

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ALLEN MATTHEWS,

Defendant-Appellant.

UNPUBLISHED

November 18, 2008

No. 278689

Montcalm Circuit Court

LC No. 06-008535-FC

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of two counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(a) and (1)(b), for which he was sentenced to concurrent prison terms of 30 to 50 years and 23 years 9 months to 50 years. Defendant was acquitted of a third count of CSC-1. Because we conclude that there were no errors warranting relief, we affirm. This appeal has been decided without oral argument under MCR 7.214(E).

Defendant was charged with raping his own daughter when she was ten years old and again when she was twelve or thirteen years old. At trial, the victim indicated that she revealed the abuse to her mother but later recanted because defendant threatened to send her to prison and kill her mother.

Defendant first argues that he was denied a fair trial when the prosecutor improperly elicited testimony from a police witness concerning defendant's decision to assert his Fifth Amendment right to remain silent:

Q: And where did you first meet Mr. Matthews?

A: I first physically met him at his mother's residence.

Q: And why did you go to his mother's residence?

A: To interview him and to arrest him.

* * *

Q: Did you have the opportunity to question Mr. Matthews?

A: Upon knocking on the door, Mr. Matthews answered the door. I explained who I was and that I'd like to speak with him and at that time he handed me a business card for an attorney and said that he hired an attorney and did not wish to speak with me.

Q: Now can you identify the individual that identified himself as Mr. Matthews on the day that you went to his mother's house?

Because defendant did not object to the testimony, the issue is not preserved for appellate review. This Court reviews unpreserved issues for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, the defendant must show (1) that error occurred, (2) the error was plain, and (3) the plain error affected substantial rights. Even if all three requirements are met, reversal is warranted only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

Evidence of a defendant's silence in the face of accusations cannot be admitted as substantive evidence to support the assertion that defendant tacitly admitted the truth of an allegation or made an admission. *People v Greenwood*, 209 Mich App 470, 472-473; 531 NW2d 771 (1995). The evidence of defendant's silence in the face of accusation in this case was not offered to show that defendant adopted the truth of the accusation. Rather, the subsequent questions by the prosecutor demonstrate that he was attempting to procure an in-court-identification from the officer. At the hearing on defendant's motion for new trial, the trial court also agreed that the prosecutor was attempting to identify defendant and that the poorly worded question and answer surprised both attorneys. It is unlikely that the officer's response to the question was anticipated by the prosecutor, as shown by the fact that the prosecutor did not ask further questions regarding the officer's contact with defendant.

Even if it were error to admit the testimony concerning defendant's refusal to speak with the officer, defendant has failed to meet his burden of showing that the error affected his substantial rights. The prosecutor did not emphasize or otherwise make use of the improper testimony and any minimal prejudice likely did not influence the jury, which ultimately acquitted defendant of one count of CSC-1. Therefore, any error in this regard does not warrant relief. *Carines, supra* at 763.

Defendant also raises several claims of ineffective assistance of counsel on appeal. Defendant first asserts that, because his counsel failed to object and preserve the above issue for appeal, he received ineffective assistance of counsel.

Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's factual findings for clear error and its constitutional determination de novo. *Id.* A finding is clearly erroneous where, after reviewing the entire record, a definite and firm conviction is left that a mistake has been made. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

To establish the ineffective assistance of counsel, a defendant must demonstrate: "(1) that counsel's performance fell below an objective standard of reasonableness under the

prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). The effective assistance of counsel is presumed and a defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

At the hearing on defendant's motion for a new trial, defense counsel testified that he chose not to object to the officer's testimony regarding defendant's silence because he did not want to give the testimony undue weight, but would have objected if the matter were brought up again. Defendant has failed to overcome the strong presumption that trial counsel's failure to object was a matter of trial strategy: there are times at trial when it is better not to object and draw attention to an improper comment. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). And we will not substitute our judgment for that of defendant's trial counsel on matters of trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

Defendant also argues that he was denied the effective assistance of counsel when his counsel failed to interview and call two witnesses that he claims were critical to his case.

Defendant submits that another daughter, the sister of the victim, would have testified that defendant never molested her and that the charges levied by the victim were false. The victim's sister testified that no attorney ever contacted or interviewed her for this case and that she would have been willing to testify on defendant's behalf.

Defendant's trial counsel indicated that he deliberately chose not to use the younger daughter at trial. Based on conversations with the investigating officer and defendant, defense counsel deemed the sister to be an unreliable witness who would likely open the door to admission of defendant's prior CSC and felonious assault convictions if, as likely, she testified that defendant would never hurt anybody and was a peaceful man. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). In addition, regard should be given to trial court's special opportunity to judge the credibility of the witnesses who appeared before it. See *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008). Based on her testimony at the hearing, the trial court characterized the witness as a "loose cannon" and found that defense counsel's decision not to call the victim's sister was wise. The trial court explained: "She would have opened up the door. She would have said things she should not have said. She would have probably insured a verdict of guilty even then possibly on all three counts." Hence, the decision not to utilize this witness at trial was based on valid considerations of trial strategy and cannot support a claim for ineffective assistance.

Defendant also submits that a neighbor would have testified at trial that she witnessed the victim accuse defendant of raping her and then retract the accusation. According to the neighbor, the victim explained that she made the accusation because she was mad at defendant.

From defense counsel's affidavit, it is clear that he investigated the neighbor because he indicated that he intended to call her as a witness if the victim denied that she recanted her earlier allegation of sexual abuse. However, the victim testified that she made an accusation and then recanted, but explained that she did so because defendant threatened to kill her mom and

threatened to lie about the abuse and send the victim to prison. Defense counsel believed it would be too damaging to defendant's case for the neighbor to testify because it might have given the prosecution an opportunity to repeat the damaging reason for the victim's recantation before the jury, i.e., defendant threatened to kill her mother and put her in jail. In addition, as with the victim's sister, defense counsel was aware that this neighbor was also an ardent supporter of defendant and any misstep on the witness stand would have likely opened the door to the admission of defendant's prior convictions, which were otherwise inadmissible. Again, we will not review questions of trial strategy with the benefit of hindsight. *Dixon, supra* at 398. Defendant has not shown that his trial counsel was ineffective for not calling the neighbor to testify on his behalf of defendant at trial.

Defendant's final argument on appeal is that he was denied the effective assistance of counsel when trial counsel did not allow him to review his pre-sentence investigation report (PSIR) before sentencing as required by MCR 6.425(E)(1). Defendant submits that had he seen his PSIR before sentencing, he would have alerted his attorney to alleged inaccuracies contained within it, specifically the false accusation that he raped his ex-wife and the embellished narrative concerning his fourth-degree criminal sexual conduct (CSC-4) conviction, which made the crime appear more severe.

A defendant is entitled to be sentenced on the basis of accurate information and be given an opportunity to review his PSIR before sentencing. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006).

The record belies defendant's claim of ineffective assistance of counsel on this issue. Counsel indicated on the record at sentencing that he and defendant had reviewed the PSIR and the information contained therein was accurate. Defendant was afforded an opportunity to speak to the court. During that time, defendant did not indicate in any way that he was dissatisfied with the information contained in the PSIR. At the motion hearing, defense counsel affirmed that he had reviewed the PSIR with defendant prior to sentencing and the trial court found defense counsel's testimony to be credible. We give regard to the trial court's special opportunity to judge the credibility of the witnesses who appeared before it. See MCR 2.613(C); *Dendel, supra* at 130.

In any event, there is no indication that the trial court relied on the allegedly inaccurate information in sentencing defendant. At the hearing on the motion for a new trial, the court stated that it did not consider defendant's ex-wife's accusation of rape in sentencing because it does not give weight to "uncharged allegations" by "disgruntled family members." Therefore, it cannot be said that, but for defense counsel's failure to challenge the information, defendant's sentence would have changed. *Yost, supra* at 387.

There were no errors warranting relief.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski