

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMI DIMITRI NSEIR,

Defendant-Appellant.

UNPUBLISHED

October 26, 2006

No. 264211

Macomb Circuit Court

LC No. 2004-004166-FH

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case arises out of defendant's sexual assault of a female employee at a restaurant he owns. The victim testified that after the restaurant closed for business, she, defendant, and other employees sat at a booth and drank beer. At approximately 10:00 p.m., she and the other employees decided to leave. Defendant remained behind and asked the victim to return. She agreed because she wanted to speak with him about a difficulty she was having with another waitress. The victim testified that defendant sexually assaulted her when she returned from a nearby store where she had purchased a soft drink.

Defendant maintained that he did not assault the victim, and presented the testimony of other employees who stated that defendant left the restaurant with the others. They maintained that they drove behind the defendant and witnessed him turn into his subdivision, which was located near the restaurant. One of the witnesses testified that the victim left the restaurant at the same time. However, other witness testified that the victim left before the other employees.

Defendant argues that he was denied the effective assistance of counsel because his attorney failed to accept the trial court's offer of a mistrial after a reference was made to a polygraph examination, and because he failed to call defendant's wife as a witness. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or

an evidentiary hearing, our review is generally limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).¹

In order to establish ineffective assistance, defendant must establish that the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and a reasonable probability that the outcome of the proceedings would have been different in the absence of counsel's unprofessional errors. *Id.* He must also overcome a strong presumption that counsel's actions were strategic. *Id.* We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant argues that defense counsel was ineffective for deciding to forego a mistrial after a police officer stated that she had asked defendant to take a polygraph examination. During direct examination, the prosecutor asked the police officer about her initial conversation with defendant where she advised him of the victim's allegations. The officer stated: "We continued the conversation. I had asked him if he could come in at a later date. He said he would come in at a later date. And then he told me that, after I was trying to get him set up for a polygraph, I had asked him—" At that point, defense counsel objected and the court sustained the objection.

At the conclusion of the police officer's testimony, the trial court discussed the matter with counsel outside the presence of the jury. The trial court concluded the discussion by offering defendant the opportunity to move for mistrial, and indicated that it would grant such a motion. Following a short recess to allow defense counsel to discuss the matter with defendant, defense counsel indicated that defendant advised him to withdraw the objection and not request a mistrial. Defendant acknowledged this on the record. Immediately afterward, the trial court released the jury for the day. No further mention was made of the polygraph.

Defendant acknowledges that he personally concurred in defense counsel's decision not to request a mistrial. However, he maintains that he did so only because defense counsel failed to adequately explain his options and discouraged him from requesting a mistrial. Defendant alleges that defense counsel advised him and his wife that a retrial would be a "horrible experience," and that defense counsel opined that he thought defendant would win with the jury they presently had. Defendant avers that he followed defense counsel's advice because of his lack of experience with the justice system. Defendant essentially admits that defense counsel's decision was strategic. We conclude that other circumstances supported this strategic decision. At that point in trial, defense counsel knew that two of defendant's employees would contradict the victim's testimony and maintain that they observed defendant leave the restaurant at the same time she and the other employees left. Both employees in fact testified that they followed defendant until defendant turned into his subdivision. This evidence likely would have been

¹ We note, however, that we also consider the affidavits submitted by defendant in support of his earlier motion to this Court to remand for an evidentiary hearing in deciding whether defendant is entitled to further relief. See MCR 7.211(C)(1)(a)(ii); *People v Narlock*, 458 Mich 861; 587 NW2d 637 (1998).

available during a subsequent trial. However, defense counsel may have thought that, with the jury they had already chosen, defendant likely would be acquitted and thus, there was little sense in prolonging defendant's acquittal. Defendant cannot show that this strategy was inherently defective. As defendant acknowledges, the inadvertent reference to a polygraph examination is not always so prejudicial so as to amount to reversible error. *People v Nash*, 244 Mich App 93, 98; 625 NW2d 87 (2000). Here, while the police officer testified that she spoke to defendant and attempted to have him take a polygraph, she did not disclose whether defendant had ever taken one, or what the results were. The answer did not imply that defendant had failed an examination. The inadvertent reference was not clearly prejudicial. Moreover, in response to defendant's immediate objection, the trial court promptly sustained the objection, struck the reference from the record, and ordered the jury to disregard it, and juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Under the circumstances, defendant admits that defense counsel thought that the prejudice of the reference was outweighed by other factors in defendant's favor. That a strategy does not work does not render its use ineffective assistance. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Defendant cannot show that defense counsel rendered ineffective assistance by agreeing to forego a mistrial.

Defendant also maintains that defense counsel rendered ineffective assistance by failing to call defendant's wife as a witness. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when 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 Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant has submitted an affidavit from his wife in which she maintains that she would have testified that defendant arrived home from work on the date of the incident at approximately 9:45 p.m., and that he did not leave home again that evening. She was also prepared to testify that it was defendant's habit to arrive home before 10:00 p.m. and that if he did not, she would call the restaurant looking for him. Defense counsel initially planned to call her as a witness, but declined to do so after calling two other defense witnesses.

Defendant maintains that this testimony, if provided, would have eliminated one of the prosecutor's theories. During cross-examination of the defense witnesses who stated that defendant left the restaurant with them and the victim, the prosecutor asked them if they knew whether defendant returned to the restaurant. They each testified that they did not. Defendant contends that his wife's testimony would have eliminated this theory, and that the outcome of this case would likely have been different had defense counsel called his wife as a witness. Under the circumstances, we find that defendant cannot show that the outcome of the trial likely would have been different had his wife testified. It is likely her testimony would have generally corroborated that of defendant's other witnesses. Despite the prosecutor's attempt to reconcile the testimony of defendant's witnesses with that of the victim, these witnesses completely contradicted her. We find it highly unlikely that the jury would have found that defendant drove into his subdivision before returning to assault the victim. Defendant's assertion that his wife's testimony was crucial to his defense is without merit. In addition, defendant's other witnesses had no obvious reason to lie to protect defendant. In contrast, the jury may have regarded his

wife's testimony with more suspicion, given her obvious bias in defendant's favor. Under the circumstances, defendant cannot show that defense counsel's strategic decision to rely on the other witnesses was objectively unreasonable.

We affirm.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens