

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER L. MORROW,

Defendant-Appellant.

UNPUBLISHED

July 27, 2001

No. 223438

Wayne Circuit Court

LC No. 99-002213

Before: Wilder, P.J., and Hood and Griffin, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b), for which he was sentenced to one year's probation. Defendant appeals as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that he was denied the effective assistance of counsel. Defendant preserved this issue by moving for a new trial below. However, because the trial court did not conduct an evidentiary hearing, review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 314; *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). The defendant must also overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Id.*

Decisions regarding what evidence to present and whether to call or question witnesses, including the decision whether the defendant will testify, are considered matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *People v Johnson*, 168 Mich

App 581, 586; 425 NW2d 187 (1988). “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.” *Rockey, supra* at 76-77. “Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense.” *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Likewise, arguing that defendant is guilty of a lesser offense does not constitute ineffective assistance of counsel; it is only the complete concession of defendant’s guilt which renders counsel ineffective. *People v Kryzstopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988); *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984).

Because the record is silent regarding the testimony defendant or other witnesses would have offered if called, defendant has not shown that a reasonable probability exists that, if counsel had called him or the other unnamed witnesses, the outcome of the trial would have been different. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Moreover, counsel did not completely concede defendant’s guilt. Rather, he contested whether the touching even occurred by attacking the victim’s credibility. He also argued in the alternative that if a touching did occur, it was a touching outside the victim’s clothing, the implication being that the touching was not for sexual gratification or arousal, and thus supported at best a conviction of a lesser offense, such as the simple misdemeanor of assault and battery. MCL 750.81.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Harold Hood

/s/ Richard Allen Griffin