

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 13, 2014

v

HERBERT KEETH,

No. 317971
Wayne Circuit Court
LC No. 13-000351-FC

Defendant-Appellant.

Before: RIORDAN, P.J., and SAAD and TALBOT, JJ.

PER CURIAM.

Herbert Keeth appeals as of right his bench trial convictions of two counts of first-degree criminal sexual conduct (“CSC”)¹ and second-degree CSC.² He was sentenced to 25 to 50 years’ imprisonment for each of the first-degree CSC convictions, and 5 to 15 years’ imprisonment for the second-degree CSC conviction. We affirm.

Keeth contends that his trial counsel was constitutionally ineffective for failing to investigate the victim’s Oppositional Defiant Disorder (“ODD”) and present the testimony of the victim’s counselor or treating doctor, which would have helped the trial court understand why the victim might falsely accuse Keeth of the crimes charged. We disagree.

Keeth never moved for a new trial or *Ginther*³ hearing in the trial court.⁴ Accordingly, “our review is limited to mistakes apparent on the record.”⁵ “Whether the defendant received the effective assistance of counsel guaranteed him under the United States and Michigan

¹ MCL 750.520b(1)(a) (victim under 13 years of age).

² MCL 750.520c(1)(a) (victim under 13 years of age).

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁴ Keeth did, however, file a motion to remand with this Court, which was denied. *People v Keeth*, unpublished order of the Court of Appeals, entered August 7, 2014 (Docket No. 317971).

⁵ *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

Constitutions is a mixed question of fact and law.”⁶ Findings of fact are reviewed for clear error.⁷ Questions of constitutional law are reviewed de novo.⁸

“Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense.”⁹ A defendant claiming that he was denied the effective assistance of counsel must establish that “(1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different.”¹⁰ “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”¹¹ “[A] defendant must overcome the strong presumption that counsel’s performance was born from a sound trial strategy.”¹² Further, this Court does not apply the benefit of hindsight when determining whether trial counsel performed competently.¹³

Trial counsel has a “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”¹⁴ “[A] court must determine whether the ‘strategic choices [were] made after [a] less than complete investigation,’ and any choice is ‘reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.’”¹⁵ “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.”¹⁶ Generally, trial counsel’s failure to call a particular witness can only constitute ineffective assistance “when it deprives the defendant of a substantial defense.”¹⁷ “A substantial defense is one that might have made a difference in the outcome of the trial.”¹⁸

⁶ *People v Douglas*, 496 Mich 557, 566; 852 NW2d 587 (2014).

⁷ *Id.*

⁸ *Id.*

⁹ *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012), citing Const 1963, art 1, § 20; US Const, Am VI.

¹⁰ *Trakhtenberg*, 493 Mich at 51.

¹¹ *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (citation and quotation marks omitted).

¹² *Trakhtenberg*, 493 Mich at 52.

¹³ *Payne*, 285 Mich App at 190 (citation omitted).

¹⁴ *Trakhtenberg*, 493 Mich at 52 (citation and quotation marks omitted).

¹⁵ *Id.* (citation omitted; second alteration in original).

¹⁶ *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

¹⁷ *Payne*, 285 Mich App at 190 (citation and quotation marks omitted).

¹⁸ *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (citation and quotation marks omitted).

Keeth argues that trial counsel was ineffective by failing to investigate and present the testimony of the victim's counselor or treating doctor, who would have allegedly testified that the victim suffered from ODD. He relies on a letter, attached to his brief on appeal, sent from counselor Carol Vandyke to Dr. Kevin Frankel on June 23, 2010, confirming the victim's diagnosis, as well as memos, also attached to his brief on appeal, detailing appellate counsel's assistant's purported conversations with trial counsel where trial counsel allegedly stated that he was "not sure if he recognized the issue about the [ODD]" and "probably just overlooked it." Keeth suggests that the victim's ODD would help explain her motivation for making false accusations against Keeth because, according to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, which Keeth also attaches to his brief on appeal, some characteristics of the disorder include spitefulness and vindictiveness. Keeth testified at trial that he decided to no longer allow the victim to visit with him at his home because she was stealing from him and lying. The letter, memos, and manual are not part of the lower court record. Because our review is limited to the record, these documents will not be considered.¹⁹ As this Court has no record evidence to support Keeth's claim, his claim must fail.

Even if we were to consider this evidence, Keeth fails to establish that, if presented, the testimony of the counselor or doctor would have been favorable to his position and, thus, establish a reasonable probability that the outcome of the trial would have been different.²⁰ Accordingly, Keeth has failed to establish a claim of ineffective assistance of counsel.²¹

In a supplemental brief filed with this Court, Keeth contends that the trial court improperly ordered him to pay \$100 in general court costs without statutory authority. We disagree.

"The application and interpretation of statutes present questions of law that are reviewed de novo."²² Because this issue is not preserved, we review it for plain error affecting Keeth's substantial rights.²³

The Legislature addressed the Michigan Supreme Court's recent decision in *People v Cunningham*²⁴ by enacting 2014 PA 352. Considering 2014 PA 352, but without addressing its purported retroactive effect, we find that the costs imposed on Keeth in the instant case were

¹⁹ See *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

²⁰ See *Trakhtenberg*, 493 Mich at 51; *Payne*, 285 Mich App at 190.

²¹ See *Trakhtenberg*, 493 Mich at 51.

²² *People v Lloyd*, 284 Mich App 703, 706; 774 NW2d 347 (2009).

²³ See *People v Konopka*, ___ Mich ___; 852 NW2d 903 (2014) (remanding to this Court to determine whether the trial court's assessment of \$500 in court costs constituted plain error affecting the defendant's substantial rights in light of *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014)).

²⁴ 496 Mich 145; 852 NW2d 118 (2014).

proper. We further note that Keeth's responsibility to pay such costs is prospective in nature, and remanding the matter to the trial court to articulate its specific reasons for imposing \$100 in costs would be an inefficient use of judicial resources.

Affirmed.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Michael J. Talbot