

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBI JOE BACON,

Defendant-Appellant.

UNPUBLISHED

December 19, 2006

No. 266337

Lenawee Circuit Court

LC No. 04-011387-FH

Before: Meter, P.J., and O’Connell and Davis, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of third-degree child abuse, MCL 750.136b(5). She was sentenced to nine months in jail, with 60 days to be served immediately, and the remainder to be deferred until she completed five years probation. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with abusing her live-in boyfriend’s eight-year-old son by throwing him into a wall, throwing him across the room, and “spanking” him so forcefully that handprints and bruises were apparent on his buttocks. Defendant’s theory of the case was that the child’s biological mother had caused the bruising. Both the child and his biological mother acknowledged that the mother had previously spanked him, but the mother denied that she ever spanked the child out of anger or that she had spanked him within a month of the appearance of the marks. Defendant’s primary defense was that the abuse occurred at the hands of the child’s mother.

Defendant argues that her counsel’s failure to call the biological mother’s former boyfriend as a witness deprived her of effective assistance of counsel. The ex-boyfriend allegedly would have testified that he had witnessed the child’s mother angrily and forcefully spank the child and the child’s younger sibling. We disagree with defendant’s argument. Because defendant did not raise the issue in the trial court or seek a *Ginther*¹ hearing, we limit our review of defendant’s claims to mistakes apparent on the record. *People v Riley (After*

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Remand), 468 Mich 135, 139; 659 NW2d 611 (2003). To succeed on an ineffective assistance claim, “the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy.” *Id.* at 140.

Defendant did not move for a new trial or an evidentiary hearing. There is no evidence regarding trial counsel’s decision not to call the ex-boyfriend as a witness. There is only speculation in the record that the boyfriend would even testify consistently with defendant’s theory of the case. Therefore, defendant has failed to overcome the presumption that trial counsel’s decision is attributable to strategy rather than incompetence. “Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Both the child and his mother acknowledged that she had previously spanked him, and defense counsel argued in closing that the medical evidence indicated that the mother was the more likely culprit. Under the circumstances, defendant was not deprived of her defense merely because her counsel decided not to call the ex-boyfriend to the stand.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O’Connell
/s/ Alton T. Davis