

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JIMINEZ, a/k/a MICHAEL GERARD
JIMINEZ,

Defendant-Appellant.

UNPUBLISHED

May 1, 1998

No. 197626

Recorder's Court

LC No. 95-013890

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL G. JIMINEZ,

Defendant-Appellant.

UNPUBLISHED

No. 197690

Recorder's Court

LC No. 95-013924

Before: Neff, P.J., and White and D. A. Teeple*, JJ.

MEMORANDUM.

A Recorder's Court jury convicted defendant of assault and battery (stemming from a domestic assault), MCL 750.81; MSA 28.276 (Docket No. 197626), and aggravated stalking, MCL 750.411i; MSA 28.643(9) (Docket No. 197690). Defendant was sentenced to thirty days time served and to five years' probation, respectively. Defendant appeals as of right. We affirm.

Defendant asserts that the trial court erroneously admitted a statement made by the victim to a police investigator on the day following the assault. Defendant has waived an appellate challenge to the

* Circuit judge, sitting on the Court of Appeals by assignment.

admission of this statement by withdrawing his objection to the statement's admission and consenting to its admission. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

Defendant also asserts that the prosecutor improperly argued that the contents of the victim's statement was substantive evidence of guilt and bolstered the credibility of the victim. Defendant failed to preserve these claims for appellate review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). More importantly, defendant withdrew his objection to the admission of the statement with knowledge of the uses the prosecutor intended for the evidence. Defendant may not harbor error to be used as an appellate parachute in the event of jury failure. *People v Bart (On Remand)*, 220 Mich App 1, 15; 558 NW2d 449 (1996).

Finally, defendant asserts that defense counsel rendered ineffective assistance of counsel. Because defendant failed to raise his ineffective assistance of counsel claims in the trial court in conjunction with an evidentiary hearing or a motion for a new trial, appellate review is limited to mistakes apparent on the record. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995).

Defendant has failed to overcome the presumption that, under the circumstances presented in this case, the challenged actions might be considered sound trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Defense counsel had used the victim's statement to impeach her credibility. By withdrawing his objection to the admission of the statement, defense counsel placed before the jury a written statement he believed to be substantially inconsistent with the victim's trial testimony. Under such circumstances, defense counsel's withdrawal of his objection to the statement's admission, with knowledge of the prosecutor's intended use of the evidence, reflects a strategic assessment that the statement was more damaging to the prosecution's case than helpful and constitutes a strategic decision to place before the jury evidence potentially damaging to the victim's credibility. This strategy appears to have been at least partially effective, as reflected by the jury's acquittal of defendant on the felonious assault charge and conviction of defendant on the lesser offense of assault and battery. Under these circumstances, defendant has failed to carry his burden of establishing that counsel's performance was constitutionally defective. *Mitchell, supra*.

Affirmed.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald A. Teeple