

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DEWARD PATTENAUDE,

Defendant-Appellant.

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UNPUBLISHED  
November 1, 2005

No. 254893  
Wayne Circuit Court  
LC No. 03-011745-01

Before: Gage, P.J., and Hoekstra, and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of domestic assault, third offense, MCL 750.81(4). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant, defendant's former girlfriend,<sup>1</sup> testified that during an argument, defendant grabbed her face and threw a small mirror at her. The mirror struck her and scratched her face. A police officer observed bleeding scratches on complainant's face, but did not recall seeing any blood, hair, or skin on the mirror.

Defendant did not call any witnesses or testify on his own behalf. In response to the trial court's inquiry, he stated that he understood that he had the right to testify, but that he was under no obligation to do so. The trial court accepted complainant's testimony as credible, and convicted defendant as charged.

Defendant argues that counsel was ineffective by failing to call him as a witness to testify in his own behalf. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a

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<sup>1</sup> Defendant and complainant are the parents of three children, and resided together at the time of the incident.

defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

A defendant's decision whether to testify is deemed a strategic decision best left to defendant and his counsel. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). If a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, the right to testify is deemed waived. *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985). We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The decision to refrain from calling a particular witness constitutes ineffective assistance only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). 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).

Defendant did not seek an evidentiary hearing on the issue of ineffective assistance; therefore, our review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Trial counsel cross-examined complainant regarding the incident, and elicited testimony from the officer regarding the lack of blood or human tissue on the mirror. Even if defendant had testified and denied throwing the mirror at complainant, the trial court, sitting as the trier of fact, would have been free to reject defendant's testimony. *People v Cummings*, 139 Mich App 286, 293-294; 362 NW2d 252 (1984). Counsel's apparent strategy of advising defendant to refrain from testifying did not succeed; however, the fact that a strategy does not succeed does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Defendant has not shown that counsel's performance deprived him of a substantial defense, *Hyland, supra*, or resulted in prejudice. *Carbin, supra*.

Affirmed.

/s/ Hilda R. Gage  
/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray