

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN NELSON CALL,

Defendant-Appellant.

UNPUBLISHED

August 19, 2008

No. 278809

Bay Circuit Court

LC No. 06-010494-FC

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b, carrying a dangerous weapon with unlawful intent, MCL 750.226, felonious assault, MCL 750.82, discharge of a firearm in a building, MCL 750.234b, and four counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant appeals as of right, and we affirm. This appeal has been decided without oral argument. MCR 7.214(E).

This matter arises from an alleged sexual assault on defendant's estranged wife. Defendant raises two issues on appeal, each involving a claim of ineffective assistance of counsel. We find both arguments to be without merit.

An ineffective assistance of counsel claim presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defendant did not seek a *Ginther*¹ hearing in the trial court; thus, our review is limited to errors apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

In criminal prosecutions, the accused's constitutional right to counsel includes the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To prevail on a claim of ineffective assistance of counsel, a defendant must generally show that (1) counsel's performance fell below an objective standard

¹*People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

of reasonableness, and (2) the defective representation so prejudiced the defendant as to deprive him of a fair trial. *Strickland, supra* at 687-688; *Cline, supra* at 637.

There is “a strong presumption of effective counsel when it comes to issues of trial strategy.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court “will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel’s competence.” *Id.* Defense counsel has wide latitude regarding trial strategy because calculated risks may be necessary to win difficult cases. *Id.*

Defendant argues that defense counsel was ineffective for eliciting testimony from the victim concerning certain of his prior bad acts. We conclude that defense counsel’s performance in this regard did not fall below an objective standard of reasonableness. It is clear from the record that counsel made a strategic decision to elicit the victim’s testimony concerning these matters for the purpose of attacking the victim’s credibility.

Counsel made an offer of proof outside the presence of the jury, and later questioned the victim consistent with the offer, concerning the victim’s claim that she had frequently denied defendant’s request for sexual relations in the past but had eventually relented on several occasions. In questioning the victim, counsel also elicited testimony that the victim felt that defendant had sexually assaulted her in the past. Among other things, the victim testified in response to counsel’s questioning that defendant had sexually assaulted her repeatedly during their marriage, but that she had only reported it for the first time in May 2006. As she was questioned, the victim vacillated in her definition of sexual assault, sometimes defining it as forcible penetration by defendant, but at other times defining it as her own capitulation to defendant following his repeated begging.

It appears from the record that counsel believed that her questioning of the victim in this manner would cause the jury to doubt the victim’s veracity. Counsel suggested to the jury that the victim’s admitted past practice of initially refusing, but then capitulating, to defendant’s request for sexual relations had again manifested itself with respect to the alleged offense at issue in this case. Counsel argued that such capitulation by the victim could not constitute sexual assault by defendant. Defense counsel’s tactics in this regard were clearly strategic in nature, and were not ineffective merely because they did not work. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant relies on *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), and MRE 404(b), as support for his claim that the victim’s testimony should not have been admitted. However, the victim’s testimony was admissible under *VanderVliet* and MRE 404(b) because it was used for a purpose other than to prove that defendant acted in conformity with the prior bad acts. Indeed, defense counsel elicited the disputed testimony for the purpose of *assisting* the defense by attempting to show that the victim was not credible. We decline the invitation to second-guess counsel’s strategic decisions with the benefit of hindsight. *Odom, supra* at 415.

Defendant also argues that defense counsel erred by not objecting to the prosecution’s domestic violence expert. We cannot agree.

Defense counsel's cross-examination of the prosecution expert revealed the likely reason that she did not object—it appears that defense counsel intended to elicit testimony from the prosecution expert that would actually *support* the defense. Indeed, during cross-examination by defense counsel, the expert testified that there can be male victims of domestic violence and that some alleged victims do lie.

Relying in part on the expert's statements, defense counsel suggested that defendant—and not the victim—was subject to domestic abuse in this case. Defense counsel also relied on the expert's testimony in closing argument, wherein she suggested that the victim's experience in assisting rape victims in the emergency room had helped her to be a convincing victim in this case.

In support of his ineffective assistance claim, defendant cites *People v Christel*, 449 Mich 578; 537 NW2d 194 (1995), in which our Supreme Court determined that the trial court had erred by admitting expert testimony concerning the battered woman syndrome. The *Christel* Court found that “a more direct connection and factual premise” was necessary to warrant the testimony in that case because the victim did not exhibit the typical behavior of other battered women. *Id.* at 581. Unlike in *Christel*, the expert testimony here was potentially relevant to both defendant's and the victim's credibility; it also assisted the jury in evaluating the victim's testimony concerning the assault and defendant's testimony concerning the victim's control. Thus, even if defense counsel had objected to the expert testimony, it would likely have been deemed relevant and admissible. Futile objections are not required. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). On the record before us, it is not apparent that defense counsel's failure to object to the prosecution's expert deprived defendant of the effective assistance of counsel. *Riley*, *supra* at 139.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly