

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACOB TRAKHTENBERG,

Defendant-Appellant.

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UNPUBLISHED

March 27, 2007

No. 268416

Oakland Circuit Court

LC No. 2005-203484-FH

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

PER CURIAM.

Defendant appeals as of right from convictions of three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), for which he was sentenced to three concurrent prison terms of 4 to 15 years each. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

One conviction arose from an incident in which defendant had the victim touch his genitals. The other two convictions arose from incidents in which defendant touched the victim's genitals. Defendant explained the latter incidents by claiming that he had been applying an ointment to the victim's genital area at the request of her mother, Liliya Tetaryly, but Tetaryly testified in rebuttal that the victim was not using ointment at that time and she had not asked defendant to apply any ointment. Relying in part on Tetaryly's rebuttal testimony, the trial court rejected defendant's explanation and found him guilty of the latter incidents.

Defendant's sole claim on appeal is that defense counsel was ineffective for failing to impeach Tetaryly with evidence to show that she was biased against him. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to

overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003) (citations omitted).]

Decisions regarding how to cross-examine and impeach witnesses are matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). “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 Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). “Defendant is entitled to relief only in those instances where his attorney’s omission deprived defendant of a substantial defense.” *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). “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).

Evidence showing bias or prejudice of a witness is always relevant because witness credibility is a material issue in every case. *Powell v St John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000). The evidence submitted on appeal related to incidents between defendant and Tetary that occurred during an apparently acrimonious divorce more than four years before the charges of sexual abuse arose and there is no evidence that Tetary was still bitter over those events. Even assuming that an inference of bias could be inferred from the events that occurred during the divorce, there is nothing in the record to suggest that defendant advised his attorney about those events and defense counsel “cannot be found ineffective for failing to pursue information that his client neglected to tell him.” *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Accordingly, defendant has failed to establish a right to relief.

We affirm.

/s/ Brian K. Zahra  
/s/ Richard A. Bandstra  
/s/ Donald S. Owens