

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSIE E. STRONG,

Defendant-Appellant.

UNPUBLISHED

June 26, 1998

No. 199581

Oakland Circuit Court

LC No. 96-144562-FH

Before: Hood, P.J., and MacKenzie and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of unlawful use of a self-defense spray device, MCL 750.224d(2); MSA 28.421(4)(2). Defendant was sentenced to one year probation. She now appeals as of right. We affirm.

On appeal, defendant first argues that there was insufficient evidence to support her convictions. We disagree. In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995). To prove unlawful use of a self-defense spray device, the prosecution must establish that the defendant: (1) used a self-defense spray device (2) to eject, release, or emit, (3) orthochlorobenzalmalononitrile or oleoresin capsicum (3) at another person and (4) did not use the self-defense spray in the protection of a person or property. MCL 750.224d; MSA 20.421(4)(2).

Here, defendant admitted that, during an altercation, she sprayed Gary Swindall, her ex-husband, in the face with mace. Swindall testified that at no time during the incident did he threaten or strike defendant. Peggy Collyer testified that, even though she never spoke to or approached defendant, defendant screamed at her and sprayed her in the face with mace. Furthermore, Collyer stated that defendant was smiling during the incident and did not appear to be in fear. A police officer testified that defendant gave him the canister of mace she said she used during the incident. That canister, listing orthochlorobenzalmalononitrile as one of its ingredients, was admitted at trial. Viewing

this evidence in a light most favorable to the prosecution, we find that there was sufficient evidence to permit a rational trier of fact to conclude beyond a reasonable doubt that defendant committed two counts of unlawful use of a self-defense spray device.

Next, defendant contends that she was denied effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's representation so prejudiced the defendant as to deprive her of a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court will not second-guess trial counsel's strategic decisions. *People v Reed*, 449 Mich 375, 384; 535 NW2d 496 (1995).

Defendant first argues that her trial counsel was ineffective for stipulating to strike an expert witness who would have testified as to the chemical contents of the spray-device container. We disagree. Decisions concerning what evidence to present are presumptively strategic. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Defendant can neither overcome this presumption nor establish prejudice where, by stipulating to the contents that were listed on the can she handed to the police, defense counsel avoided a costly continuance and kept the issue focused on defendant's self-defense theory.

Next, defendant argues that counsel was ineffective for stipulating to the use of the term "mace," rather than insisting that the prosecutor and judge use its extremely long chemical name. We disagree. The stipulation simplified the trial regarding an uncontested issue. Therefore, defendant has neither overcome the presumption of trial strategy nor established prejudice.

Defendant also claims that counsel was ineffective for failing to request CJI2d 7.20, which states that the prosecution must prove that defendant did not act in self-defense. We disagree. CJI2d 7.20 need not be given where the court has already instructed the jury on the prosecution's general burden to prove the defendant's guilt beyond a reasonable doubt, as the court did in this case. See *People v Brown*, 34 Mich App 45, 47; 190 NW2d 701 (1971). Furthermore, the court instructed the jury on the issue of self-defense three times. Therefore, because a request for CJI2d 7.20 would have been futile, defendant was not denied the effective assistance of counsel by trial counsel failure to make the request. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

Next, defendant argues that counsel was ineffective for failing to object to the prosecutor's failure to establish that a police officer obtained defendant's permission before interviewing her son. However, defendant has waived this argument by failing to cite any authority for this proposition. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995).

Defendant next argues that counsel was ineffective for failing to call defendant's son's school social worker to testify about Gary Swindall's prior acts of violence. We disagree. Even assuming the statements were admissible hearsay under 803(4), the decision whether to call a witness is a matter of sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Failure to call

a witness or present other evidence constitutes ineffective assistance of counsel only if it deprived defendant of a substantial defense that would have affected the outcome of the proceeding. *Id.* Here defendant has not overcome the presumption that trial counsel's decision not to call the social worker was sound trial strategy.

Finally, defendant argues that counsel was ineffective for failing to introduce evidence concerning Swindall's alleged acts of violence toward her that occurred in 1988 during their marriage . Defendant claims the evidence would have substantiated her self-defense argument by showing that she had a reason to fear Swindall. Because trial counsel presented other evidence to support defendant's claim of self-defense, defendant has not met her burden of demonstrating that counsel's failure to present this evidence deprived her of a substantial defense that would have affected the outcome of the proceeding. *Daniel, supra* at 58.

Affirmed.

/s/ Harold Hood

/s/ Barbara B. MacKenzie

/s/ Martin M. Doctoroff