

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DUANE HERBERT,

Defendant-Appellant.

UNPUBLISHED

April 1, 1997

No. 149963

Genesee Circuit Court

LC No. 91044799 FH

Before: Hoekstra, P.J., and Marilyn Kelly and J.B. Sullivan,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He then pleaded guilty to habitual offender, second offense. MCL 769.10; MSA 28.1082.

Defendant appeals as of right, arguing that several instances of prosecutorial misconduct denied him a fair trial. He asserts that he was denied the effective assistance of counsel. Finally, he alleges that the prosecution failed to present evidence sufficient to sustain the verdict. We affirm.

I

First, defendant argues that he was denied a fair trial, because the prosecutor vouched for the credibility of the complainant during closing argument. We disagree. The prosecutor did not indicate that the government had some special knowledge that the complainant was testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). The prosecutor merely argued that defendant was not worthy of belief. Moreover, during his opening statement, defense counsel indicated that the defense in this case was that complainant was not a credible witness. Because the prosecutor's comments appropriately addressed an issue raised by defendant, they were not reversible error. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

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

II

Next, defendant argues that, during rebuttal, the prosecutor impermissibly vouched for the credibility of her witnesses by stating that neither the complainant nor complainant's cousin had any reason to lie. Again, the prosecutor did not suggest that she had some special knowledge regarding whether the witnesses' testimony was truthful. *Bahoda, supra*. Moreover, the prosecutor was rebutting defense counsel's closing argument during which he asserted that the witnesses' testimony was not credible. *Simon, supra*.

With respect to defendant's remaining claims of prosecutorial misconduct, we find that defendant was not denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The prosecutor was either responding to arguments of defense counsel or properly drawing inferences from the evidence presented at trial. *Bahoda, supra* at 282.

III

Next, defendant argues that he was denied the effective assistance of counsel. Specifically, he alleges that his trial counsel was ineffective because (1) the only defense presented was to portray the complainant as a liar; (2) counsel did not question witnesses in sufficient detail; and (3) counsel erred in calling a witness on defendant's behalf whose testimony at trial was inconsistent with her statement to the police.

To establish an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as an attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome the presumption that the challenged conduct was sound trial strategy and must establish prejudice as a result of the error. *Id.* at 312-314, *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Here, defendant has failed to overcome the presumption of sound trial strategy on the part of his attorney. He failed to argue what other defense was applicable to his case. Moreover, it is unclear from the record whether a more intensive cross-examination would have aided defendant. Finally, counsel's decision to call a witness is a matter of trial strategy. *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Therefore, on the record before us, we conclude that defendant has not established that he was denied the effective assistance of counsel.

IV

Finally, defendant argues that the prosecution did not present sufficient evidence to sustain his conviction. When reviewing a claim of insufficient evidence, we view the evidence in a light most favorable to the prosecution. We determine whether a rational trier of fact could have found that

the essential elements of the crime were proven beyond a reasonable doubt. *People v Chandler*, 201 Mich App 611, 612; 506 NW2d 882 (1993).

Second-degree criminal sexual conduct is established where the defendant engaged in sexual contact with another person under thirteen years of age. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Sexual contact is defined as the intentional touching of a person's intimate parts or the clothing covering the immediate areas of the intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification. MCL 750.520a(k); MSA 28.788(1)(k). Intimate parts are defined as the primary genital area, groin, inner thigh, buttock or breast. MCL 750.520a(c); MSA 28.788(1)(c).

The complainant testified that at the time of the incident she was eleven years old. She stated that defendant pulled her against him and started "humping" her with his penis against her "behind" and his arms wrapped around her belly. Then, with his right hand, defendant began rubbing between her legs, on her vagina, and was about to put his hand in her pants when she pulled it away. Even though defendant argues that his testimony and that of another witness rebutted the complainant's testimony, the jury believed complainant. We will not interfere with the jury's role of determining the credibility of the witnesses or the weight of the evidence. *People v Wolfe*, 440 Mich 508 514; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992). Looking at the evidence in a light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Marilyn Kelly

/s/ Joseph B. Sullivan