

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID PAUL ROYCE,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 196907
Marquette Circuit Court
95-030669-FH

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault and infliction of serious injury (domestic assault), MCL 750.81a; MSA 28.276(1). Defendant was sentenced to one year and four months' to two years' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that he was denied effective assistance of counsel when his attorney failed to research the interplay between Michigan's reporting statute, MCL 750.411; MSA 28.643, and physician-patient privilege statute, MCL 600.2157; MSA 27A.2157. Defendant asserts that had defense counsel properly researched the matter, testimony of the emergency room nurse and physician who attended to the victim would have been excluded from evidence under the privilege statute.

Even if we were to agree with defendant that the trial court's conclusion about the interplay between the two statutes was erroneous, we reject defendant's allegation that he was denied effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, 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 proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 112; 115 S Ct 923; 130 L Ed 2d 802 (1995). Accordingly, any deficiencies in counsel's performance must be prejudicial to defendant in order to constitute ineffective assistance. *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

“[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations.” *Strickland, supra*, 466 US at 690-691. We find defense counsel’s decision not to investigate further to have been reasonable. Defense counsel’s duty to provide competent and zealous representation is owed to his client, see MRPC 1.1, 1.3, not to the victim. In this case, the privilege belonged to the victim, not defendant. Accordingly, the privilege should only have been invoked if she determined it was in her best interests to do so. Although the victim did testify on defendant’s behalf, it cannot be assumed that all of her interests coincided with those of defendant. Further, “[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.” MRPC 4.3. As defendant’s advocate, any advice defense counsel might have given the victim about invoking the physician-patient privilege would not have been disinterested.

Further, given that defendant had no stake in protecting the confidentiality of the physician-patient relationship at issue, his assertion that the privilege should have been invoked on his behalf appears to us to be motivated only by the desire to bury damaging evidence. This is not a reasonable justification for invoking the privilege. “The privilege is to be used for preserving legitimate confidential communications, not for suppressing the truth.” *People v Lawrence Johnson*, 111 Mich App 383, 389; 314 NW2d 631 (1981).

We therefore conclude that defendant has failed to establish that defense counsel’s performance was objectively unreasonable. Additionally, had defendant established that defense counsel’s performance was unreasonable under prevailing norms, his argument would have still failed due to the fact that he has not shown that he was prejudiced by defense counsel’s performance. Based on the evidence that would have remained, we have not been convinced that there is a reasonable probability that but for counsel’s alleged error the outcome of the proceedings would have been different. Finally, we note that defendant’s claim that *People v Armentero*, 148 Mich App 120; 384 NW2d 98 (1986) supports his argument is erroneous. Unlike the case at hand, the issue in *Armentero* involved a privilege actually held by the defendant (spousal privilege). *Id.* at 127. Further, the *Armentero* Court concluded that the counsel’s failure to invoke the defendant’s spousal privilege in that case did not evidence ineffective assistance. *Id.* at 130.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Richard A. Bandstra