

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 19, 2011

v

MARCELLUS MARTELL GOODEN,

Defendant-Appellant.

No. 296238
Wayne Circuit Court
LC No. 09-019487-FC

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Following a bench trial, the circuit court convicted defendant of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b)(i) (victim at least 13 but less than 16 years of age, and defendant is a member of the same household), and one count of disseminating sexually explicit matter to a minor, MCL 722.675. The court sentenced defendant to concurrent terms of 9 to 15 years' imprisonment for each first-degree CSC conviction, and one to two years' imprisonment for the disseminating sexually explicit matter conviction. On appeal, defendant raises only an ineffective assistance of counsel claim. We affirm.

Defendant's convictions stem from his sexual assault of and provision of sexually explicit matter to his then 13-year-old niece, ES. ES had lived with her maternal aunt and defendant, her aunt's husband, for seven years at the time of this incident. On the afternoon of July 19, 2009, defendant provided ES with a significant amount of vodka. Defendant then took ES into his bedroom where he played a pornographic video. During the video, defendant convinced ES to touch his exposed penis. Later that night, defendant took ES into the garage and gave her more vodka as well as cigarettes. ES passed out in a chair and awoke when defendant penetrated her mouth and then vagina with his penis. ES fled the garage and was rescued by neighbors who summoned the police. Later medical testing established that ES had a blood alcohol content of 0.112, but the examining doctor could not conclusively determine whether ES had been sexually assaulted.

Defendant argues that defense counsel should have presented evidence regarding ES's behavioral problems in order to show that ES had motive to fabricate the CSC allegations. Defendant raised his ineffective assistance of counsel claim for the first time on appeal in a motion to remand for an evidentiary hearing. This Court denied defendant's motion and, therefore, no evidentiary hearing was conducted. As such, our review is limited to mistakes

apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). A claim of ineffective assistance of counsel “is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant’s constitutional right to the effective assistance of counsel.” *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). This Court reviews the trial court’s findings of fact for clear error and constitutional determinations de novo. *Id.* at 484-485. To establish that counsel was ineffective, a defendant must show that counsel’s performance was so deficient that it actually denied the defendant of the right to counsel. We presume, however, that counsel employed sound trial strategy. The defendant must then show “that, but for counsel’s error, the result of the proceeding would have been different.” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant specifically contends that counsel should have called his wife as a defense witness to testify regarding ES’s behavioral problems. “[T]he failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense.” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Defendant cannot establish that he was denied a substantial defense in this case because his wife did, in fact, testify at trial regarding ES’s behavioral problems, albeit as a prosecution witness. Defendant’s wife testified that ES was confined to the house as punishment at the time of the incident for speaking impolitely to older neighbors. The trial judge, as the finder of fact, found defendant’s wife to be a less than credible witness given her testimony that ES did not appear to be intoxicated on the afternoon of July 19 despite that ES had consumed a large quantity of vodka. Accordingly, even if defense counsel had re-called defendant’s wife as a witness, it is unlikely that her additional testimony would have swayed the court. Defense counsel instead focused on the lack of physical evidence in this case. The fact that this strategic decision was ultimately unsuccessful does not necessarily establish that counsel was ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Affirmed.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher