

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MUHAMMAD YAQOOB RAJPUT,

Defendant-Appellant.

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UNPUBLISHED

December 15, 2009

No. 286993

Wayne Circuit Court

LC No. 08-002686-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b) (victim between the ages of 13 and 16 years old and related to defendant). Defendant was sentenced to 15 to 40 years' imprisonment for each conviction. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I.

This case arises out of criminal sexual conduct perpetrated on the female victim by defendant between the years of 2000 and 2003. Defendant lived in the same house with his son, his daughter-in-law, his four grandchildren, including the victim, and others. Because of limited sleeping areas in the house when the victim was approximately ten years old, defendant and the victim began sleeping on the floor together. The victim testified that, when they slept next to each other, defendant touched her chest and vagina.

The victim further testified that, when she was approximately eleven years old, defendant began showing her pictures of naked people having sex. During this same time, defendant would cover her with a blanket while she watched television in the living room and he would feel her body. Defendant also penetrated the victim's vagina with his fingers.

The victim also testified that, when she was approximately twelve years old, she and defendant were left home alone while the family went to the store. Defendant followed the victim to the laundry room, shut the door, pushed the victim to the floor, pulled down her pants and underwear, and placed his penis into her vagina. The victim screamed and bit defendant. The victim testified that her vagina bled afterward. When the family returned home, defendant showed the family the bite marks from the victim and told the family she was crazy and bit him

while they had been wrestling. The victim testified that, each time defendant committed criminal sexual conduct with her, he told her not to tell her father because he would be angry and would not believe her.

The victim did not report defendant's criminal sexual conduct until she was 16 years old. At trial, defendant denied ever inappropriately touching the victim or inserting his fingers into her vagina. Defendant claimed that the victim wanted to frame him because of animosity between him and his son and his attempts to discipline the grandchildren. Defendant was charged with three counts of first-degree criminal sexual conduct, but the jury found him guilty of only two counts.

## II.

Defendant's sole issue on appeal is that he was denied the effective assistance of counsel because defense counsel did not call three witnesses to corroborate defendant's testimony. Defendant claims that his wife, a school administrator/counselor, and a private investigator retained by counsel would have corroborated his own testimony that he did not commit criminal sexual conduct on the victim. We disagree. A defendant must make a testimonial record in the trial court with a motion for a new trial that will evidentially support his claim of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), quoting *People v Jelks*, 33 Mich App 425, 431; 190 NW2d 291 (1971). When there is no evidentiary hearing or motion for a new trial at the trial court level, as in this case, review is limited to the errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

To establish a claim for ineffective assistance of counsel, a defendant must show that (1) counsel's assistance fell below an objective standard of professional reasonableness, and (2) but for counsel's ineffective assistance, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-88, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v LeBlanc*, *supra* at 575. The defendant "must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). Counsel's decisions regarding whether to call or question witnesses and what evidence to present are presumed to be trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Thus, the failure to call witnesses constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Counsel competently cross-examined each of the prosecution's witnesses and defendant took the stand in his own defense. It is not apparent from the existing record how the three proposed witnesses would have testified. Defendant has made no offer of proof nor has he provided affidavits detailing the allegedly corroborating testimony. Defendant has the burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Because defendant failed to demonstrate that he was deprived of a substantial defense due to counsel's alleged failure, he has not overcome the presumption that counsel's actions constituted sound trial strategy.

Defendant also requests that this Court remand his case for an evidentiary hearing regarding the ineffective assistance of his trial counsel. However, because defendant's request

for remand is not accompanied by affidavits or an offer of proof, which support his defense or articulate the facts that would be established by the three witnesses at a *Ginther* hearing as required by MCR 7.211(C)(1)(a), we reject defendant's untimely request.

Affirmed.

/s/ Elizabeth L. Gleicher  
/s/ E. Thomas Fitzgerald  
/s/ Kurtis T. Wilder