

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT REAUME,

Defendant-Appellant.

UNPUBLISHED

May 30, 1997

No. 194228

Oakland Circuit Court

LC No. 94-135616-FH

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c) (incapacitated victim), and was sentenced to 18 months' to 15 years' imprisonment. He appeals as of right. We affirm.

On August 11, 1994, defendant visited Sara Thompson at her cousin's house in Ferndale. Defendant and Thompson had been close friends for nine years. Thompson told defendant that she had a sore back from working the night before, and she asked him to give her a back massage, which he did. Thompson told defendant that she was tired and to come back in an hour and a half to wake her up so that she could pick up her daughter from her aunt's house. Thompson testified that she then fell asleep, and awoke when she felt defendant's hand in her pants and his finger penetrating her vagina. She told defendant to leave, and he left. Approximately thirty minutes later, Thompson went to her car. There was a rose on the windshield, and a note. The note read: "I'm sorry, I wouldn't blame you if you hated me forever. Love, Scott." Defendant testified that he never touched Thompson's vagina, or, if he did, it was an accident.

On appeal, defendant first argues that the trial court erred in denying his motion for a new trial on the ground that the prosecutor improperly questioned him regarding his relationships with other women in an attempt to appeal to the morals of the community. However, because defendant did not object at trial to the prosecutor's questions, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because

we find that any prejudice caused could have been eliminated by a timely curative instruction, we decline to review this issue.

Defendant next argues that the trial court abused its discretion in denying his motion for a new trial based on ineffective assistance of counsel. We disagree.

To prove ineffective assistance of counsel, defendant must prove that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *Stanaway, supra* at 687-688. Trial counsel is presumed competent, and defendant has the burden of proving that the complained of conduct is not within sound trial strategy. *Id.* Because no evidentiary hearing was held on the issue of ineffective assistance of counsel, review is limited to the record. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

Defendant first argues that he was denied the effective assistance of counsel by his trial counsel's failure to move to suppress an involuntary statement. We disagree. There is no evidence that defendant's statement was involuntary or that defendant's trial counsel knew or should have known that it was not voluntary. Furthermore, defendant has not proven that the outcome of his trial would have been different had trial counsel moved to suppress the statement. Although the statement largely corroborated Thompson's testimony, the jury could reasonably have found Thompson's testimony to be credible, based on testimony of police witnesses and on defendant's own testimony at trial. Therefore, defendant was not denied the effective assistance of counsel by his trial counsel's failure to move to suppress his involuntary statement.

Defendant also argues that he was denied the right to the effective assistance of counsel by trial counsel's failure to object to the prosecution's improper questioning. We do not believe that the prosecution's line of questioning was improper. A claim of ineffective assistance of counsel based on defense counsel's failure to object or make motions that could not have affected defendant's chances for acquittal is without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant next asserts that his conviction was against the great weight of the evidence. This Court reviews a denial of a motion for a new trial based on a great weight of the evidence argument under an abuse of discretion standard. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). The question is whether the verdict was manifestly against the clear weight of the evidence. *Id.* To determine whether a verdict is against the great weight of the evidence, or has worked an injustice, a judge necessarily reviews the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993). While a judge cannot take from the jury its right of judgment, the judge may set aside a "perverse verdict" and grant a new trial on the ground that the prosecution's witnesses lack credibility. *Id.*

MCL 750.520d(1)(c); MSA 28.788(4)(1)(c) provides that a person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and the actor

knows or has reason to know that the victim is incapable, mentally incapacitated, or physically helpless. “Physically helpless” for purposes of the CSC statute means that the victim is unable to communicate unwillingness to an act. Such is the case when the victim is asleep or unconscious. *People v Perry*, 172 Mich App 609, 622; 432 NW2d 377 (1988). Whether a defendant knows or has reason to know that the victim is physically helpless is determined by an objective reasonable person test. *People v Baker*, 157 Mich App 613, 615; 403 NW2d 479 (1986).

Defendant argues that the evidence does not support the jury’s finding that he knew or had reason to know that Thompson was asleep, and therefore physically helpless, when alleged penetration took place. We disagree. The jury heard Thompson’s testimony that she told defendant that she was tired and asked him to come back in an hour or an hour and a half to wake her up. Thompson also testified that she had been asleep for at least ten to fifteen minutes, and awoke when she felt defendant’s hand in her pants. From this testimony, the jury could reasonably have found that defendant knew or should have known that Thompson was asleep when the incident occurred.

Defendant also argues that the jury’s verdict was against the great weight of the evidence because he testified that there were two other occasions when he and Thompson attempted to enter into sexual contact. However, he never alleged at trial or on appeal that the touching that gave rise to his conviction in this case was consensual, but rather has consistently asserted that it never occurred, or if it did, it was accidental. Furthermore, the jury could reasonably have found that defendant’s testimony was not credible, as he gave conflicting statements to the police and at trial. Therefore, the trial court did not abuse its discretion in finding that defendant’s conviction was not against the great weight of the evidence.

Affirmed.

/s/ Richard A. Bandstra

/s/ Richard Allen Griffin

/s/ E. Thomas Fitzgerald