

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 30, 2013

v

SHAUN WILLIAM BREWER,

Defendant-Appellant.

No. 310306
Wayne Circuit Court
LC No. 11-008130-FC

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of first degree criminal sexual conduct, MCL 750.520b(1)(g). Defendant was sentenced to concurrent terms of 14 to 28 years in prison. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

The charges involved an incident at the home defendant had shared with the complainant. The complainant testified that while she was sleeping or “passed out,” defendant allegedly inserted objects into her vagina and anus. Complainant testified that defendant then took pictures of these scenes, which the complainant discovered on a digital camera. Complainant and defendant then got into a heated argument and an altercation ensued causing the complainant to immediately leave the home.

As she was getting into her car to leave defendant’s home, complainant testified that a neighbor approached her and advised her to go to the hospital. Complainant took the advice of the neighbor and went to an area hospital where she was examined by a sexual assault examiner (SANE), Elana Rouse. While at the hospital, the police were notified and an investigation was begun. A search warrant was executed on the house of defendant. Defendant also waived his constitutional rights and gave the police a statement. In his statement, defendant admitted that complainant was drinking and incoherent on the night at issue. Defendant also admitted to taking pictures of complainant, but denied the accusations of sexual assault.

On appeal, defendant argues that he was denied the effective assistance of counsel when his attorney failed to present medical testimony to show that he was incapable of committing a sexual assault. Effective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To prevail on a claim of ineffective assistance, the defendant must show that counsel’s performance was defective, and that the

deficient performance was prejudicial and deprived the defendant of a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Lloyd*, 459 Mich 433, 446; 590 NW2d 738 (1999). To show prejudice, the defendant must show that, but for counsel's error, there is a reasonable likelihood that the result would have been different. *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998).

When police arrived at defendant's home to execute the search warrant, defendant claimed he was ill and needed to go to the hospital. Defendant asserted that he had been injured and as a result of his injury had sustained significant pain and mobility issues. He told police he would have been physically unable to commit the crime alleged because of a prior back surgery. He also stated that he often had to use a cane to get around. However, on appeal, plaintiff makes no showing that any medical testimony would have been favorable to the defense. Defendant did not provide affidavits regarding the substance of any doctors' testimony, and did not move for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). At sentencing, he attempted to "fire" his attorney in an unrelated claim regarding the sentencing guideline scoring. Defendant also asked for "immediate reversal" of his conviction because of ineffective assistance of counsel. He named *Ginther*, *Strickland v Washington*, and *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). As previously stated, the record is devoid of any medical testimony that would have proven defendant incapable of inserting objects into the complainant's vagina and anus. Here, as in *Payne*, defendant has "merely speculated" that his expert would have been helpful to his defense. *Payne*, 285 Mich App at 190. Threshold determinations of any expert testimony are helpfulness and relevancy. *People v Christel*, 449 Mich 578, 592; 537 NW2d 194 (1995). To the extent any medical testimony might have shown defendant incapable of running or throwing the complainant down the hallway, these facts would not be material on retrial because defendant was acquitted of domestic violence. Thus, defendant has not shown that any alleged error deprived him of a "substantial defense."

Additionally, the decision to call witnesses, including expert witnesses, is one of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Failure to call a witness can constitute ineffective assistance only where it deprives the defendant of a substantial defense. *Id.* The defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses, i.e., those that might make a difference in the outcome of the proceedings. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). However, defense counsel is given wide latitude in matters of trial strategy, and there is a strong presumption of effective assistance. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

As previously stated, defendant failed to provide this Court any evidence of the extent of any physical limitations which would render him physically unable to have committed the crimes for which he was convicted. Given that defendant cannot produce for this Court any such evidence, it is impossible for this Court to make a finding that trial counsel was ineffective for failing to produce the very same evidence which defendant himself has been unable to produce.

Next, defendant argues that the trial court abused its discretion in denying an evidentiary hearing regarding proffered testimony by defendant's brother that the complainant took defendant's pain medication with her when she moved out. The decision to admit or exclude evidence is within the trial court's discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998); *People v Ackerman*, 257 Mich App 434, 443; 669 NW2d 818 (2003). A court

abuses its discretion when its decision is outside a range of reasonable or principled outcomes. *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007).

Here, the trial court found that the proffered evidence was not more probative than prejudicial. MRE 403 provides that relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. *People v Bahoda*, 448 Mich 261, 289-291; 531 NW2d 659 (1995); *People v Magyar*, 250 Mich App 408, 415-416; 648 NW2d 215 (2002). “Unfair prejudice” may occur when marginally probative evidence is given undue or preemptive weight by the jury. *People v Feezel*, 486 Mich 184, 198; 783 NW2d 67 (2010); *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

Applying the above standards, the trial court did not abuse its discretion in excluding evidence that the complainant took defendant’s medication with her when she left the house. This evidence did not go to whether defendant committed the charged crimes or whether the complainant consented, and it was already clear from the complainant’s testimony that she was angry with defendant. The only relevance the proffered evidence had was to demonstrate that at the time she left the home, complainant was angry with defendant. On this issue, the proffered evidence was, at most, marginally probative. Defendant was able to present his theory that the complainant was very angry with him through his mother’s and brother’s testimony. Additionally, the proffered evidence would not have provided the jurors’ with any significant or new facts. Furthermore, we find that the trial court correctly balanced the probative value of the evidence against the unduly prejudicial and confusing effect the evidence would have on the jury. We therefore find no reversible error.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Michael J. Kelly