

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GOLDIE ARMOND ZIELIEKE,

Defendant-Appellant.

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UNPUBLISHED

June 25, 1999

No. 200891

Macomb Circuit Court

LC No. 93-003238 FC

Before: Gage, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree criminal sexual conduct (sexual penetration with a person under thirteen years of age), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). The trial court sentenced defendant to three to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that he was entitled to a new trial on the basis that he received ineffective assistance of counsel because defense counsel failed to interview two witnesses who could have seriously impeached the victim's credibility. To justify reversal under the state and federal constitutions for ineffective assistance of counsel, a defendant must affirmatively demonstrate that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). The defendant must overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). The decision whether to call witnesses is a matter of trial strategy that can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant argues that defense counsel forgot about two potential witnesses who would have contradicted the victim's testimony that one of the witnesses had accompanied the victim to defendant's home, and the victim's testimony that she told the other potential witness about the assault on the day it

occurred. Even assuming *arguendo* that defense counsel unreasonably failed to call the potential witnesses, defendant has not shown that this failure prejudiced him. The *Ginther*<sup>1</sup> hearing did not reveal that either potential witness could have disputed the victim's testimony regarding the circumstances of defendant's assault. Furthermore, in light of the fact that defense counsel made several efforts at trial to impeach the victim's credibility by highlighting inconsistencies in her statements to the police, at the preliminary examination and at trial, the fact that the potential witnesses would have disputed various details of plaintiff's testimony that were unrelated to the actual assault would not likely have made a difference in the outcome of the trial. Therefore, we conclude that because defendant was not deprived of a substantial defense, his claim of ineffective assistance must fail. *Hoyt, supra*.

Defendant also argues that the trial court erred in denying his motion for a new trial based on newly discovered evidence without conducting an evidentiary hearing. Given defense counsel's testimony that he was aware of the potential witnesses prior to trial and our above conclusion that the potential witnesses' testimony would not have provided defendant a substantial defense, we cannot conclude that the trial court abused its discretion in denying defendant's motion for new trial. *People v Davis*, 199 Mich App 502, 515-516; 503 NW2d 457 (1993) (To merit a new trial on the basis of newly discovered evidence, a defendant must show that the evidence is newly discovered, is not merely cumulative, would probably have caused a different result, and was not discoverable and producible at trial with reasonable diligence; newly discovered evidence is not a ground for new trial where it would merely be used for impeachment purposes.).

Lastly, defendant claims that the trial court erred in assessing five points on offense variable twenty-five (OV 25). We note that defendant's position is arguably moot because it appears that defendant has already served his minimum three-year sentence. *People v Bailey (On Remand)*, 218 Mich App 645, 648; 554 NW2d 391 (1996). Moreover, defendant's argument is without merit because a review of the sentencing hearing transcript reveals that the trial court did not assess any points for OV 25.

Affirmed.

/s/ Hilda R. Gage  
/s/ Michael R. Smolenski  
/s/ Bruce K. Zahra

<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).