

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT FRANCIS WARREN,

Defendant-Appellant.

UNPUBLISHED

August 9, 1996

No. 173806

LC No. 93-001738

Before: Cavanagh, P.J., and Hood and J.J. McDonald,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and was sentenced to concurrent eight-to-fifteen-year terms of imprisonment on each of the convictions. Defendant now appeals as of right. We affirm.

For ease of analysis, we have combined the issues raised in the brief filed by appellate counsel and in defendant's pro per brief.

I

Defendant first argues that his trial counsel was ineffective. A defendant who claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den ___ US ___; 115 S Ct 923; 140 L Ed 2d 802 (1995).

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

Defendant first contends that defense counsel was ineffective for moving to consolidate the charges involving the two complainants.¹ We find no error requiring reversal. Defense counsel argued in the trial court that it would be in the interests of justice and fairness to consolidate the cases, and that the failure to do so would be prejudicial to defendant. Consolidation of the cases was permissible under MCR 6.120(C). Defendant himself unequivocally requested that the two cases be consolidated and stated that consolidation would be to his benefit. Defendant cannot now claim error when he acquiesced to counsel's representations. *People v Barclay*, 208 Mich App 670, 672-673; 528 NW2d 842 (1995).

Moreover, defense counsel argued at trial that the accusations of criminal sexual abuse were fabricated by the two complainants and stressed inconsistencies in their stories. Thus, the decision to consolidate the cases was a matter of trial strategy. The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel. *People v Murph*, 185 Mich App 476, 479; 463 NW2d 156 (1990), modified with respect to sentencing 190 Mich App 707; 476 NW2d 500 (1991).

Defendant also argues that he received ineffective assistance of counsel because defense counsel failed to object to the inaccuracies in the presentence report. In the absence of an evidentiary record on defendant's claim, our review is limited to deficiencies apparent on the record. *People v Johnson (On Rehearing)*, 208 Mich App 137, 142; 526 NW2d 617 (1994). We have reviewed the record and find no error requiring reversal. At sentencing defendant stated that the presentence report was accurate. There was testimonial support for the statement in the report that both digital and vaginal penetration had occurred. Defense counsel addressed the discrepancy regarding defendant's participation in a substance abuse program at the sentencing hearing. Defendant's remaining three allegations of errors in the presentence report are unsupported by the record. Defendant has not met his burden of showing that his counsel was ineffective.

II

Defendant next argues that his sentences are disproportionate. However, defendant's sentences are within the guidelines and are therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has not presented the sentencing court and this Court with any mitigating factors sufficient to overcome the principle of proportionality. *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). Defendant's sentences are proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

III

Defendant also argues that he is entitled to resentencing because of inaccuracies in the presentence report. However, defendant failed to object to the alleged inaccuracies at sentencing

and in fact indicated that the report was accurate. Because defendant failed to preserve this issue, we decline to review it. *People v Sharp*, 192 Mich App 501, 504; 481 NW2d 773 (1992).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Harold Hood

/s/ John J. McDonald

¹ Defendant was charged with two counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct with regard to the complainant in the instant case, and two counts of second-degree criminal sexual conduct with regard to the complainant's cousin. The jury convicted defendant of four counts of two counts of second-degree criminal sexual conduct with regard to the complainant and acquitted him of the charges involving the cousin.