

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MANE SEVERE,

Defendant-Appellant.

UNPUBLISHED

September 18, 2007

No. 270913

Kent Circuit Court

LC No. 04-010788-FC

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals by right his conviction of third-degree criminal sexual conduct, MCL 750.520(d)(1)(a). We affirm.

There was no dispute that defendant had sexual intercourse with the victim, LP, in early 2004. The only issue was LP's age. The prosecutor presented evidence that LP, who immigrated from Haiti, was born on January 28, 1989 or January 28, 1991. LP testified at trial that she was born on January 28, 1984. After trial, defendant obtained a birth certificate indicating that LP was born in 1984. The trial court denied defendant's motion for a new trial on the basis of newly discovered evidence.

This Court reviews the trial court's decision on a motion for a new trial for an abuse of discretion, but its factual findings are reviewed for clear error. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes the verdict has resulted in a miscarriage of justice. MCR 6.431(B). A new trial may be granted on the basis of newly discovered evidence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). To obtain a new trial on the basis of newly discovered evidence, the defendant must show that (1) the evidence itself, and not just its materiality, was newly discovered; (2) the evidence was not cumulative; (3) the evidence would probably cause a different result upon retrial; and (4) the defendant could not, with reasonable diligence, have discovered and produced the evidence at trial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

The trial court did not abuse its discretion in denying defendant's motion. The prosecutor produced a birth certificate from LP's birth father showing that LP was born in 1991. There was

other evidence that LP was born in 1989 or 1991. LP herself testified for the first time at trial that she was born in 1984. Given the conflicting evidence regarding the year of LP's birth and that no other evidence supported the contention that the newly discovered birth certificate reflected the true date of birth, it is unlikely that the newly discovered birth certificate would have affected the outcome of the trial. Further, defendant failed to show that the newly discovered birth certificate could not, with reasonable diligence, have been obtained and produced at trial. Defendant contended that he was unable to obtain the birth certificate before trial because LP had no way to contact her birth mother at the time, and LP asserted as much in her affidavit. But, LP testified at trial that it was through her birth mother that she learned that she was born in 1984, so, LP apparently was able to contact her birth mother before trial, and thus, with reasonable diligence, defendant could have obtained the newly discovered birth certificate and produced it at trial.

Defendant also contends that trial counsel was ineffective for failing to obtain the 1984 birth certificate and introduce it as evidence at trial. 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 establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Id.* at 424. It is presumed that counsel performance was not deficient and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Whether to call or question witnesses are 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." *Id.* at 76-77. Ineffective assistance of counsel will be found only when the failure to call a witness or present other evidence deprived the defendant of a substantial defense, i.e., one that might have affected the outcome of the trial. *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998).

The evidence at trial conflicted regarding whether LP was born in 1984, 1989, or 1991, which would make her anywhere from 13 to 20 when she first had sexual relations with defendant. The prosecutor produced a birth certificate from LP's birth father showing that LP was born in 1991, but LP's adoptive father testified that the date was incorrect because LP was really born in 1989. Defendant obtained a birth certificate from LP's birth mother showing that LP was born in 1984. There is nothing in the record to show that the 1984 birth certificate reflected the true date of birth. Further, the children's passport was admitted into evidence, and the jury could determine for itself whether the picture of LP was more likely to be that of a three-year-old, five-year-old, or ten-year-old child. Therefore, it is unlikely that the outcome would have been different if counsel had produced the 1984 birth certificate at trial.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder