STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 3, 2000
v	No. 208227 Oakland Circuit Court
JAMES RICHARD GRAVES, Defendant-Appellant.	LC No. 97-151504-FH

Before: Cavanagh, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), and fourth-degree CSC, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to concurrent sentences of eight to twenty-five years' imprisonment for the third-degree CSC conviction and two to fifteen years' imprisonment for the fourth-degree CSC conviction. We affirm.

I

Defendant first argues that he was denied the right to a public trial because the courtroom was closed during the testimony of three juvenile witnesses. The right to complain about a public exclusion order may be waived, either expressly or by the accused's failure to object. *People v Gratton*, 107 Mich App 478, 481; 309 NW2d 609 (1981). Here, defense counsel did not object to the prosecutor's motion to exclude the public during the testimony of the minor witnesses pursuant to MCL 600.2163a; MSA 27a.2163(1); rather, counsel agreed to the closing of the courtroom.[1] This issue is therefore unpreserved and, in order to avoid forfeiture of the issue, defendant must demonstrate plain error that could have affected the outcome of the trial. See *People v Carines*, 460 Mich 750, 763-764, 597 NW2d 130 (1999). Defendant has failed to show that he is entitled to relief. Even assuming that the closure of the courtroom constitutes plain error,[2] defendant has not established that his substantial rights or the fairness of the judicial proceedings were affected. See *id*.

II

Defendant next asserts that he was denied the effective assistance of counsel at trial. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

No separate evidentiary hearing was held below with regard to defendant's claim of ineffective assistance of counsel. Therefore, our review of this issue is limited to the lower court record. See *People v Shively*, 230 Mich App 626, 628, n 1; 584 NW2d 740 (1998).

A

Defendant argues that his counsel was ineffective for failing to object to closure of the courtroom during the testimony of juvenile witnesses. We disagree.

The prosecutor brought a pretrial motion for closure of the courtroom pursuant to MCL 600.2163a; MSA 27a.2163(1).[3] In support of her motion, the prosecutor cited the ages of the witnesses; the sexual nature of the testimony; and the fact that, after the preliminary examination, an altercation had taken place between the complainant's family and defendant's family. Defendant has made no showing that, by acquiescing to the prosecutor's motion, defense counsel's performance was below an objective standard of reasonableness under prevailing professional norms. Furthermore, defendant has not demonstrated that a reasonable probability exists that the outcome of the proceedings would have been different if the courtroom had not been closed. See *Pickens, supra*. Consequently, defendant has failed to establish that counsel was ineffective on this basis.

B

Defendant contends that counsel was ineffective for failing to present alibi witnesses. However, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The fact that defense counsel's strategy did not work does not constitute ineffective assistance of counsel. *People v Plummer*, 229 Mich App 293, 309; 581 NW2d 753 (1998). On the record before us, we find no evidence that counsel was ineffective for failing to call alibi witnesses.

Moreover, the affidavits proffered by defendant do not persuade us that remand for an evidentiary hearing is warranted. The affidavits of Charles Brooks and Charles Shanahan actually contradict defendant's testimony regarding the time of his return from the Brooks house. In

addition, the time of the incident at issue was not definitively established, but the testimony of Rachel Essenberg and Christina Coulter indicates that it occurred after defendant returned to his residence. Consequently, the affidavits do not establish that defendant was elsewhere when the criminal acts occurred. See *People v Holland*, 179 Mich App 184, 192; 445 NW2d 206 (1989).

C

Defendant also maintains that counsel was ineffective for failing to present an opening statement. However, the decision whether to give an opening statement is a matter of trial strategy. *People v Harlan*, 129 Mich App 769, 778-779; 344 NW2d 300 (1984). As previously stated, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Rockey*, *supra*.

Defendant points out that counsel stated at the beginning of trial that he reserved his opening statement and then failed to give one. However, there is nothing in the record to support defendant's charge that counsel "forgot" to give his opening statement. Counsel may simply have changed his strategy during the course of the trial. In any case, defendant has failed to indicate how he was prejudiced by counsel's waiver of the right to make an opening statement.

D

In addition, defendant claims that counsel was ineffective for failing to object to testimony regarding defendant's use of marijuana and the prosecutor's comment about marijuana use during closing argument. We disagree. Rachel Essenberg's statements that defendant had smoked marijuana on the evening in question were unsolicited by the prosecutor and defense counsel. Counsel may well have made the strategic decision to refrain from objecting so as to avoid emphasizing the testimony. The prosecutor's comment in closing argument regarding marijuana use by people in the house did not specifically mention defendant and was supported by the evidence. Defense counsel was not required to raise a meritless objection. See *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

III

Finally, defendant argues that the trial court should have granted his motion for a new trial on the basis of newly discovered evidence. We review a trial court's decision regarding a motion for a new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

Defendant asserts that he is entitled to a new trial based on the affidavit of Jennifer Kibbe, in which she averred that the complainant told her on three occasions that "it didn't happen." However, Kibbe's testimony could only be used to impeach the complainant's testimony that defendant touched her buttocks and had sexual intercourse with her. Newly discovered evidence is not grounds for a new trial where it would be used merely for impeachment purposes. *People v*

Davis, 199 Mich App 502, 516; 503 NW2d 457 (1993). Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Helene N. White
/s/ Michael J. Talbot

[1] Defendant argues that counsel could not waive his right to an open trial. We disagree. It was not necessary for defendant to personally consent to the closure of the courtroom when he was represented by counsel. Cf. *People v Lawson*, 124 Mich App 371, 376; 335 NW2d 43 (1983); *People v Grenke*, 112 Mich App 567, 569; 316 NW2d 494 (1982).

Furthermore, we note that the prosecution brought the motion for exclusion on the first day of trial, September 18, 1997, and the juvenile witnesses did not begin to testify until the following day. Thus, defendant had the opportunity to inform counsel that he objected to the closure.

[2] Because there was ample evidence in support of the prosecution's motion for closure, the closure of the courtroom does not appear to be plain error.

[3] MCL 600.2163a; MSA 27a.2163(1) provides in pertinent part:

> (12) If the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (11), the court shall order 1 or more of the following:
>
> (a) All persons not necessary to the proceeding shall be excluded during the witness's testimony from the courtroom where the trial is held.