

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID SCOTT HOSKINSON,

Defendant-Appellant.

UNPUBLISHED
December 16, 2010

No. 290856
Macomb Circuit Court
LC No. 2008-002557-FH

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

Defendant David Hoskinson appeals as of right his jury trial convictions for third-degree criminal sexual conduct¹ and fourth-degree criminal sexual conduct.² The trial court sentenced David Hoskinson to 30 to 180 months in prison for the third-degree criminal sexual conduct conviction, and 12 to 24 months in prison for the fourth-degree criminal sexual conduct conviction. We affirm.

I. FACTS

This case arises out of a sexual incident occurring between David Hoskinson and the complainant occurring either late in the evening of December 29, 2007, or in the early morning hours of December 30, 2007.

The complainant and Elizabeth Hoskinson, David Hoskinson's wife, were best friends. The Hoskinsons and the complainant used to live across the street from each other in Auburn Hills, but the Hoskinsons eventually moved about one mile away, into Rochester Hills. The complainant knew the Hoskinsons for about two and half years. Two and half years before the sexual incident and before the complainant and Elizabeth Hoskinson became best friends, the complainant performed fellatio on David Hoskinson. She did not consider it an intimate act because it only occurred one time.

On the night of December 29, 2007, the complainant, Elizabeth Hoskinson, and Layla Bromm, the Hoskinsons' niece, decided to go to the bar. The complainant drove to the

¹ MCL 750.520d(1)(c).

² MCL 750.520e(1)(c).

Hoskinsons' Rochester Hills house around 7:30 p.m. Elizabeth Hoskinson, Bromm, David Hoskinson, and all of the Hoskinsons' children were home. The original plan was for the complainant, Elizabeth Hoskinson, and Bromm to go out to the bar for an evening of drinking, but David Hoskinson invited himself to join the group. David Hoskinson agreed to be the designated driver for the evening.

The group arrived at a bar in Auburn Hills around 9:00 p.m. The complainant and Elizabeth Hoskinson began consuming alcohol heavily. The complainant stated that she had about five vodka and sodas and a beer, but no shots. The complainant said consumption of these drinks affected her judgment because she was no longer a "big drinker." When the group left the bar around 1:00 a.m., both the complainant and Elizabeth Hoskinson were inebriated.

After leaving the bar, they drove through the drive-thru at Taco Bell to get food, and then went to the Hoskinsons' house to eat the food. Upon arriving at the house, David Hoskinson had problems getting the front door to his house open, so the complainant decided to urinate on the other side of the vehicle. The complainant stated that she normally did not urinate outside, but her consumption of alcohol affected her judgment that night. After that, David Hoskinson was able to get the front door open, and the group entered the house to eat the food.

Around 2:30 a.m., David Hoskinson and the complainant left the Hoskinsons' house. David Hoskinson had agreed to drive the complainant to her boyfriend's house in Sterling Heights. Within a couple of minutes after David Hoskinson began driving, the complainant rested her head against the passenger side window and fell asleep.

The complainant awoke while David Hoskinson was driving to find that her pants were undone and pulled down, and David Hoskinson had his fingers inside her vagina. The complainant saw that her hand was on David Hoskinson's exposed and erect penis. At the same time, the complainant heard David Hoskinson asking her if she wanted him to take her to a parking lot and "finish it off." The complainant understood "finish it off" to mean that David Hoskinson wanted to have sex with her. The complainant took her hand off of David Hoskinson's penis and unsuccessfully tried to remove David Hoskinson's hand from her vagina. The complainant told David Hoskinson to stop, but he would not, and the complainant began crying. Once David Hoskinson realized that the complainant was crying, he removed his hand from the complainant's vagina. The complainant stated that David Hoskinson's fingers were inside her vagina for about one minute.

David Hoskinson then began panicking and screaming. He told the complainant that she could not tell Elizabeth Hoskinson or anyone else what happened. David Hoskinson pulled into a parking lot and quickly grabbed the complainant's face. David Hoskinson told the complainant to calm down, to not tell anyone what happened, and to zip her pants back up.

The complainant then called her boyfriend to get the exact location of his house because David Hoskinson could not locate it.³ David Hoskinson and the complainant arrived at her boyfriend's house after 2:30 a.m. The boyfriend was standing at his front door to help David

³ The complainant and her boyfriend had only begun dating in December 2007.

Hoskinson locate his house and to let the complainant into his house. When David Hoskinson pulled into the boyfriend's driveway, the complainant exited the car. The boyfriend stated that the complainant appeared very agitated and distressed as she entered his house. The boyfriend thought she was almost crying. The boyfriend asked the complainant what was wrong, but the complainant did not respond. The boyfriend then asked David Hoskinson what was wrong with the complainant. David Hoskinson did not reply, and the boyfriend asked David Hoskinson what he did to the complainant. David Hoskinson just shrugged his shoulders. The boyfriend went into his house and discovered that the complainant had gone into the bathroom. Eventually, the complainant came out of the bathroom and told the boyfriend what David Hoskinson had done to her. The complainant continued to cry until she fell asleep.

The next morning, around 10:30 a.m., the boyfriend took the complainant to the Hoskinsons' house to pick up her car. The complainant had to go inside to pick up the keys to her car. Elizabeth Hoskinson answered the door when the complainant knocked, and she asked the complainant to accompany her on some errands. The complainant agreed, and when the two women returned to the Hoskinsons' house, Elizabeth Hoskinson asked the complainant what was wrong with her. The complainant then told Elizabeth Hoskinson what David Hoskinson had done to her. Elizabeth Hoskinson started screaming at David Hoskinson, and then David Hoskinson began screaming at the complainant and destroying objects in the house. After David Hoskinson threw an end table towards the complainant, she left the Hoskinsons' house.

At trial, the complainant denied that she blacked out from consuming too much alcohol on December 29, 2007. However, she did admit that she had a lot of alcohol to drink that night. The complainant also stated that she was acting out of character that night because she had been drinking. The complainant stated that she lost some of her inhibitions when she drank and would engage in activities she normally would not. The complainant also stated that she had drank heavily after the incident, but by the time of trial, she had stopped drinking alcohol entirely.

The complainant did not report the incident until January 1, 2008, because she thought her intoxicated stated during the assault would preclude charging David Hoskinson with a crime. The complainant went to the Sterling Heights police station and spoke to two different officers.

Officer Antoinette Fett from the Sterling Heights Police Department interviewed the complainant on January 1, 2008. Officer Fett stated that, during the interview, the complainant told Officer Fett that she awoke to David Hoskinson's fingers penetrating her vagina while he was driving. The complainant also stated that her hand was placed on David Hoskinson's penis. Additionally, the complainant stated that David Hoskinson was driving her to her boyfriend's house when this occurred and that David Hoskinson went into a rage when the complainant told Elizabeth Hoskinson what had happened. Officer Fett stated that the complainant appeared upset during the interview.

Detective Paul Reno from the Sterling Heights Police Department was the officer in charge of this case. Detective Reno interviewed the complainant and David Hoskinson. During her interview, the complainant first told Detective Reno she had not previously been "intimate" with David Hoskinson, but when asked a second time, the complainant stated she had once performed fellatio on David Hoskinson. During his interview, David Hoskinson stated that he drove the complainant to her boyfriend's house on December 29, 2007, because the complainant and Elizabeth Hoskinson had both been drinking heavily. While driving the complainant, the

complainant fell asleep against the passenger window. At some point, David Hoskinson thought the complainant was going to throw up, so he reached over and rolled down the passenger side window while stopped at a red light. David Hoskinson also stated that he had difficulty finding the boyfriend's house. When they reached the boyfriend's house, David Hoskinson thought the complainant was acting "bitchy," but he did not know why. The next day, the complainant spoke to Elizabeth Hoskinson and suddenly Elizabeth Hoskinson was accusing David Hoskinson of assaulting the complainant the night before. This upset David Hoskinson, and they began fighting.

As previously noted, the jury found David Hoskinson guilty. David Hoskinson moved for a new trial before the trial court. David Hoskinson argued that prosecutorial misconduct occurred when the prosecution elicited testimony regarding the complainant's prior sexual relationship with David Hoskinson. Before trial, the trial court had ruled that all evidence regarding the prior sexual relationship between the complainant and David Hoskinson was inadmissible. According to David Hoskinson, prejudicial error affecting the outcome of his trial occurred when the prosecution elicited such testimony during trial without David Hoskinson also being able to address during voir dire or in his opening statement the prior sexual relationship between him and the complainant.

The prosecution responded, arguing that it elicited testimony regarding the past sexual relationship between David Hoskinson and the complainant for the limited purpose of allowing the jury to evaluate the credibility of the complainant because the complainant had denied being intimate with David Hoskinson during her interview with Detective Reno.

After a hearing, the trial court denied David Hoskinson's motion for a new trial. It stated that the prior sexual conduct between the parties was inadmissible unless David Hoskinson alleged consent as a defense. The trial court stated that it made the correct ruling in excluding the complainant and David Hoskinson's prior sexual relationship from the voir dire process, and that, regardless, the issue was not outcome determinative.

David Hoskinson appealed to this Court. But David Hoskinson also again moved for a new trial with the trial court. David Hoskinson requested a *Ginther*⁴ hearing because he argued that he was denied the effective assistance of counsel when defense counsel failed to properly investigate key witnesses, failed to offer expert testimony regarding the effects of excessive alcohol consumption on memory, and failed to object to the improper scoring of prior record variable (PRV) 7 and offense variables (OV) 4 and 10.

After holding two *Ginther* hearings, the trial court issued its opinion and order denying David Hoskinson's request for a new trial based on the ineffective assistance of counsel. The trial court stated that defense counsel's decision to not call an expert witness constituted sound trial strategy because defense counsel sought to have the prosecution establish that the complainant was intoxicated. Furthermore, the trial court found it reasonable that while he prepared for trial, defense counsel expected that he was going to be able to present evidence regarding the complainant's conduct at the bar. Defense counsel's decision against having David

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Hoskinson testify at trial also constituted sound trial strategy. The trial court concluded that defense counsel was not unreasonable in failing to call Elizabeth Hoskinson or Bromm to testify because both admitted at the *Ginther* hearing that they failed to return several phone calls from defense counsel. Finally, the trial court opined that it was not reasonably probable that the outcome of the trial would have been different had it not been for defense counsel's conduct, and thus, David Hoskinson failed to meet his burden of proof.

This Court dismissed David Hoskinson's appeal for want of prosecution because David Hoskinson failed to timely submit his brief on appeal.⁵ David Hoskinson moved for rehearing. This Court granted David Hoskinson's motion for rehearing and vacated its dismissal of David Hoskinson's appeal.⁶ We now address David Hoskinson's appeal as of right.

II. RIGHT TO CONFRONTATION AND THE RAPE SHIELD STATUTE

A. STANDARD OF REVIEW

David Hoskinson argues that his right to confrontation was violated when the trial court excluded the complainant's past sexual conduct under the rape shield statute.⁷ "This Court reviews evidentiary issues for an abuse of discretion."⁸ An abuse of discretion exists if the results are outside the range of principled outcomes.⁹ We also review de novo the constitutional question whether a defendant was denied the right to confront the witnesses against him.¹⁰

B. ADMISSIBILITY UNDER THE RAPE SHIELD STATUTE

Michigan's rape shield statute provides:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted . . . unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

⁵ *People v David Hoskinson*, unpublished order of the Court of Appeals, entered June 16, 2010 (Docket No. 290856).

⁶ *People v David Hoskinson*, unpublished order of the Court of Appeals, entered on July 28, 2010 (Docket No. 290856).

⁷ MCL 750.520j.

⁸ *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007).

⁹ *Id.* at 588-589.

¹⁰ *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.^[11]

Pursuant to the statute, evidence of the victim's sexual conduct is specifically prohibited except when the evidence is material and probative of the victim's past sexual history with the defendant or to show the source or origin of semen, pregnancy, or disease.¹²

The trial court properly excluded the evidence that David Hoskinson proffered in his motion because he sought to introduce evidence of the complainant's past sexual conduct with persons other than David Hoskinson, and the evidence was not for the purposes of proving the source or origin of semen, pregnancy, or disease. Thus, we conclude that the rape shield statute specifically excluded the complainant's past sexual conduct.

C. RIGHT TO CONFRONTATION

In certain limited situations, evidence that does not come within the specific exceptions of the rape shield statute may nevertheless be relevant and its admission required to preserve a criminal defendant's Sixth Amendment right of confrontation.¹³

“In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation.”¹⁴ This Court applies the rape shield statute on a case-by-case basis to balance the rights of the victim and the defendant in each case.¹⁵ Exceptions to the rape shield statute include allowing the victim's past sexual conduct for the narrow purpose to show that the victim has made false accusations in the past or to show the victim's bias.¹⁶ However, “[t]he right of cross-examination does not include a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interests of the trial process or of society. . . . Defendants are, however, guaranteed a reasonable opportunity to test the truth of a witness' testimony.”¹⁷

¹¹ MCL 750.520j.

¹² See *People v Adair*, 452 Mich 473, 481; 550 NW2d 505 (1996), citing MRE 401 (“A complainant's sexual history with others is generally irrelevant with respect to the alleged sexual assault by the defendant.”).

¹³ *People v Hackett*, 421 Mich 338, 344, 348; 365 NW2d 120 (1984); *People v Buie*, 285 Mich App 401, 408; 775 NW2d 817 (2009).

¹⁴ *Adair*, 452 Mich at 485, quoting *Hackett*, 421 Mich at 349.

¹⁵ *People v Morse*, 231 Mich App 424, 433; 586 NW2d 555 (1998).

¹⁶ *Hackett*, 421 Mich at 348-349.

¹⁷ *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

David Hoskinson has failed to show that the trial court's ruling denied him the right to effectively confront the complainant. David Hoskinson wished to question the complainant regarding sexual conduct that occurred between the complainant and Elizabeth Hoskinson and between the complainant and an unidentified male in order to prove that the complainant was intoxicated while at the bar. Allowing the jury to hear about a victim's sexual past to prove the victim consumed a high level of alcohol is not a recognized exception, and such a rule would violate a victim's rights under the rape shield statute.¹⁸ The right to confrontation does not include a right to such questioning when the defendant is not seeking to prove that the victim made a false accusation in the past or is biased. Furthermore, defense counsel repeatedly asked the complainant during cross-examination how much alcohol she drank, how inebriated she was, and whether she correctly remembered the events that occurred that night. Thus, David Hoskinson effectively confronted the complainant regarding the truthfulness of her testimony relating to her level of intoxication that night, and the effect that her alcohol consumption may have had on her memory. Therefore, we conclude that the trial court did not violate David Hoskinson's right to confrontation.

III. NEW TRIAL

A. STANDARD OF REVIEW

David Hoskinson argues that he is entitled to a new trial to prevent the miscarriage of justice. More specifically, he argues that the jury never received critical information from certain key witnesses, including an expert witness, who would have challenged the evidence against him. This Court reviews for an abuse of discretion a trial court's decision whether to grant a motion for a new trial.¹⁹

B. LEGAL STANDARDS

MCL 769.26 provides:

[n]o judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Additionally, MCR 6.431(B) provides that “[o]n the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.”²⁰

¹⁸ *Morse*, 231 Mich App at 433.

¹⁹ *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

²⁰ See *People v Brown*, 279 Mich App 116, 144-145; 755 NW2d 664 (2008); see also MCL 770.1 (“The judge of a court in which the trial of an offense is held may grant a new trial to the

C. APPLYING THE STANDARDS

As explained above, the trial court properly ruled that all evidence of the complainant's prior sexual activities was not admissible. The rape shield statute prevented the jury from hearing evidence relating to the complainant's sexual conduct. Thus, a miscarriage of justice did not occur and a new trial is not warranted when defense counsel stated that he wished to use the testimony of Elizabeth Hoskinson, Bromm, and the unidentified male to bring in evidence of the complainant's prior sexual conduct.

Regarding the expert witness, this was new evidence presented for the first time after trial. "For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial."²¹ Additionally, newly discovered evidence does not require a new trial if it would merely be used for impeachment purposes or if it relates only to a witness's credibility.²²

At the *Ginther* hearing, defense counsel stated that he thought of calling an expert witness, but did not do so because the complainant denied drinking alcohol. Thus, the evidence itself was not newly discovered and defense counsel could have found it through reasonable diligence. Furthermore, David Hoskinson's expert evidence would have suggested to the jury that the complainant could not have remembered the events of the night when she was allegedly sexually assaulted based on the estimated amount of alcohol she consumed. Such testimony would relate solely to the complainant's credibility regarding the events of that night and would not be new evidence for the jury. Accordingly, we conclude that the trial court properly denied David Hoskinson's motion for a new trial.

IV. SCORING OF SENTENCING VARIABLES

A. STANDARD OF REVIEW

David Hoskinson argues errors in the scoring of OV 4, OV 10, and PRV 7. This Court reviews de novo the application of the sentencing guidelines, but reviews for an abuse of discretion a trial court's scoring of a sentencing variable.²³

defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs.").

²¹ *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal quotations and citations omitted).

²² *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

²³ *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

B. LEGAL STANDARDS

A sentencing court has discretion in determining the number of points to be scored, provided the evidence adequately supports a particular score.²⁴ This Court will uphold scoring decisions for which there is any evidence in support.²⁵ This Court must affirm a sentence within the applicable guidelines range, absent an error in the scoring or reliance on inaccurate information in determining the sentence.²⁶

C. APPLYING THE STANDARDS

1. OV 4

Under OV 4, the trial court should score ten points if “[s]erious psychological injury requiring professional treatment occurred to a victim.”²⁷ The trial court should “[s]core 10 points if the serious psychological injury *may* require professional treatment.”²⁸ In making this determination, the fact that treatment has not been sought is not conclusive.²⁹ The victim’s expression of fearfulness is enough to satisfy the statute.³⁰

Although the complainant did not testify at trial that she suffered psychological injury, she did write a complainant impact statement that was read during David Hoskinson’s sentencing hearing. In her statement, the complainant stated that she had nightmares and had become depressed because of the sexual abuse. She stated that she had lost her trust in all people, including her friends and daughter, and was working towards rebuilding her relationships with people. The complainant also stated that she wished to seek counseling when she had the money to do so. This evidence was adequate to uphold the trial court’s scoring of OV 4 at ten points.

2. OV 10

Under OV 10, the trial court should score five points if “[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious.”³¹ “‘Exploit’ means to manipulate a victim for selfish or unethical purposes.”³² David Hoskinson was convicted of third-degree criminal

²⁴ *Hornsby*, 251 Mich App at 468.

²⁵ *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

²⁶ MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

²⁷ MCL 777.34(1)(a).

²⁸ MCL 777.34(2) (emphasis added).

²⁹ *Id.*

³⁰ *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009).

³¹ MCL 777.40(1)(c).

³² MCL 777.40(3)(b).

sexual conduct.³³ And “[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and . . . [t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.”³⁴

David Hoskinson asserts that because the complainant’s vulnerability was essentially an element of the crime for which he was convicted, it was error to score him under OV 10 for exploitation of the complainant. David Hoskinson’s argument is incorrect. David Hoskinson’s conviction for third-degree criminal sexual conduct was because the complainant was physically helpless at the time of the sexual assault. Upon being convicted, the trial court assessed David Hoskinson five points under OV 10 because the complainant was under the influence of alcohol and asleep at the time of the sexual assault. The two determinations are separate, and according to the scoring guidelines, the trial court correctly assessed five points under OV 10.³⁵

3. PRV 7

Under PRV 7, the trial court should score ten points if the defendant has one subsequent or concurrent felony conviction.³⁶ David Hoskinson argues error occurred because the Penal Code defines fourth-degree criminal sexual conduct as a misdemeanor.³⁷ David Hoskinson’s argument fails because the Code of Criminal Procedure³⁸ under which the sentencing guidelines³⁹ fall defines a felony as “a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.”⁴⁰ The Code of Criminal Procedure defines a misdemeanor as “a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine.”⁴¹

“Criminal sexual conduct in the fourth degree is a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than \$500.00 or both.”⁴² Thus, although it is true that fourth-degree criminal sexual conduct is classified as a misdemeanor under the Penal Code, for purposes of the sentencing guidelines, fourth-degree criminal sexual conduct is considered as a felony. Because no errors occurred in the scoring of David

³³ MCL 750.520d(1)(c).

³⁴ *Id.*

³⁵ *Kimble*, 470 Mich at 310-311.

³⁶ MCL 777.57(1)(b).

³⁷ MCL 750.520(e)(2).

³⁸ MCL 760.11 *et seq.*

³⁹ MCL 777.11 *et seq.*

⁴⁰ MCL 761.1(g).

⁴¹ MCL 761.1(h).

⁴² MCL 750.520(e)(2).

Hoskinson's sentencing variables, his minimum sentencing guidelines range has not changed, and he is not entitled to resentencing.⁴³

V. EFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

David Hoskinson argues that he was denied the effective assistance of counsel when defense counsel failed to present certain witnesses and failed to object to the scoring of OV 4, OV 10, and PRV 7. David Hoskinson moved for a new trial with the trial court, the trial court held a *Ginther* hearing, and the trial court denied David Hoskinson's motion for a new trial based on ineffective assistance of counsel. Thus, review of these issues includes the necessary testimonial record.⁴⁴ The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law.⁴⁵ We review for clear error the trial court's findings of fact, but we review de novo its constitutional determinations.⁴⁶

B. LEGAL STANDARDS

To establish a claim for ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceeding would have been different.⁴⁷ Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise.⁴⁸ The defendant "must overcome a strong presumption that counsel's performance constituted sound trial strategy."⁴⁹ Counsel's decisions regarding whether to call or question witnesses and what evidence to present are presumed to be trial strategy.⁵⁰ Thus, the failure to call witnesses constitutes ineffective assistance of counsel only when it deprives a defendant of a substantial defense.⁵¹

C. APPLYING THE STANDARDS

At the *Ginther* hearing, defense counsel stated that his trial strategy was to persuade the jury that the complainant was so intoxicated that her testimony did not prove David Hoskinson committed the charged crimes beyond a reasonable doubt. Regarding the expert witness, defense

⁴³ *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006).

⁴⁴ *Ginther*, 390 Mich at 443; *People v Jelks*, 33 Mich App 425, 431; 190 NW2d 291 (1971).

⁴⁵ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

⁴⁶ *Id.*

⁴⁷ *Strickland v Washington*, 466 US 668, 687-88, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

⁴⁸ *LeBlanc*, 465 Mich at 578.

⁴⁹ *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

⁵⁰ *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

⁵¹ *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

counsel stated that he did not think to call an expert witness regarding the effects of alcohol on the complainant's memory because the complainant denied consuming a large amount of liquor, and no witnesses from the bar were able to testify regarding her conduct. Regarding the lay witnesses, defense counsel stated that Elizabeth Hoskinson refused to testify on behalf of her husband. Further, Bromm initially agreed to testify, but after her husband returned from serving in the military, she would not return any of defense counsel's phone calls. Defense counsel also noted that even if he would have found and called the unidentified male that the complainant engaged in sexual activity with at the bar earlier that evening, the witness's testimony would not have been very helpful because, according to defense counsel's understanding of the trial court's rulings, the witness would not have been allowed to testify regarding the complainant's prior sexual conduct.

Defense counsel's decision not to call these witnesses to testify did not fall below the standard of reasonableness for an attorney. Defense counsel adequately explained his trial strategy in not calling each of these witnesses. Furthermore, there is nothing in the record to indicate that defense counsel's decision to call an expert witness or the other witnesses would have resulted in a different outcome of the proceedings. Accordingly, David Hoskinson has failed to overcome the presumption that counsel's performance constituted sound trial strategy.

Regarding David Hoskinson's claim that defense counsel was ineffective for failing to object during his sentencing hearing, we find David Hoskinson abandoned this issue by failing to engage in any meaningful analysis.⁵² Regardless, as we have already discussed, there were no errors in the scoring of David Hoskinson's sentencing variables. Thus, David Hoskinson has failed to show that defense counsel was ineffective because his minimum sentencing guidelines range has not changed.⁵³

We affirm.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood

⁵² *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

⁵³ *People v Wilson*, 252 Mich App 390, 394-397; 652 NW2d 488 (2002).