

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK D. DOWELL,

Defendant-Appellant.

UNPUBLISHED

January 17, 1997

No. 188026

Oakland Circuit Court

LC Nos. 94-134650 FH;

94-134651 FH

Before: Markman, P.J., and O'Connell and D. J. Kelly,* JJ.

PER CURIAM.

A jury convicted defendant of three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), accosting a minor for immoral purposes, MCL 750.145a; MSA 28.341, and three counts of habitual offender, fourth offense, MCL 769.12; MSA 28.1084. The court then sentenced defendant to ten to fifteen years' imprisonment for each CSC conviction. These sentences were vacated, and defendant was sentenced to ten to twenty years' imprisonment on each habitual offender conviction and to one year imprisonment for accosting a minor for immoral purposes, all to be served concurrently. Defendant now appeals of right and we affirm.

Defendant first argues that he was denied effective assistance of counsel because his trial counsel, in front of the jury, referred to defendant's invocation of his marital privilege. By failing to move below for a new trial or an evidentiary hearing on the matter, defendant failed to preserve this issue for appeal. See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Nonetheless, we may review this issue if the alleged deficiency in defense counsel's performance is apparent from the record. *People v Hyland*, 212 Mich App 701 710; 538 NW2d 465 (1995). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). On the record before this Court, we cannot say that counsel's passing reference to the marital privilege, which was immediately followed by a curative instruction to

* Circuit judge, sitting on the Court of Appeals by assignment.

the jury, had any effect on the result of the proceeding. Therefore, we find no ineffective assistance of counsel.

Defendant also argues that he was denied a fair trial because the prosecution improperly bolstered the complainant's credibility by calling a number of witnesses whose testimony was inadmissible. However, defendant failed to preserve this issue for appeal because he did not object below, *Tringali v Lal*, 164 Mich App 299, 306; 416 NW2d 117 (1987), and, furthermore, has failed to direct this Court's attention to the specific testimony alleged to constitute error. In any event, our review of the trial transcript reveals no instances of the improper bolstering of complainant. Rather, the prosecution presented several witnesses, each of whom testified in a manner consistent with complainant's account of the crime. This is not the improper bolstering of a witness, but the presentation of a case-in-chief.

Finally, defendant argues that the trial court enhanced his sentence based on vindictiveness. He contends that he was sentenced more harshly as a result of the trial court's anger over his outburst during sentencing. After thoroughly reviewing the record, we find that the court did not base its sentence on vindictiveness. *People v Atkinson*, 125 Mich App 516; 336 NW2d 41 (1983). Prior to defendant's outburst, the trial court indicated that it would rely on the testimony and the facts in the case to make the sentencing determination. After defendant's outburst, the trial court again repeated that it would base the sentence upon the presentence report, the fact that defendant had been convicted, and defendant's absolute right to appeal. The court also stated that regardless of its personal feelings, defendant would be sentenced within the sentencing guidelines' range. Thus, the record does not support defendant's argument that the trial court was angry or vindictive. Therefore, the sentence was proper.

Affirmed.

/s/ Stephen J. Markman

/s/ Peter D. O'Connell

/s/ Daniel J. Kelly