

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL L. NETT,

Defendant-Appellant.

UNPUBLISHED

December 22, 2009

No. 290149

Dickinson Circuit Court

LC Nos. 07-003794-FH;

07-003812-FH

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck. JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of third-degree criminal sexual conduct, MCL 750.520d, and two counts of fourth-degree criminal sexual conduct, MCL 750.520e. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole argument on appeal is that he was denied the effective assistance of counsel. Because no *Ginther*¹ hearing was held below, our review of defendant's claim is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of professional reasonableness and that, but for counsel's unreasonable conduct, the result of the trial would have been different. *Id.* Effective assistance is presumed, and a defendant bears a heavy burden to prove otherwise. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Defendant first argues that trial counsel's failure to call expert witnesses to support his defense that the touching was for treatment purposes was objectively unreasonable and deprived him of a substantial defense. We disagree. Decisions regarding whether to call witnesses at trial are matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). The failure to call a witness at trial constitutes ineffective assistance of counsel only 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 one that might have made a difference in the outcome of the

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

trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). Deference is given to trial counsel's strategic judgments. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Contrary to defendant's argument, trial counsel's failure to call expert witnesses was not objectively unreasonable. Defendant did not proffer the defense that his conduct was in conformity with chiropractic standards. Rather, he consistently denied touching the victims in the manner testified to. Moreover, he acknowledged that massaging a patient's breasts and vagina were outside the scope of the areas that a licensed chiropractor may treat in Michigan and admitted there were no trigger points inside a patient's vagina. Expert testimony that his actions were consistent with appropriate chiropractic treatments would have been contrary to his defense of complete denial and would have contradicted his statement to police.²

Second, defendant argues that trial counsel's failure to offer exhibits from professional treatises as evidence to support his defense theory was objectively unreasonable. We disagree. Decisions regarding what evidence to present at trial are matters of trial strategy. *Horn, supra* at 39.

Defendant attached to his brief on appeal several pages from what appears to be a treatise or manual related to chiropractic or massage practice. The pages show the location of various trigger points in the upper and lower back and pelvic areas of the body. Defendant suggests that because the pages demonstrate that he legitimately touched the victims to treat their conditions, trial counsel was ineffective for failing to introduce the pages as exhibits at trial. However, the record reflects that trial counsel introduced an exhibit that showed various trigger points in the body. Defendant was given an opportunity to testify about the exhibit, and explained to the jury that the location of the trigger points coincided with the areas he touched when treating the victims. Accordingly, we fail to see how trial counsel's decision not to introduce the pages as exhibits was not reasonable trial strategy or how counsel's decision prejudiced defendant.

Finally, defendant argues that trial counsel's stipulation to joinder of the claims against him deprived him of effective assistance of counsel. We disagree.

Defendant was charged in two separate informations. Plaintiff filed a motion, pursuant to MCR 6.120, to consolidate the two cases for trial. Defendant opposed the motion, and successfully argued that the trial court should not consolidate the two cases. Several months later, defense counsel stipulated to consolidate the two cases for trial, and defendant was tried on all counts at a single trial.

Even assuming that trial counsel's action to stipulate to consolidate the two cases for trial was objectively unreasonable, defendant has not shown that he was prejudiced by counsel's action. Evidence of each charged offense could have been introduced at each trial under MRE 404(b). See *People v Sabin (After Remand)*, 463 Mich 43, 63-65; 614 NW2d 888 (2000). Indeed, the prosecutor moved to introduce 404(b) evidence regarding uncharged allegations that

² In addition, defendant has provided no indication as to who trial counsel could have called as an expert witness or how such an expert would have testified.

defendant sexually assaulted other patients during treatment. There is no reason to believe that had defendant not stipulated to consolidate the cases, plaintiff would not have moved to introduce 404(b) evidence in each case. Moreover, the trial court instructed the jury that it “[m]ust consider each crime separately and in light of all of the evidence of the case” and that it “may find the Defendant guilty of all or any one or any combination of these crimes, or not guilty.” Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck