

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN J. DIGIUSEPPE,

Defendant-Appellant.

UNPUBLISHED

December 17, 2002

No. 237101

Macomb Circuit Court

LC No. 99-002015-FH

Before: Kelly, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault and battery, MCL 750.81. The trial court sentenced defendant to sixty days in Macomb County Jail. We affirm.

Defendant argues that the trial court erred in denying his motion for a new trial in which he argued that he was denied the effective assistance of counsel based on defense counsel's failure to call seven witnesses. We disagree.

A trial court's decision to grant or deny a motion for a new trial will not be disturbed on appeal unless a clear abuse of discretion is shown. *People v Lemmon*, 456 Mich 625, 648; 576 NW2d 129 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts upon which the trial court ruled, would say that there was no justification for the court's decision. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

In this case, defendant was charged with criminal sexual conduct in the fourth degree (CSC IV), MCL 750.520e. The charge arose from an incident at Skinny's Sports Bar, owned and operated by defendant, in which defendant improperly touched the victim, a part-time bartender.

"To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced the defendant so as to deprive him of a fair trial." *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Additionally, the defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Decisions about what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

In this case, defendant cannot overcome the presumption that defense counsel's decision not to call the seven defense witnesses was sound trial strategy. See *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). At trial, defense counsel, after consulting with defendant, did not call any witnesses in defendant's behalf. Rather, defense counsel moved for a directed verdict, after the close of the prosecution's case-in-chief, arguing that the prosecution failed to sustain its burden of proof on the charged offense of CSC IV. Although the trial court denied defense counsel's motion for a directed verdict, the jury convicted defendant of the less serious offense of assault and battery. Based upon the trial result, we cannot say that defense counsel's trial strategy amounted to ineffective assistance of counsel.

In any event, based on our review of the lower court record, defense counsel's trial strategy of not calling the defense witnesses was motivated by his desire to prevent the prosecution from calling, on the second day of trial, a second witness who would have provided testimony harmful to defendant. The prosecutor intended to call this second witness to present "similar acts" testimony under MRE 404(b). However, the prosecutor was unable to secure this witness' presence in the courtroom on the first day of trial. Thus, by not calling any witnesses, defense counsel ensured that the jury decided the case without hearing potential rebuttal testimony against defendant.

However, even assuming for the sake of argument that defense counsel's failure to call the witnesses was not a sound trial strategy, defendant cannot show that he was prejudiced. The record indicates that the incident occurred behind the bar and lasted only a few seconds. The incident occurred late on a Saturday night while the bar was crowded with people drinking and watching a boxing match. Although defendant attached to his motion for new trial affidavits of the seven prospective witnesses averring that they did not witness the alleged act, the act occurred in a manner that obscured it from the view of patrons or other employees. Even assuming that defense counsel erred by not calling the witnesses in this case, defendant cannot show that he was deprived of a substantial defense given the scant probative value of the witnesses' presumed testimony. Therefore, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant also claims that the trial court abused its discretion in denying his motion for a new trial on the ground that his counsel was ineffective by persuading him to waive his constitutional right to testify and not to present any witnesses in his behalf. According to defendant, he did not knowingly waive his right to testify at trial and to present witnesses on his behalf. There is nothing in the record to support defendant's claim in this record. Because

defendant affirmatively indicated that he waived his right to testify and his right to call witnesses in his behalf, he waived appellate review of this issue. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Christopher M. Murray

/s/ Pat M. Donofrio