

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERRY MACKALL,

Defendant-Appellant.

UNPUBLISHED

April 22, 2004

No. 239724

Wayne Circuit Court

LC No. 01-003375

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with criminal sexual conduct in the first degree, MCL 750.520b, as a result of allegations made by complainant, his step granddaughter, that he attempted to penetrate her vagina with his penis. Complainant's sister testified that she observed defendant attempting to engage in sexual intercourse with complainant. Medical evidence indicated that a physician observed redness and swelling but no seminal fluid in complainant's vaginal area. The trial court granted defendant's motion for a directed verdict on the charged offense on the basis that no evidence established that defendant penetrated complainant, but convicted defendant of assault with intent to commit criminal sexual conduct involving sexual penetration.

Defendant argues that he is entitled to a new trial because the verdict was against the great weight of the evidence. We disagree. A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). Determining whether a verdict is against the great weight of the evidence requires a review of the entire body of proofs. The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). A defendant convicted in a bench trial need not move for a new trial in order to preserve the issue. MCR 7.211(C)(1)(c).

Defendant's argument is based entirely on a challenge to the credibility of complainant and her sister. If the evidence conflicts, the issue of credibility ordinarily should be left for the trier of fact; in deciding a motion for new trial, the court should not sit as the thirteenth juror. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). The trial court, sitting as the

trier of fact, was entitled to accept complainant's and her sister's testimony as credible, notwithstanding the fact that it may have contained some inconsistencies. And complainant's testimony established the elements of assault with intent to commit criminal sexual conduct involving sexual penetration. *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983) (specific intent may be inferred from the surrounding facts and circumstances); *People v Love*, 91 Mich App 495, 502; 283 NW2d 781 (1979) (Elements of offense are: (1) defendant committed an assault, and (2) with the intent to commit sexual penetration). Accordingly, defendant is not entitled to a new trial.

Defendant also argues that he was denied the effective assistance of counsel. Because defendant failed to move for an evidentiary hearing in the trial court, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that trial counsel rendered ineffective assistance by failing to call witnesses for the defense, failing to give an opening statement or a closing argument, and failing to object to inaccuracies in the presentence investigation report. We disagree. Decisions regarding what evidence to present and whether to call or question witnesses are generally matters of trial strategy. *Id.* We do not substitute our judgment for that of trial counsel on matters of trial strategy. *Id.* at 76-77. Moreover, defendant does not identify the witnesses that he believes should have been called, nor does he specify what beneficial evidence any defense witnesses could have provided. Therefore, trial counsel's failure to call certain unidentified witnesses did not deprive defendant of a substantial defense, and thus, did not constitute ineffective assistance. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac'd in part on other grds 453 Mich 902 (1996). We also find that counsel's decision to waive opening statement and closing argument constituted trial strategy, and cannot show any resulting prejudice particularly given that this was a bench trial. Finally, defendant has not shown that counsel's failure to object to any alleged inaccuracies in the presentence investigation report resulted in prejudice. *Carbin, supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski