

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 21, 2012

v

EDWARD ALLAN PROCTOR,

Defendant-Appellant.

No. 303493
Kent Circuit Court
LC No. 09-009612-FH

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant Edward Allan Proctor appeals his conviction of domestic assault, third offense, MCL 750.81(4). The trial court sentenced defendant to 365 days in jail. He was also on probation for a period of 60 months, during which time he was forbidden from contacting the victim. We affirm.

Defendant and the victim had an off-and-on dating relationship spanning more than 20 years. Together they have two adult sons, Eddie and Cameron. On the morning of August 14, 2009, the victim and defendant were in bed together and the victim refused defendant's request that she fellate him. Angered by the victim's refusal, defendant got very close to the victim and pressed his forehead against her forehead. She told him leave. When the victim tried to get out of bed, defendant grabbed her foot and twisted it. He then climbed on top of the victim and choked her. The victim bit his hand and he responded by biting her arm. He continued to choke her and said "I'm going to kill you, you bitch." She tried to apologize while he was choking her. Eventually the victim passed out. When she regained consciousness, defendant was punching her with his fists. When he finished hitting the victim, he sat on the edge of the bed and told the victim to put his biker boots on his feet for him. The victim complied. When she finished, defendant used his booted foot to kick her in the face. Defendant then picked a helmet up off the dresser and hit her in the head with the helmet. Eventually defendant stopped his attack and got back into bed. The victim used the opportunity to escape. She grabbed a towel and ran outside to seek the aid of neighbors who were having a garage sale nearby.

On appeal, defendant argues he was denied the effective assistance of counsel because his trial counsel failed to call three key witnesses. A claim alleging the denial of effective assistance of counsel presents a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of law are reviewed de novo, and a trial court's findings of fact, if

any, are reviewed for clear error. *Id.* Where, as here, the trial court does not hold an evidentiary hearing, review is limited to mistakes apparent on the record. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

In order to establish the ineffective assistance of counsel, defendant bears the burden of demonstrating: (1) that “counsel’s representation fell below an objective standard of reasonableness,” and (2) that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Whether to call witnesses is presumed to be a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Defendant bears a heavy burden of proving the challenged action was not sound trial strategy. *LeBlanc*, 465 Mich at 578. Importantly, “the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *Dixon*, 263 Mich App at 398.

First, defendant argued his trial counsel was ineffective for failing to call Katie and Jamie Maclangs, the neighbors to whom the victim ran for help. Rather than calling Jamie and/or Katie, defense counsel argued during closing that the prosecutor’s failure to call the neighbors was an indication that their testimony would not have corroborated the victim’s story. Despite this clear strategy by trial counsel, defendant now argues Katie and Jamie’s testimony was essential to establishing that defendant was driving a truck and not his motorcycle. He argues that because he was not riding his motorcycle, he would have no need for biker boots. As proof of the testimony they could offer, defendant cites to a police record. With regard to Katie, there is no reference in the police report to whether she saw anyone drive away in a truck. As such, defendant has failed to meet his burden of establishing the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The police report does indicate that Jamie stated she saw a male leave in a truck pulling a trailer with jet skis on it. However, contrary to defendant’s argument, this was not new or contested information. The victim openly testified that defendant was driving his truck with a trailer for the jet skis; she also fully acknowledged that defendant was not driving his motorcycle and that his motorcycle was not at her house. A responding police officer also verified that defendant left the scene in a truck. As such, Jamie’s testimony was unnecessary to establish this fact. Moreover, had Jamie and Katie testified, the police report indicates their testimony would have been damaging to defendant’s case. Both Jamie and Katie described the victim as appearing terrified and they both observed physical injuries on the victim’s face and neck; Katie even photographed the victim’s injuries for her. Given that there was never any dispute that defendant left in a truck pulling jet skis, it was eminently sound trial strategy to not invite damaging testimony by calling Katie and/or Jamie and to instead argue that their testimony would have damaged the prosecutor’s case. *Dixon*, 263 Mich App at 398; *Rockey*, 237 Mich App at 76-77.

Second, defendant argues it was objectively unreasonable not to call his son, Eddie, to testify. The record indicates that defense counsel intended to call Eddie to the stand but that, due to a clerical error by defense counsel, Eddie’s name was not included on the list of witnesses. The omission of Eddie’s name was an admitted oversight by defense counsel; it was not a matter of trial strategy. In making such an unprofessional error, defense counsel’s performance appears

to have fallen below an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994).

Nevertheless, reversal is not required because defendant cannot establish that the error altered the outcome of the proceedings and rendered them fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). At trial, defendant maintained that the victim fabricated her claim of abuse out of jealousy over defendant's relationship with one of his other girlfriends, Kathy Sall. Defense counsel's failure to procure Eddie's testimony did not prevent defendant from presenting this defense. *Dixon*, 263 Mich App at 398. On the contrary, defendant testified extensively to his version of events. He described an uneventful morning in bed with the victim during which he did not physically assault her. Instead, he claimed she left the room half-naked in a jealous rage to accuse him of abuse because Sall called on the telephone. He attempted to explain the bruise on her chin as an injury from a jet ski and the bite marks as evidence of consensual rough sex. In his support of his defense, he offered testimony from his other son, Cameron, to establish that he never hit a woman and never, in 20 years, acted aggressively towards the victim. Cameron also testified that the victim was excessively jealous of Sall. Likewise, Sall testified that the victim was insanely jealous and frequently called to leave nasty telephone messages. Sall even claimed that defendant came home rather than spending the night with the victim. Defendant offered letters signed by the victim, in which she recanted her claim of abuse. He also offered a friend's testimony that the letters were not written by defendant and that the victim signed the letters fully cognizant of their contents. Moreover, he sought to disparage the particulars of the victim's story. Defense counsel asked the victim about the biker boots and argued to the jury that defendant would not have been wearing them if he were not riding his motorcycle. Defense counsel also downplayed her injuries, highlighting her delay in seeking medical treatment, and claiming the pictures did not depict injuries indicative of the type of assault she described. Defense counsel also insinuated that the victim had an alcohol and/or cocaine problem. Because defendant did in fact present his claimed defense, counsel's failure to call Eddie did not deprive him of that substantial defense. See *Dixon*, 263 Mich App at 398.

Moreover, any information Eddie could have provided would have been incidental to the issue of assault before the jury. In particular, Eddie theoretically could have testified that he did not hear any noise in the house, the victim told him she was hit by a jet ski, and that when he went to the bedroom he did not see biker boots. However, most importantly, Eddie was not in the bedroom during the assault, and he could not testify that defendant did not strike the victim, choke her, or kick her. Because Eddie could not testify to what occurred in the bedroom, his testimony was largely insignificant to the issue at hand and would not have substantially aided defendant's defense. See, e.g., *Garza*, 246 Mich App at 256; *People v Hoyt*, 185 Mich App 531, 538; 462 NW2d 793 (1990). As such, defendant cannot show he was deprived of a "substantial defense" or that "but for" counsel's error the result of the proceedings would have been different. *Dixon*, 263 Mich App at 398; *Garza*, 246 Mich App at 255.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens