STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2008
v	No. 273055 Berrien Circuit Court
SAM LOWE, Defendant-Appellant.	LC No. 2006-400990-FC

Before: Davis, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of first-degree criminal sexual conduct, MCL 750.520b; and four counts of second-degree criminal sexual conduct, MCL 750.520c. We affirm.

Defendant first argues that he was denied the effective assistance of counsel. Ineffective assistance of counsel is ultimately a question of law, which we review de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Where, as here, no *Ginther*[1] hearing was held, review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). To establish a claim of ineffective assistance of counsel, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of defendant's trial would have been different, and (3) the resulting trial was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant first argues that his trial counsel unreasonably failed to investigate whether his other children would have contradicted the victim's version of events. A trial counsel's failure to reasonably investigate a case can constitute ineffective assistance of counsel. *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). When claiming ineffective assistance due to defense

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Defendant specifically argues that the children would have undermined the testimony of the victim by asserting that the victim's presence in a certain bathroom where an assault allegedly occurred was inconsistent with a household rule. Defendant also argues that the children would have exculpated defendant by contradicting the victim's version of events by testifying that the victim would not have been left alone with defendant. We conclude that defendant has not met his burden of establishing the factual predicate for this claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The record is devoid of any evidence that the children would have testified in support of defendant's defense, and defendant has failed to present affidavits or any other offer of proof supporting that this Court should remand for a *Ginther* hearing. Moreover "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is a defense that could have made a difference at trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). As previously stated, nothing in the record supports that defendant's other children would have testified about the household rule or whether defendant would have been alone with the victim. Further, there is no reason to believe that such testimony would have affected the outcome of the trial.

Defendant also argues that he is entitled to a new trial because his trial counsel unreasonably failed to inspect the house where the alleged incidents occurred. Defendant claims that a rudimentary inspection would have contradicted the victim's testimony about the assaults, and shown that her version of events was impossible. We disagree. Again, defendant has failed to establish the factual predicate of his claim. *Hoag*, *supra* at 6. The record does not support defendant's appellate assertions with respect to the location of the bathroom or whether it had a shower. In addition, any alleged failure of defense counsel to investigate the house did not deprive defendant of a substantial defense. The victim's credibility was attacked by defense counsel and inconsistencies were otherwise brought to the attention of the jury. "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 Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant next argues that it was objectively unreasonable for his trial counsel to introduce the testimony of a subsequent foster parent of the victim at trial, because that foster parent testified that the victim informed her of one of the encounters with defendant. Decisions regarding what evidence to present are presumed to be matters of trial strategy. *Rockey*, *supra* at 76. At trial, the prosecutor elicited that the victim informed numerous persons about her encounters with defendant, including the principal of her school, a Child Protective Services Specialist, and a forensic interviewer affiliated with Child Protective Services. Defendant's trial counsel attempted to show that the victim gave different versions of her story to each person she informed of the encounters. During his opening statement, defendant's trial counsel asserted that the victim "has told different stories at different times." The testimony of the subsequent foster parent was consistent with this strategy. She testified that the victim only mentioned one sexual encounter with defendant; this contradicted the victim's testimony at trial. "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." *Id*. at 76-77. The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Moreover, defendant cannot show that the challenged testimony was outcome determinative. The jury heard testimony from numerous other witnesses that the victim disclosed abuse. To be entitled to relief on the ground that counsel was ineffective, defendant must demonstrate that, but for trial counsel's decision to admit the evidence, he would have been acquitted. See *Toma*, *supra* at 302.

Defendant next argues that his trial counsel unreasonably informed the jury that the prosecutor had a duty to call the victim's siblings as witnesses. Regardless whether counsel's statements were incorrect, defendant does not meet his burden to explain or rationalize how defense counsel's conduct in making the challenged assertions fell below an objective standard of reasonableness, but for which the outcome of the trial would have been different. *Toma*, *supra* at 302. Defendant also argues on appeal that his trial counsel failed to "inform him of the nature of the court proceedings or that he was going to put him on the stand." Again, defendant does not explain or rationalize his position that this alleged lack of information regarding the nature of the court proceedings prejudiced him. Defendant may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Defendant's claims therefore fail.

Defendant additionally argues that his trial counsel was ineffective for failing to obtain exculpatory discovery material, including a videotape of the victim's interview with the forensic interviewer. Defendant fails to establish the factual predicate of this claim. *Hoag*, *supra* at 6. Defendant's trial counsel conducted a lengthy cross-examination of the forensic interviewer, including highlighting numerous discrepancies between the victim's trial testimony and her statements during the interview. Thus, the record does not support that, but for counsel's conduct with respect to discovery, defendant would have been acquitted. *Toma, supra* at 302. In other words, there has been no showing that if other evidence, including the videotape, was obtained, the outcome of trial would have been different.

Next, defendant argues that his trial counsel unreasonably implied that Trooper Vrablic's testimony was correct during the direct-examination of defendant. Defendant fails to show how the challenged testimony was either prejudicial to him or deprived him of a substantial defense. To the contrary, the cited exchange refuted the victim's assertions regarding her alleged sexual encounters with defendant. Furthermore, during direct examination, defendant refuted Trooper Vrablic's testimony. Trial counsel's decisions regarding the presentation of testimony will be deemed ineffective only where a defendant can show that he was deprived of a substantial defense. *Dixon*, *supra* at 398.

Defendant finally argues that the trial court should have suppressed his statement to Trooper Vrablic because he was not given his *Miranda*[2] warnings, rendering the statement involuntary. Defendant also requests a remand for an evidentiary hearing to determine whether

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

the statements were voluntary and whether counsel was ineffective with respect to their admission. We disagree.

On the record before us, suppression was not warranted. *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). "An officer's obligation to give *Miranda* warnings to a person attaches only when the person is in custody, meaning that the person has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with a formal arrest." *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997). To determine whether a defendant was in custody at the time of an interrogation, this court takes into account the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave. *People v Mendez*, 225 Mich App 381, 382-383; 571 NW2d 528 (1997). The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. *Zahn*, *supra* at 449.

The record shows that defendant's statement to Trooper Vrablic was not made during a custodial interrogation. The interview occurred in a "screened in porch that was attached to the front of [defendant's] residence." Police questioning in a suspect's home is usually viewed as noncustodial, because the psychological pressures associated with the atmosphere of the station house are not present. *People v Coomer*, 245 Mich App 206, 220; 627 NW2d 612 (2001). Here, Trooper Vrablic testified that, when he arrived at defendant's house, he stated that defendant was not under arrest and that defendant was free to leave. On this record, the trial court did not commit plain error by admitting defendant's statements to Trooper Vrablic, trial counsel was not ineffective in failing to challenge the admission of the statement, and defendant has not shown the presence of a factual dispute that would require an evidentiary hearing.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Helene N. White