

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH VERNEAL BYRD,

Defendant-Appellant.

UNPUBLISHED

December 27, 1996

No. 188613

LC No. 94 09425 FH

Before: Corrigan, P.J., and Sullivan* and T.G. Hicks,** JJ.

PER CURIAM.

Defendant appeals by right his conviction by jury of second-degree criminal sexual conduct, 750.520c(1)(a); MSA 28.788(3)(1)(a). We affirm.

Defendant asserts that he was denied effective assistance of counsel because counsel did not advise him to assert the spousal privilege. Because defendant did not move for a hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973) or for a new trial, this Court's review of defendant's claim of ineffective assistance of counsel is limited to the facts on the existing record. *Ginther, supra* at 443-444; *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). We review a claim of ineffective assistance of counsel de novo. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). This Court presumes that counsel was effective, and a defendant bears the heavy burden of demonstrating otherwise. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). To establish a claim for ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel was not functioning as an attorney as guaranteed by US Const, Am VI. Moreover, the defendant must overcome the presumption that the challenged action could be considered sound trial strategy and show that any deficiency prejudiced his case. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). A defendant must also show a reasonable probability that, but for counsel's deficient performance, the result would have been different and that the result of the proceeding was

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

** Circuit judge, sitting on the Court of Appeals by assignment.

fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; ___ NW2d ___ (1996). A review of the record reveals that defendant was not denied the effective assistance of counsel. Defendant has not shown that, but for the admission of his spouse's testimony, the result at trial would have been different. Other witnesses, including the victim himself, testified against defendant; the spouse's testimony was merely cumulative. Defendant has not demonstrated that the result of the proceeding was fundamentally unfair or unreliable.

Moreover, in his brief on appeal, defendant admits that the court explained to him the spousal privilege. After the court instructed defendant that his wife could not be called as a witness to testify against him without his consent, defendant agreed to permit his spouse to testify. Defendant may not be heard to complain on appeal about an error that he caused or an error to which he acquiesced. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Affirmed.

/s/ Maura D. Corrigan

/s/ Joseph B. Sullivan

/s/ Timothy G. Hicks