

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH JEROME AYERS, JR.,

Defendant-Appellant.

UNPUBLISHED

January 29, 2008

No. 267766

Isabella Circuit Court

LC No. 05-000875-FC

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(f) (actor causes personal injury to the victim and force or coercion used to accomplish penetration). Defendant was sentenced to 7 to 15 years. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant and the complainant were both at a party. The complaint alleges that defendant motioned her to follow him into a downstairs bathroom. The complainant says she assumed defendant wanted to talk, so she followed him in. According to the complaint, after the two had talked for a while, defendant started kissing her until she pushed him away. Defendant continued to force himself upon her. The complainant testified that defendant then turned her around, grabbed her by the hair, forced her to the floor, and penetrated her with his penis. The complainant alleges that she repeatedly told defendant to stop, getting progressively louder and louder. Defendant stopped and left, and the complainant immediately left the bathroom. Visibly upset, she told friends at the party that defendant had just raped her. Defendant admits he had intercourse with the complainant in the bathroom but claims it was consensual.

Defendant asserts he was denied the effective assistance of counsel by his trial counsel's failure to investigate two potential and known witnesses who would have bolstered defendant's version of what happened. Specifically, defendant indicates that the two were near the bathroom door when defendant and the complainant were inside but did not hear loud noises, such as screaming, coming from the bathroom. Defendant asserts that the two would have testified that the complainant's demeanor after the alleged assault was normal.

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Where the issue is counsel's performance, a defendant must satisfy a two-pronged test. The defendant must show that (1) counsel's performance was

below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Counsel's effectiveness is presumed, and there is a very high burden of proof to show otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. *Pickens, supra* at 325. There is therefore a strong presumption of effective counsel when it comes to issues of trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). An appellate court will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. See *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Not calling a witness to testify whose testimony is supportive of defendant's case because of concerns that the jury will react badly to that witness or because that witness is not credible is a valid trial strategy choice. However, the conclusion underlying this decision should be based on a proper investigation of that witness. Defendant's trial attorney admitted that he had not directly interviewed either witness, relying instead on an investigation done by a private investigator. We believe that counsel cannot be faulted for relying on the judgment of that investigator, given testimony that the relationship between the attorney and the investigator was sufficiently established for the former to rely on the latter's judgment. We acknowledge that the record is sparse on how the investigation was carried out, but we do not believe this shows that trial counsel's reliance was objectively unreasonable. Indeed, where a working relationship has been established and a level of trust developed, it is understandable that an attorney would not need to be privy to the details of how an investigation was carried out in order for the attorney to have faith in the reported results. In any event, defendant has the burden to establish the factual predicate for a claim of ineffective assistance of counsel, which includes establishing that the investigation was unsound. See *Strickland, supra* at 687-688.

With respect to calling either witness, the court concluded that trial counsel believed that one of these two witnesses was likely to commit perjury. Although expressing some concern about the attorney's testimony that defendant told him this, the court nonetheless credited the testimony concerning what the investigator reported about credibility and fabrication. The acceptance of some but not all of the testimony of a witness is a matter of witness credibility, and this Court defers to the trial court's superior ability to assess witness credibility. MCR 2.613(C). Accordingly, the court's conclusion is not clearly erroneous. Defense counsel cannot be deemed ineffective for failing to call a witness likely to commit perjury. See MCL 750.424.

Further, even if defendant could establish the first prong of the *Strickland* test, his claim fails under the second prong. Neither of the witnesses saw what happened in the bathroom. And given the noise level of the party, even if the jury believed both of them when they said they were near the door and did not hear anything, that does not necessarily contradict the complainant's testimony that she verbally objected to defendant's actions. She may simply not have been audible above the party noise. Finally, given that the complainant almost immediately told others that she was raped by defendant, and that multiple witnesses saw her very upset and distraught over it that same night, it seems extremely unlikely that defendant's potential

witnesses would have altered the jury's verdict. Thus, defendant's claim of ineffective assistance of counsel fails.

Affirmed.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood