

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANKLIN BRADFORD ANDERSON,

Defendant-Appellant.

UNPUBLISHED
December 22, 2009

No. 289142
Wayne Circuit Court
LC No. 08-008141-FH

Before: K. F. Kelly, and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of three counts of criminal sexual conduct in the third degree, MCL 750.520d(1)(a). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The 14-year-old complainant testified that defendant repeatedly assaulted her while she was in foster care in April and June 2007. She did not immediately report the assaults, but did so once she returned to living with her family. During trial, complainant admitted that when she was first interviewed by a police officer she lied and told the officer that defendant forced himself on her. Complainant noted that her mother was present during the interview and that complainant was ashamed that she actually acceded to defendant's request to remove her clothing. During a later police interview, complainant told the officer that defendant had not used physical force. Defense counsel presented no witnesses at trial, and defendant did not testify.

Defendant now argues that he did not receive the effective assistance of counsel at trial because counsel promised the jury it would hear testimony from police officer witnesses who were never produced at trial. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial

outcome would have been different.” *Id.* at 663-664. Because defendant did not move for a new trial or a *Ginther*¹ hearing before the trial court, our review of this claim is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

During opening statement, counsel referenced the fact that the jury would hear that complainant “has already given two diametrically different versions of what supposedly happened” and stated that the jury would hear from the police officers who would testify about complainant’s completely different versions of the alleged assaults during her two interviews. However, during closing argument, counsel explained that he had determined that the police testimony was unnecessary to show that complainant was not worthy of belief, given her admissions during trial.

On the record before us, we find defense counsel’s decision not to call the police witnesses a deliberate one. Decisions concerning what witnesses to call are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Counsel’s decision was strategic. The jury had already been shown that complainant provided inconsistent versions of the assaults. The officers’ testimony would not have appreciably added to this admission. And had counsel called the officers, it presumably could have opened the door to possibly damaging testimony concerning the officers’ observations during the interviews. We decline defendant’s request to reevaluate counsel’s obvious trial strategy after the fact. “[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel’s competence with the benefit of hindsight.” *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Counsel’s strategy did not constitute ineffective assistance of counsel simply because it did not work. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).