

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD JOSEPH ROGALSKI,

Defendant-Appellant.

UNPUBLISHED

January 14, 2000

No. 206111

Washtenaw Circuit Court

LC No. 96-007088 FH

Before: Talbot, P.J., and Gribbs and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4). He was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to three to fifteen years' imprisonment. We affirm.

Defendant first argues that he was denied a fair trial because the prosecutor misrepresented the applicable law on the issue of penetration in this criminal sexual conduct case. Prosecutorial misconduct issues are decided on a case-by-case basis, and this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship that they bear to evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). A prosecutor may argue the evidence and all reasonable inferences from such as it relates to his or her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Because defendant failed to preserve this issue, appellate review of the prosecutor's allegedly improper conduct is precluded unless an instruction could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998).

Upon review of the record, we find that failure to review this issue would not result in a miscarriage of justice because the prosecutor's comments concerning penetration did not misstate the law. Further, the trial court instructed the jury regarding the amount of penetration required to prove the

charge and admonished the jurors more than once that the attorneys' comments are not evidence and to base their verdict only on the evidence. Defendant was not denied a fair trial.

Next, defendant argues that he was denied effective assistance of counsel, claiming that his attorney failed to properly prepare his defense. This issue is unpreserved because defendant failed to request a new trial or an evidentiary hearing before the trial court. See *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). Our review is foreclosed unless the record contains sufficient detail to support defendant's claims. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

Effective assistance of counsel is presumed, and it is the defendant's heavy burden to prove otherwise. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). To establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient under an objective standard of reasonableness and must establish that his counsel's deficient representation prejudiced him to the extent of depriving him of a fair trial. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995). Defendant must show that but for his attorney's unprofessional behavior, a reasonable probability exists that the trial result would have been different. *LaVearn, supra*, 216; *Leonard, supra*, 592. In addition, a defendant must overcome the presumption that the challenged action or inaction by counsel was trial strategy. *Id.* This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant first argues that defense counsel failed to sit down with him and prepare a defense or trial strategy. Defendant states that other than at court appearances, defense counsel only discussed the case with him over the phone. Defendant presents no law for the proposition that an attorney must be physically present to discuss a case, rather than communicating by telephone. Defendant does not show how additional personal interviews could have made a difference in the outcome of the proceedings. *LaVearn, supra*, 216. Defendant has failed to demonstrate that his counsel's performance in preparing for trial fell below an objective standard of reasonableness, or so prejudiced him as to deprive him of a fair trial. *Strickland, supra*, 466 US 694.

Next, defendant argues that defense counsel was ineffective because he failed to raise crucial points at trial: that the victim accused him of sexual assault only after he turned her in to the police for outstanding warrants, that part of her "modus operandi" was to go to hospitals and walk-in clinics claiming rape to procure prescription medications that she was abusing, and that within a week of the alleged incident and her moving out, she moved back in with defendant. In effect, defendant suggests that defense counsel failed to present evidence that would undermine the victim's credibility and failed to present specific witnesses. Decisions as to what evidence to present and whether to call or to question witnesses are presumed to be matters of trial strategy, *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997), and the failure to present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hoyt*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

Upon review of the record, it is apparent that, for the most part, the evidence which defendant wanted defense counsel to present was in fact presented at trial. The record reveals that defense counsel brought out on cross-examination that the victim had a prior conviction for theft, that she is an alcoholic, that she admitted to being a drug abuser in the past, that she requested pain medication at her examination after the alleged sexual assault, that a drug screen of the victim at the hospital revealed that she had alcohol and possibly Valium in her blood, and that she had been hospitalized in a mental hospital before and after the incident. During closing argument, defense counsel highlighted the doctor's testimony that the victim is a drug abuser. Defense counsel brought out through the doctor's testimony and at closing argument how prescription drug abusers go to doctors complaining of pain to get drugs. Defense counsel pointed out that the victim sought drugs from the nurse and the doctor when she received treatment days after the alleged incident. Defense counsel also attacked the victim's credibility in his closing argument. Defendant has not shown that any failure to present further evidence in this regard was anything more than a matter of trial strategy, nor that he was deprived of a substantial defense regarding the credibility of the victim due to counsel's failure to present additional evidence on this issue.

Defendant argues that defense counsel failed to raise the issue of penetration even though defendant denied penetration in his statement to the police. Upon review of the record, it is apparent that defense counsel did explore the issue of penetration with the victim and that he attacked her credibility. This was a matter of trial strategy that we will not second-guess.

Defendant also argues that defense counsel failed to request a lesser included offense instruction on attempted criminal sexual conduct and failed to discuss with him the inclusion or exclusion of lesser included offenses in the jury instructions. On the circumstances of this case, defendant has not overcome the strong presumption that it was sound trial strategy for defense counsel to pursue an "all or nothing" strategy regarding defendant's guilt of the offense charged. Moreover, the lesser included instruction on fourth-degree criminal sexual conduct was given, and therefore defendant can show no prejudice.

Finally, defendant contends that defense counsel failed to object during closing arguments to the prosecutor's alleged misrepresentation of the law regarding penetration. As we stated above, the prosecutor did not misstate the law. An attorney is not ineffective for failing to make a futile objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Moreover, there was sufficient instruction on what constitutes evidence and what constitutes penetration to have cured any such error. Defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Michael J. Talbot
/s/ Roman S. Gribbs
/s/ Patrick M. Meter