attorney’s representation fell below an objective standard of reasonableness.” *Toma*, 462 Mich at 302. Regarding counsel’s decision not to call the CPS witnesses, “the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense,” *Dixon*, 263 Mich App at 398. The record shows that defendant advanced his theory of defense even without calling those witnesses. Thus, defendant was not deprived of a substantial defense, and we cannot conclude that defense counsel’s decision not to call the witnesses constituted ineffective assistance. See *id.*

With respect to the failure of counsel to explain to the jury why the CPS witnesses were not called, we note that nothing in the record reveals why counsel chose not to offer an explanation. Defense counsel instead, in his closing, chose to turn the absence of CPS testimony in defendant’s favor. He argued that the prosecution chose not to call witnesses, including CPS workers, who would have testified to the minors’ failure to disclose any allegations against defendant. Thus, no error is apparent from the record, and we conclude that defendant has failed to rebut the strong presumption that counsel’s action was sound trial strategy.

Defendant next asserts that defense counsel’s failure to cross-examine one of the victims who testified at trial constituted ineffective assistance.<sup>2</sup> “Decisions regarding . . . whether to . . .

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<sup>2</sup> We note that defendant’s argument is erroneously based on a claim that no cross-examination of the witness took place. However, defense counsel actually cross-examined the witness when the prosecution called the witness as a rebuttal witness. Thus, we limit our consideration of this argument to defense counsel’s failure to cross examine the witness during the prosecution’s case-in-chief.

question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *Davis*, 250 Mich App at 368. The record shows that defense counsel stated on the record that his decision not to cross-examine the witness during the prosecution’s case-in-chief was a strategic decision. The fact that a particular trial strategy did not work does not render defense counsel’s performance deficient. *Petri*, 279 Mich App at 412. Defendant was not deprived of a substantial defense because he advanced his desired theory at trial. *Dixon*, 263 Mich App at 398. Because defendant was not deprived of a substantial defense, defense counsel was not ineffective by failing to cross-examine the victim. See *Hopson*, 178 Mich App at 412.

Finally, defendant asserts that defense counsel was ineffective because defense counsel failed to seek a pretrial ruling on the admissibility of one of the victim’s medical records. Related to this argument, defendant challenges his counsel’s decision to wait and confirm the admissibility of the medical records until after the victim testified at trial.

Defendant’s argument that defense counsel was ineffective for failing to seek a pretrial ruling on the report’s admissibility overlooks the fact that defense counsel in fact moved the trial court before trial to rule on whether the victim’s records were admissible. The trial court ruled on this motion, stating that the records would be admitted, subject to its approval. Because defense counsel in fact sought a pretrial ruling on whether the victim’s medical records were admissible, there was no failure to seek a pretrial ruling that could form the factual basis for deficient performance. See *Hoag*, 460 Mich at 6 (“[d]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.”).

However, had defense counsel confirmed the medical records’ admissibility before the victim testified, defense counsel would have at least been aware, before the victim’s testimony, that the medical records were inadmissible. Defense counsel then may have been able to admit some of victim’s statements contained in the medical records into evidence, to the extent that he cross-examined the victim and the medical records were inconsistent with her testimony. See *People v Weatherford*, 193 Mich App 115, 122; 483 NW2d 924 (1992); MRE 613(b). Consequently, we conclude that counsel’s actions related to the medical records were objectively unreasonable. However, we do not conclude that this action prejudiced defendant. Defense counsel sought to admit the medical records into evidence in order to attack the victim’s credibility. Although the records were not admitted, defendant still thoroughly attacked the victim’s credibility. Consequently, we conclude that there is no reasonable probability that the outcome would have been different but for defense counsel’s deficient performance. See *Trakhtenberg*, 493 Mich at 51.

Defendant also argues that the trial court abused its discretion by excluding the victim’s medical records from trial and that it deprived him of his right to present a defense. Defendant,

however, fails to address the merits of these arguments, and thus, has abandoned them. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Donald S. Owens

/s/ Cynthia Diane Stephens