

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLYDE NIXON,

Defendant-Appellant.

UNPUBLISHED

November 25, 1997

No. 193871

Recorder's Court

LC No. 95-009839

Before: Jansen, P.J., and Fitzgerald and Young, JJ.

MEMORANDUM.

Defendant appeals by right his jury conviction of two counts of third degree criminal sexual conduct, involving an underage female. MCL 750.520d; MSA 28.788(4). On appeal, defendant contends that he was deprived of the effective assistance of trial counsel.

Defendant identifies numerous claimed errors of trial counsel which he claims deprived him of a fair trial. He first claims, for example, that trial counsel opened the door to reference to an unrelated civil action, in which defendant's employer was sued based on a claim that defendant, in the course of employment, had sexually molested one of the tenants of the apartment complex where he was employed. The trial court permitted the prosecutor to ask only two questions on this issue, whether, without reference to the victim's age, a complaint of unspecified nature had been made, to which the witness responded in the affirmative, and whether the employer had made a civil settlement of the claim, as to which the witness professed no knowledge. The jury thus never had before it any evidence that such a settlement was made, and was, of course, at the conclusion of the case instructed that the questions of the attorneys were not evidence.

Second, counsel's strategy of having defendant "come clean" as to his prior record of theft offenses consequent upon his former drug addiction was not an invalid strategy. Without contrary argument on appeal, the trial court ruled that such offenses, which all involved an element of theft or dishonesty, could properly have been utilized by the prosecution for impeachment purposes whether or not first adduced by defense counsel on direct examination of defendant. *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988). Defendant cites an unpublished opinion of this Court, where the prior

convictions were for identical or similar offenses and would not have been admissible. Here, the offenses were wholly distinct in kind, being theft offenses, not sexual offenses, and were admissible. From a standpoint focusing on counsel's evaluation of this strategy prior to trial, rather than in hindsight, the jury might well have been persuaded that the charged criminal sexual conduct offenses were so out of character for defendant, who had shown propensity only to be a drug addict and thief, as to raise a reasonable doubt as to his guilt.

Defendant has failed to establish either that counsel's strategy, in other than retrospect, was so deficient as to render counsel's performance less than that minimum standard guaranteed by the Sixth Amendment, *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995), or that any such claimed deficiency likely had a significant effect on the outcome of trial. *People v Pickens*, 446 Mich 298, 332; 521 NW2d 797 (1994). Attorney error short of ineffective assistance of counsel is an inadequate basis for appellate relief. *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995).

Affirmed.

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald

/s/ Robert P. Young, Jr.