

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY LEE ARTIBEE, SR,

Defendant-Appellant.

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UNPUBLISHED  
November 9, 2004

No. 251115  
Eaton Circuit Court  
LC No. 02-020352-FC

Before: Cooper, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of six counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under thirteen), and was sentenced to concurrent prison terms of 225 to 480 months for each conviction.<sup>1</sup> Defendant's motion for new trial was denied. Defendant appeals as of right. We affirm.

I

Defendant first argues that he was denied a fair trial by several instances of ineffective assistance of counsel. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685; 122 S Ct 1843, 1850; 152 L Ed 2d 914, 927 (2002), on rem 359 F3d 785 (CA 6, 2004); *People v Toma*, 462

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<sup>1</sup> Defendant was acquitted of a seventh count of first-degree CSC that alleged genital penetration with a finger.

Mich 281, 302; 613 NW2d 694 (2000), and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Deference is afforded to counsel's strategic judgments. *Wiggins v Smith*, 539 US 510; 123 S Ct 2527, 2535, 2539; 156 L Ed 2d 471, 485, 489 (2003).

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 Matuszak*, 263 Mich App 42, 58; \_\_\_ NW2d \_\_\_ (2004). Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (#246739, rel'd 8/24/04) slip op p 3, 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 *Id.*. A substantial defense is one, which 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).

#### A

Defendant first argues that he was denied a fair trial by counsel's failure to make an opening statement. The decision to waive opening statement is a matter of trial strategy that is rarely the basis of a successful claim of ineffective assistance of counsel. *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). At trial, defense counsel reserved his opening statement. After the prosecution rested, and before he presented defense witnesses, defense counsel waived his opening statement. Defense counsel testified at the evidentiary hearing that he thought it would detract from his closing argument if he simply repeated what he said in an opening statement shortly before giving his closing statement. He did not believe that it would prejudice defendant by foregoing an opening statement. He indicated that the defense theory of the case was before the jury because of how he cross-examined Jessica; that is, that "she wasn't believable."

Where a defense attorney makes an extensive closing argument during which he is afforded a full and fair opportunity to comment on the case and the evidence presented, prejudice does not generally result from the waiver of an opening statement. See, e.g., *People v Buck*, 197 Mich App 404, 413-414; 496 NW2d 502, rev'd in part on other grounds *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993). Defense counsel made an extensive closing argument during which he focused on the inconsistencies of the victim's testimony. He also focused on the location of the alleged assaults in an attempt to show that it would not make sense for defendant to assault the victim in locations where he could be easily discovered. Under these circumstances, counsel's decision to forego an opening statement did not undermine defendant's chance for a fair trial, and this Court will not second-guess trial counsel in matters of trial strategy.

## B

Defendant argues that counsel was ineffective for failing to object to the prosecutor's remark during open statements that "she [the victim] says it actually happened on multiple occasions. The number I don't believe she is going to be able to tell you," because the prosecutor did not give notice pursuant to MRE 404(b)(2) that he intended to introduce other acts evidence. Defense counsel testified at the evidentiary hearing that he made a judgment call not to object to the reference to other acts evidence because the evidence supported the defense theory that the victim lacked credibility. He testified that:

As far as the other bad acts, if, the way they came out, . . . I thought that wasn't hurting us, that rather it was so absurd, what she was saying, that it would impact her credibility. Remember the room, the computer room, where supposedly this stuff, that [the victim] said this, this when I'm in for him to repeatedly be in an open room, where there is a front door right next to it with no door on that, with, that door on the room on, struck me as being the height of, it just, it just made her credibility, as I judged it, even less so. And this was a credibility case . . .

Defense counsel impeached the victim with the alleged number of incidents and challenged her credibility using the evidence. Under these circumstances, defendant has failed to rebut the presumption that defense counsel's decision regarding other acts evidence constituted trial strategy.

## C

Defendant asserts that defense counsel did not properly interview Dr. Mashni before trial. Defense counsel testified at the evidentiary hearing that defendant provided him with a list of persons to interview, including three doctors with regard to erectile dysfunction. Dr. Mashni was one of those persons. Counsel made an appointment with Dr. Mashni and talked with him in person about his testimony before trial. Counsel decided to call Dr. Mashni because he was the most knowledgeable in his field.

The record does not support defendant's claims that counsel failed to properly interview Dr. Mashni and that counsel erred by calling Dr. Mashni as a witness. Decisions regarding what evidence to present and whether to call or question witnesses are matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

## D

Defendant maintains that the failure to list and call Bonnie Saxton as a witness demonstrated ineffective assistance of counsel. A failure to produce witnesses constitutes ineffective assistance of counsel only if it deprives a defendant of a substantial, or outcome-determinative defense. *Dixon, supra*. The choice of witnesses is presumed to be part of sound trial strategy, and to overcome that presumption, a defendant must show that counsel failed to properly prepare for trial and therefore was ignorant of the substantial nature of the omitted testimony. *Id.*

Saxton was an alcohol therapist who did an evaluation of defendant. She was originally contacted regarding an unrelated charge of drunk driving. Saxton would have offered an opinion that defendant did not meet the profile of a sexual offender.

During the evidentiary hearing, defense counsel testified that he first learned Saxton could be a potential witness in the CSC case about a week prior to trial. Defense counsel did not think of her as an expert in this area, and instead thought of her in terms of defendant's alcohol problem. Counsel did not want to emphasize this problem to the jury. Saxton told counsel that she had never been called as an expert in the area of profiling, but that she had "read a couple of books on it." Counsel did not think Saxton would be a valuable witness to call because she lacked the credentials to testify that defendant did not have the profile of a molester.

In light of Saxton's lack of expertise in the area of criminal profiling, together with the fact that evidence of defendant's alcohol abuse would be presented to the jury if Saxton testified, counsel made a decision that Saxton was not a valuable witness. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Dixon, supra*. Defendant has not demonstrated that the failure to call Saxton as a witness denied him a substantial defense.

The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). In order to reverse on the basis of cumulative error, the effect of the errors must be seriously prejudicial in order to warrant a finding that the defendant was denied a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Only actual errors are aggregated to determine their cumulative effect. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). Having found no errors, we reject defendant's claim that the cumulative effect of multiple errors requires a new trial. *LeBlanc, supra* at 591-592.

## II

Defendant argues that the trial court erred by denying his motion for a new trial that was based on the arguments raised in Issue I, as well as the additional arguments that (1) the odor of alcohol on defense counsel's breath demonstrated ineffective assistance of counsel; (2) financial difficulties may have provided motivation for Jessica and her parents to lie in the proceedings against defendant; (3) defense counsel did not rehearse Mary Artibee's testimony prior to trial; and (4) counsel presented no real trial strategy. This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

A review of the testimony presented during the hearing on the motion for new trial reveals that the trial court did not abuse its discretion by denying the motion for new trial. MCR 6.431(B). First, none of the witnesses testified that defendant was under the influence of alcohol. Second, defendant was examined about his financial involvement with Larry Jr., and defendant himself testified that he "had no problems" with Larry and his family and that he knew of no reason why Jessica would lie. Third, defense counsel recalled talking to Mary Artibee before trial. Mary's testimony was minimal. Defendant has failed to explain how he was prejudiced by counsel's failure to "rehearse" Mary's testimony. Fourth, defense counsel discussed possible defenses with defendant and decided on a trial strategy of denial and a challenge to Jessica's

credibility. Defendant has failed to show an error by defense counsel that affected the outcome of the proceedings. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

Affirmed.

/s/ Jessica R. Cooper  
/s/ E. Thomas Fitzgerald  
/s/ Joel P. Hoekstra