

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS LAVERNE BAKER,

Defendant-Appellant.

UNPUBLISHED

December 1, 1998

No. 198836

Calhoun Circuit Court

LC No. 96-001962 FH

Before: Sawyer, P.J., and Wahls and Hoekstra, JJ.

MEMORANDUM.

Defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798, and assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1); MSA 28.788(7)(1). He received enhanced sentences of ten to thirty years' and ten to twenty years' imprisonment, respectively, reflecting his status as a third felony offender, MCL 769.11; MSA 28.1083. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Our review of defendant's claims of ineffective assistance of counsel is limited to deficiencies in the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Defendant first argues that his trial counsel was ineffective because she failed to challenge the reliability of the victim's identification of defendant by cross-examining the victim concerning the circumstances surrounding the identification. In order to establish that counsel was ineffective, defendant was required to show that but for counsel's alleged error there is a reasonable probability that the result of the proceeding would have been different and that the result of the proceeding was fundamentally unfair or unreliable. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Defense counsel cannot be said to have been ineffective for failing to place before the jury evidence already placed before it by the prosecutor. Moreover, the questioning of witnesses is a matter of trial strategy and is not a basis for a claim of ineffective assistance of counsel. *In re Rogers*, 160 Mich App 500, 505; 409 NW2d 486 (1987). Therefore, defense counsel's focus during closing argument on the victim's "hysterical" emotional state during and immediately following the

robbery and assault, to the exclusion of other circumstances of the identification less favorable to defendant, constitutes sound trial strategy.

Defendant also argues that counsel was ineffective because the theory of defense she proffered on defendant's behalf was that the robbery and assault were committed by the victim's neighbor. The essence of counsel's brief closing argument was that the robbery and assault were committed by the neighbor, that defendant was not present during the commission of the offenses, and that the victim's hysteria led to a misidentification. The record contains some evidence in support of this theory. Given the strength of the prosecutor's case against defendant, defense counsel made a difficult professional decision regarding the best possible defense. Under such circumstances, defendant has failed to establish that counsel acted in a constitutionally-deficient manner. See, e.g., *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

Next, defendant argues that counsel was ineffective because counsel failed to seek the suppression of defendant's 1990 breaking and entering conviction and, instead, elicited the prior conviction's existence from defendant on direct examination. The success of any attempt to suppress the conviction was not assured because the use of the prior conviction for impeachment purposes was arguably permissible where the prior conviction is moderately probative of veracity, where the conviction was only six years old, and where the prior conviction was not substantially similar to the offenses charged in this case. See, e.g., *People v Allen*, 429 Mich 558, 610-611; 420 NW2d 499 (1988). In light of the uncertainty of success, defense counsel's attempt to minimize the impact of the prior conviction by introducing it in the manner in which she did constituted sound trial strategy.

Defendant's failure to make a testimonial record in the trial court renders defendant's remaining claims unsustainable. See *Pickens*, *supra* at 327; *People v Johnson (On Rehearing)*, 208 Mich App 137, 142; 526 NW2d 617 (1994).

Affirmed.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Joel P. Hoekstra