

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY BRIAN FOSTER,

Defendant-Appellant.

UNPUBLISHED

November 16, 2004

No. 249190

Wayne Circuit Court

LC No. 02-013884-01

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

MEMORANDUM.

Defendant appeals as of right his jury conviction for first-degree criminal sexual conduct, MCL 750.520b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arose out of an assault on his estranged wife. Prior to trial, the prosecution moved to admit evidence of prior bad acts consisting of previous incidents involving complainant and defendant. The trial court granted the motion, but excluded evidence of defendant's prior conviction for domestic violence. However, defense counsel questioned complainant about that conviction on cross-examination, introducing the matter into evidence. On appeal, defendant argues that this action denied him the effective assistance of counsel.

To establish an ineffective assistance of counsel claim, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

We conclude that the presentation of evidence of defendant's prior conviction for domestic assault was sound trial strategy. Defense counsel sought to establish that despite defendant's history of bad behavior, complainant was willing to take him back and try to preserve the marriage. Counsel argued that the couple had consensual sex as part of the attempted reconciliation. Decisions regarding what evidence to present are presumed to be matters of trial strategy and this Court will not second-guess trial counsel on matters of trial strategy, nor will it assess counsel's performance with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Given the strong evidence against defendant,

counsel had few alternatives. Where most of defendant's history of bad behavior was already found to be admissible, it is highly unlikely that the admission of evidence of defendant's prior conviction affected the outcome of the case.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Michael R. Smolenski