STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILIP VALENTIN BOLD, a/k/a BRADY BOLD and PHILIP VICTOR BOLD,

Defendant-Appellant.

UNPUBLISHED
January 15, 2004

No. 242228
Kent Circuit Court
LC No. 01-011533-FH

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant was convicted after a bench trial of two counts of home invasion first-degree, MCL 750.11a(2), and two counts of assault with intent to commit criminal sexual penetration, MCL 750.520g(2). He appeals by right. We affirm but remand for resentencing.

Defendant first argues that the prosecution failed to introduce evidence sufficient to prove beyond a reasonable doubt that defendant intended to commit criminal sexual penetration either on October 20, 2001 or on October 26, 2001, when defendant broke into the victim's home on both October 20 and October 26, 2001. We disagree.

When reviewing the sufficiency of the evidence in a bench trial, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000).

To sustain a conviction for assault with intent to commit criminal sexual penetration, the prosecution must prove four elements beyond a reasonable doubt: (1) that defendant committed an assault, (2) with an improper sexual purpose or intent, (3) that the act the defendant intended to commit involved penetration, i.e., some actual entry of another person's genital or anal openings or some oral sexual act, and (4) that an aggravating circumstance existed, such as the use of force or coercion. *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982). An actual touching is not required, and when the act involves penetration, it is not necessary to show that the sexual act was actually started or completed. *Id.* at 755. In the present case, defendant has challenged only the third of these elements, specifically that defendant possessed the requisite intent to commit a sexual act involving penetration.

This Court has held that questions of credibility and intent should be left to the trier of fact to resolve, *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Moreover, this Court has further held that intent may be inferred from all the facts and circumstances, and that, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987); *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Furthermore, circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Additionally, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The victim of both assaults testified that on October 20, 2001, a man came into her bedroom during the night wearing no trousers, got into bed with her, and demanded to see her vagina. According to the victim, the man left only after she feigned a heart attack. The parties stipulated to the entry into evidence of a report that the seminal evidence found on the victim's nightgown matched defendant's DNA profile. The report further explained that the chance of this evidence matching the DNA profile of someone other than defendant was one out of 3.7 quadrillion.

With regard to the second count of assault with which defendant was charged, the victim testified that the same man came into her bedroom again during the early morning of October 26, 2001, grabbed the telephone from her as she was attempting to call the police, pulled the telephone cord from the wall. As he attacked her where she had fallen to the floor, police rushed in and prevented the man from further assaulting her. Andrew Barker, a police officer with the Grand Rapids Police Department, informed the court that he was the first to reach the bedroom on the night of October 26, 2001, having been summoned by the victim's telephone call to the police. He described that when he entered the bedroom, he found the victim on her knees by the bed with a man hunched over her with his hands around her neck or shoulders, and with the zipper on his pants unzipped.

Considering the evidence presented at trial in the light most favorable to the prosecution, construing all evidentiary conflicts in favor of the prosecution, and keeping in mind that intent may be inferred from all the facts and circumstances and that minimal circumstantial evidence is sufficient to prove intent, we believe that the prosecution introduced evidence sufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that defendant possessed the necessary specific intent to commit a sexual act involving penetration on both October 20, 2001, and October 26, 2001.

Defendant next argues that trial counsel failed to present an adequate defense to the crimes with which defendant was charged and, accordingly, denied defendant his constitutional right to the effective assistance of counsel. Defendant has identified seven allegedly improper actions or omissions of trial counsel. Again, we disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). In order to overcome this presumption, a defendant must meet a two-pronged test. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the

circumstances according to prevailing professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial, *Strickland, supra* at 687-688; *Pickens, supra* at 309, so that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant first alleges that defense counsel should have moved for separate trials for the two incidents, but defendant has failed to identify any error which could constitute unprofessional conduct much less show any prejudice arising from the alleged error. MCR 6.120(B) provides as follows:

> (B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) the same conduct, or
>
> (2) a series of connected acts or acts constituting part of a single scheme or plan.

In the present case, the two incidents giving rise to the four charges on which defendant was tried occurred within days of each other, were perpetrated against the same victim at the same location, and were virtually identical in how they were attempted. Clearly they were connected acts or acts constituting part of a single scheme or plan. Under the circumstances, it is unlikely that any motion to sever the charges would have been granted. This Court has held that counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Therefore, no error occurred in connection with trial counsel's failure to move for separate trials. So there is no basis for a claim of ineffective counsel.

Regarding defendant's second allegation, it is true that defense counsel made no opening statement at trial. Defense counsel is not required, however, to make an opening statement unless defendant can show prejudice resulting from his not doing so. *People v Smith*, 33 Mich App 360, 361; 189 NW2d 819 (1971). Defendant has not presented any evidence to support his claim that trial counsel's failure to make an opening statement prejudiced him in any way. Accordingly, this alleged error similarly cannot form the basis of an ineffective assistance claim.

Turning to defendant's third allegation of conduct, that his counsel conducted only limited cross-examination of some witnesses and no cross-examination of others, we again conclude that defendant has failed to identify any error which could constitute unprofessional conduct, much less show any prejudice arising from the alleged error. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The errors asserted here are presumed to be a matter of trial strategy for which this Court will not substitute its judgment. *Id.* at 76-77. Therefore, defendant's third allegation of error also provides no basis for an ineffective assistance claim.

Defendant's fourth allegation of conduct falling below an objective standard of reasonableness is equally meritless. This Court has held that a bald assertion without supporting authority precludes appellate examination of the issue. *People v Jones (On Rehearing),* 201 Mich App 449, 456-457; 506 NW2d 542 (1993); *Impullitti v Impullitti*, 163 Mich App 507, 512; 415 NW2d 261 (1987). Defendant merely asserts that defense counsel's stipulation to the introduction of the DNA evidence constitutes ineffective assistance without identifying any theory which might have rendered the evidence inadmissible. Under these circumstances we find that defendant has waived this argument for appellate review.

Defendant's next allegation, that defense counsel failed to call defendant as a witness, also lacks merit. As noted above, decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Rockey, supra* at 76-77. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Id.* Moreover, the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hoyt, 185* Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one which might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Defendant has not shown that trial counsel's failure to call him to the stand deprived him of a substantial defense. Therefore, this alleged error, provides no ground for reversal.

Regarding defendant's sixth allegation, failure to raise an intoxication defense, we once again believe that defendant simply has failed to identify any error which could constitute unprofessional conduct, and the requisite prejudice arising from the alleged error. Trial counsel presented two alternative defense strategies: voluntary intoxication and lack of intent. Both strategies had their weaknesses. The voluntary intoxication defense, if successful, could have resulted in defendant's acquittal on the CSC charges because assault with intent to commit criminal sexual penetration is a specific intent crime, *People v Evans,* 173 Mich App 631, 634; 434 NW2d 452 (1988), and voluntary intoxication is a defense to specific intent crimes, *People v Longsworthy*, 416 Mich 630, 637-638; 331 NW2d 171 (1982). But the victim's testimony as to the events of October 20, 2001, suggested that defendant was not intoxicated and the defendant's apparent purposefulness and preparation for both incidents, as subsequently noted by the trial court, undermined this defense theory. The lack-of-intent strategy, on the other hand, required defendant to overcome evidence that defendant had the requisite level of intent when he acted on October 20 and October 26, 2001. In this case, faced with a choice between two defenses, each with significant weaknesses, we believe that trial counsel's decision to eschew the intoxication defense, which appeared to pertain only to the two charges stemming from the October 26, 2001 incident, in favor of the lack-of intent-defense, which if successful could have resulted in acquittal on both assault charges, constituted nothing more than a strategic choice. But defendant has presented no evidence that such a decision was not sound trial strategy. Under similar circumstances in *People v LaVearn,* 448 Mich 207, 215-218; 528 NW2d 721 (1995), the Court found that defense counsel's decision to forgo an intoxication defense in favor of raising a misidentification defense did not constitute ineffective assistance of counsel because it appeared to constitute sound trial strategy, and the defendant had failed to demonstrate any reason for finding this not to be so. Similarly, we believe defendant once again has failed to identify any error which could form the basis of an ineffective assistance claim.

We also note that in *People v Savoie*, 419 Mich 118, 134; 349 NW2d 139 (1984), the Michigan Supreme Court stated that the proper standard to be applied in determining whether an intoxication defense may succeed is "whether the degree of intoxication was so great as to render the accused 'incapable of entertaining the intent.'" *Id.*, quoting Justice Christiancy in *Roberts v People*, 19 Mich 401, 418 (1870). The evidence presented here was that defendant was on both occasions capable of entertaining the intent to commit criminal sexual penetration.

Defendant's last allegation regards the brevity of defense counsel's closing argument. Although trial counsel's closing argument, was brief, it clearly laid out defendant's theory of the case. Defendant has presented no case law or other legal authority establishing specific requirements for a closing argument, nor has he provided any evidence that trial counsel's closing argument if deficient had any effect on the outcome of the proceedings. Under these circumstances we find that defendant has failed to overcome the strong presumption that counsel's assistance was effective.

Thus, we find that defendant failed to demonstrate that any of trial counsel's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms and, therefore, failed to overcome the strong presumption that trial counsel was effective.

Finally, defendant argues that the trial court committed plain legal error when despite ordering defendant to serve his sentences for assault consecutively to his convictions for home invasion, it scored only the sentencing guidelines for the home invasion offenses; therefore, defendant is entitled to remand for resentencing on the assault with intent to commit CSC only. Plaintiff concedes this point, and we agree.

The trial court committed plain legal error when it failed to score the sentencing guidelines for the offense of assault with intent to commit criminal sexual penetration. MCL 777.21(2) required the court to score each offense. Also, the Michigan Sentencing Guidelines Manual, 2001 and 2003 editions instruct as follows:

> In instances where there are multiple conviction counts for a single offender, a sentencing information report (SIR) should be completed for the conviction offense that has the highest Crime Class. In instances where the sentences imposed will be served consecutively, an SIR should be completed for every crime that will be served consecutively.

Although, the trial court sentenced defendant to serve his sentences consecutively, the trial court did not score the sentencing guidelines for the offense of assault with intent to commit criminal sexual penetration. Therefore, we cannot determine whether defendant's sentences for the assault convictions were within the proper guidelines range, and defendant is entitled to a remand for resentencing on the charges for assault to commit CSC.

We affirm defendant's convictions, but remand for the described resentencing. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot