STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY KINDLE,

Defendant-Appellant.

UNPUBLISHED
July 16, 1996

No. 177459
LC No. 93-306577

Before: Hood, P.J., Markman and A.T. Davis*, JJ.

PER CURIAM.

Following a delinquency hearing, defendant, a juvenile, was found guilty of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). He now appeals the order of the Wayne Probate Court committing him to the Michigan Department of Social Services. We affirm.

The charge against defendant, who was 13 years of age at the time of the offense, stems from allegations by his six-year-old cousin that he put his finger into her vagina.

Defendant first argues that he was denied effective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court will not substitute its judgment for that of counsel's 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).

Defendant alleges seven instances of ineffective assistance of counsel. First, he argues that defense counsel erred by waiving a jury trial in favor of a bench trial when he was aware of the fact that

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

the referee was a former prosecutor and the former head of the prosecutor's child abuse unit. We disagree. There is no basis for questioning the integrity of a referee simply on the ground that she was formerly a prosecutor and the head of the prosecutor's child abuse unit. It cannot be said that, as a result of the referee's former positions, she is automatically unable to remain unbiased and impartial when acting as the finder of fact in a bench trial. As such, there is no basis for an ineffective assistance of counsel claim on that basis. Furthermore, the decision to waive a jury trial is a matter of trial strategy, and defendant has failed to overcome the presumption of sound trial strategy. In light of the victim's age and the nature of the crime, we are not persuaded that the decision to waive a jury trial was not sound trial strategy. Defendant has also failed to demonstrate that, but for counsel's actions, the outcome of the proceedings would have been different.

Second, defendant argues that defense counsel erred when he stipulated to the testimony of Dr. Borgereing concerning the results of his examination of complainant. Again, the decision to stipulate to the testimony was a matter of trial strategy and did not constitute ineffective assistance of counsel.

Third, defendant argues that defense counsel erred when he failed to object to the hearsay testimony given by Tecora Thomas concerning statements made by the emergency room physician. The erroneous admission of the hearsay testimony is harmless if the testimony is cumulative to other properly admitted evidence. *People v Crawford*, 187 Mich App 344, 353; 467 NW2d 818 (1991). Tecora Thomas' testimony concerning the statement of the emergency room physician was cumulative to the testimony of Dr. Borgereing, which was properly admitted into evidence. Therefore, defendant has failed to show that, but for defense counsel's failure to object, the outcome of the proceedings would have been different.

Defendant's fourth claim concerns defense counsel's failure to object to the hearsay testimony of Tecora Kindle concerning statements made by complainant identifying defendant as the perpetrator. However, the statements at issue fall under MRE 803(4), the hearsay exception dealing with statements made for purposes of medical diagnosis or treatment. *People v Meeboer*, 439 Mich 310; 484 NW2d 621 (1992). Since the statements were not hearsay, an objection would have been futile and would not have affected defendant's changes of acquittal. *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989).

Defendant's fifth claim of ineffective assistance of counsel is that defense counsel erred by calling Officer Williams as a witness. The decision whether to call witnesses is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant has failed to overcome the presumption of sound trial strategy by demonstrating that his counsel's decision to call the witness affected the outcome of the case. The defense theory was that, while complainant was penetrated by someone or something, defendant was not the perpetrator. Officer Williams' testimony indicated that something traumatic happened to complainant, but did not incriminate respondent.

Defendant's sixth claim of ineffective assistance is that defense counsel's decision to call Addie Kindle as a witness was error because she supported complainant's credibility. Again, the decision to call witnesses is a matter of trial strategy. *Id*. Although Addie Kindle testified that she believed

complainant to be a truthful person, she also gave favorable testimony to the defense. Her testimony that she saw complainant playing with a balloon stick tended to support defendant's theory that the victim injured herself.

Finally, defendant claims that defense counsel erred when he questioned him concerning two other petitions pending against him. However, because the trial court objected to the question before defendant answered, no inadmissible or prejudicial testimony was heard by the jury. Therefore, defendant has not shown any prejudice resulting from the question.

Defendant also argues that the trial court erred in allowing the testimony of Tecora Thomas concerning statements made by complainant to the emergency room physician and nurse on the night of the sexual assault. Because defendant failed to object to this testimony, this issue is not preserved for appellate review. *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). Even if we were to review this issue, we would find that the statements were admissible as a hearsay exception under MRE 803(4). *Meeboer, supra*.

Defendant next claims that his jury waiver was invalid. We disagree. A review of the record reveals that the requirements of MCR 6.402 were satisfied in this case. See *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993).

Defendant further argues that the trial court abused its discretion when it determined that complainant had sufficient intelligence and sense of obligation to tell the truth and allowed her to testify. Because defendant failed to object to the admission of complainant's testimony on the ground that she was not competent to testify, he waived his right to assert error on appeal. *People v Cobb*, 108 Mich App 573, 575; 310 NW2d 798 (1981).

Defendant next argues that the trial court abused its discretion by allowing the prosecution to use leading questions on direct examination. We disagree. The decision whether to permit leading questions is within the discretion of the trial court. *People v Hicks*, 2 Mich App 461, 466; 140 NW2d 572 (1966). Leading questions may be used on direct examination to the extent necessary to develop a witness' testimony. MRE 611(c). Given the nature of the testimony and the witness' age, we are not persuaded that the trial court abused its discretion in allowing the use of leading questions.

Finally, defendant argues that the trial court's decision to commit him to the Department of Social Services (DSS) was erroneous. We disagree. A trial court's decision to commit a juvenile to the DSS is reviewed for an abuse of discretion. *In re Ricks*, 167 Mich App 285, 295; 421 NW2d 667 (1988). It appears from the record that the referee considered all of the relevant

evidence presented to the court. We conclude that the referee's decision was not an abuse of discretion.

Affirmed.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Alton T. Davis