STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 10, 2008
v	No. 277139 Wayne Circuit Court
REGINALD LEE KIRKWOOD, Defendant-Appellant.	LC No. 06-012193-01

Before: Owens, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age). He was sentenced to concurrent prison terms of 15 to 40 years for the two CSC I convictions and 3 to 15 years for the CSC II conviction. Defendant appeals as of right. We affirm.

Defendant first claims he was denied the effective assistance of counsel because counsel failed to call the complainant's gynecologist and psychologist as witnesses, and failed to have the complainant examined by an independent psychologist. We disagree. Criminal defendants have a constitutional right to effective assistance of counsel. *Strickland v Washington*, 466 US 668, 685-686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and it is defendant's heavy burden to prove otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "When no *Ginther*[1] hearing has been conducted, our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish ineffective assistance of counsel, a defendant must show that but for counsel's errors, the result of the proceedings would have been different. *Id.* at 129.

Defendant claims the gynecologist would have testified that there was no physical evidence of the incidents occurring. The decision whether to present an expert witness is

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

presumed to be a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The failure to call a witness constitutes ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *Dixon*, *supra*. A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

At trial, counsel established that the complainant recently had a gynecological examination. Counsel then used this information to cast doubt on the complainant's testimony, pointing out that the prosecution failed to offer any evidence to prove that the complainant had any scarring or damage in her vaginal area. Counsel likely determined that this tactic was sufficient to impeach the complainant's credibility, and that it was not worth the risk of the gynecologist testifying that scarring was present or providing an explanation for any lack of scarring. Coupled with defendant's failure to provide any evidence to support his position that had the gynecologist been called, the testimony would have been as he asserts, we find no error.

Defendant next suggests the complainant's psychologist would have undermined her credibility with testimony regarding the more than ten-year delay in reporting the incidents. As before, defendant offers no proof regarding this witness's testimony. Moreover, this does not appear to be a case where the victim pushed memories of the assaults from her conscious to subconscious mind. When asked why she told those treating her at the second mental facility about the assaults, the complainant stated that she did so "[b]ecause my mom said in order to get over it and passed it, I have to talk about it." When asked how she knew what her mother was talking about, the complainant explained it was "[b]ecause [she] was writing certain things down and [her mother] would find stuff." In fact, when defense counsel questioned the complainant about her possibly faulty memory, she screamed, "How do you forget somebody that raped you? Come on now." Given the prior early reporting that was not believed by her mother, this testimony strongly implies that the assaults remained in the complainant's conscious mind but were just never reported.

Moreover, had the witness testified, it is possible that this would have actually hurt the defense. The psychologist might have cited the complainant's recent behavior changes, suicide attempt, and counseling sessions as the reason why she ultimately reported the incidents. Given this risk, counsel may have decided it was more effective to cast doubt on the prosecution's case by referencing the ten-year delay during cross-examination and closing argument, rather than to call the psychologist as a witness. Accordingly, we decline to substitute our judgment for that of counsel or second-guess this issue of trial strategy. *Matuszak*, *supra*.

Finally, defendant fails to establish that there was no examination by an independent psychologist. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (observing that a "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel"). Rather, he speculates that if such an examination had occurred, counsel would have mentioned it at trial. Defendant appears to suggest that the examination results would have impeached the complainant's credibility by establishing that she suffered from a repressed memory. Again, nothing in the record supports defendant's claim. Thus, it is quite possible that the examination results were unfavorable and that counsel elected not to mention

them as a matter of trial strategy. *Dixon*, *supra*; *Matuszak*, *supra*. However, even if counsel did fail to have the complainant examined and this examination would have benefited the defense, defendant has not shown that the outcome would have been different. *Mack*, supra at 129. The complainant's testimony provided ample evidence for defendant's conviction, and the trial court expressly stated that it found her credible. We conclude that defendant has not overcome the burden that he received effective assistance of counsel. *Solmonson*, *supra*.

Defendant also claims the evidence was insufficient to convict him of CSC I because the prosecutor failed to establish the element of penetration. We disagree. "Circumstantial evidence and the reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of the crime," *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993), and any conflicts in the evidence are resolved in the prosecution's favor, *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). At trial, the primary evidence of penetration was established through the testimony of the complainant. On direct-examination, she testified that defendant's penis went inside her vagina and that he "went up and down" on her. Although there were certain details of the incident that the complainant could not remember, at no point did she waiver on the issue of penetration. From this testimony it was reasonable to conclude that penetration occurred. This was ultimately a question of witness credibility, which was properly left to the trier of fact to determine. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Alton T. Davis