

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD LOUIS SWEET, JR.,

Defendant-Appellant.

UNPUBLISHED

April 18, 2006

No. 259608

St. Clair Circuit Court

LC No. 02-001152-FH

Before: Murphy, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

Defendant was charged with two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a). Following a jury trial, he was convicted of only one count, for which he was sentenced to two to fifteen years in prison. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant’s sole claim on appeal is that trial counsel was ineffective for failing to pursue an alibi defense. 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, a 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) (citations omitted).]

The decision to argue one defense over another is a matter of trial strategy. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. 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) (citations omitted). Ineffective assistance of

counsel can take the form of a failure to investigate and present a particular defense if the defendant made a good-faith effort to avail himself of that defense and the defense was substantial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). “A substantial defense is one that might have made a difference in the outcome of the trial.” *Id.* “[A] substantial alibi defense would be one in which defendant’s proposed alibi witnesses verified his version.” *Id.* at 527.

The record shows that counsel filed a notice of alibi defense identifying four witnesses but omitted to state with particularity where defendant claimed to have been at the time the offense occurred. See MCL 768.20(1). Counsel later withdrew the notice due to the unavailability of the witnesses. Because the record is silent regarding the testimony these witnesses would have offered if called, defendant has not shown that their testimony would have benefited the defense. Therefore, to the extent defendant contends that counsel was ineffective for failing to call these alibi witnesses, his claim must fail. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002); *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant also contends that defendant was ineffective for failing to pursue an alibi through his own, otherwise unsupported, testimony. See *People v Merritt*, 396 Mich 67, 87-89; 238 NW2d 31 (1976). However, the record does not show that defendant had an alibi for the offense, which occurred between 6:30 and 7:00 a.m. on December 12, 2001. Defendant testified that he began working for ANR Contracting in November 2001. He took the bus to the job site in Detroit and because he had to be at work by 7:00 a.m., he left home by 5:45 a.m. at the latest. But defendant did not testify that he worked for ANR full time or even that he was scheduled to work on December 12, 2001. Although defendant later volunteered that he had told a previous lawyer that he was not at home on the day of the incident, he did not say where he was, much less that he was at work or on his way there. Therefore, his limited testimony does not show that he was not at home on the morning the offense occurred. Because there is nothing in the record to show that defendant had a substantial alibi defense, counsel was not ineffective for failing to pursue such a defense.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O’Connell
/s/ Christopher M. Murray