STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JEROME TURNER,

Defendant-Appellant.

UNPUBLISHED
May 26, 2000

No. 210012
Wayne Circuit Court
LC No. 96-004887

Before: Markey, P.J., and Gribbs and Griffin, JJ.

PER CURIAM.

Defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was sentenced to seven to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues he was denied the effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, because of such representation, he was prejudiced to the extent he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must show that, but for trial counsel's errors, there is a reasonable probability the result of the proceeding would have been different and must overcome the strong presumption that counsel's actions constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant first contends Beverly Austin, defendant's trial counsel, was ineffective for failing to produce Bernetter Dudley, defendant's former live-in girlfriend, as an alibi witness. An attorney's failure to call a particular witness is presumed to be trial strategy, and this Court will not substitute its judgment for that of trial counsel on such matters. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). The record indicates Austin made every reasonable effort to locate Dudley. She went to Dudley's last known address three or four times, she telephoned Dudley's sister twice, she contacted Wayne County Juvenile Court and attempted to speak with the worker in charge of Dudley's case, and she went to the juvenile court herself to look at the file. Defendant was unable to provide Austin with Dudley's current address and told her he did not know where Dudley had gone. Austin looked for

Dudley up until the day of trial. Therefore, the record shows Austin made a reasonable attempt to locate Dudley. Furthermore, even if Austin had found Dudley, her testimony would not have provided a solid alibi for defendant. She could not have testified as to what had or had not occurred while she was sleeping.

Defendant next contends Austin was ineffective for failing to call witnesses who could have impeached the complainant's credibility. Austin did not call Gracie, a neighbor, because she did not think Gracie's testimony would have been helpful. This decision was reasonable given the complainant did not wrongfully accuse the man in the bathroom of molesting her, but rather, she simply saw the man touching himself. Austin also could not have called defendant's sister to impeach the complainant's credibility because she had heard the complainant using foul language, not lying. The record does not indicate Austin was aware that defendant wanted to call Jane Hicks, a neighbor, as a witness, and defendant never suggested to Austin the complainant's father should be subpoenaed. Even if Austin was aware of these potential witnesses, however, an attorney's failure to call particular witnesses is presumed to be trial strategy. *Avant, supra* at 508.

Defendant next contends Austin was ineffective for failing to investigate the case. A thorough review of the lower court file reveals no order excluding the use of defendant's prior convictions. The file does, however, contain an order appointing an investigator. Austin was appointed to represent defendant on August 17, 1997, over a year after the investigator was appointed. She undertook the responsibility to locate Dudley herself. She took the same steps an investigator or the prosecutor's office would have taken in the same circumstances.

Defendant also argues Austin was ineffective by failing to request a lesser included offense instruction on fourth-degree criminal sexual conduct. When a defendant maintains that he did not commit the offense charged, the decision not to request a lesser included offense is a matter of trial strategy. *People v Robinson*, 154 Mich App 92, 93-94; 397 NW2d 229 (1986). Defendant maintained he did not commit the charged offense, and also indicated he did not want any lesser included offenses. Therefore, the decision not to request any lesser included offenses was a matter of trial strategy. *Robinson, supra* at 93-94.

Defendant next contends the trial court should have instructed the jury on fourth-degree criminal sexual conduct. We disagree. Defendant argues fourth-degree criminal sexual conduct is a necessarily included offense of second-degree criminal sexual conduct. If an offense is a necessarily included lesser offense, it is impossible to commit the greater offense without also committing the lesser offense, and the evidence at trial will always support a necessarily included lesser offense if it supports the greater offense. *People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996); *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993). If either party requests an instruction on a necessarily included lesser offense, the trial court must instruct the jury on that offense. *People v Torres (On Remand)*, 222 Mich App 411, 419; 564 NW2d 149.

Fourth-degree criminal sexual conduct is not a lesser included offense of second-degree criminal sexual conduct when a defendant is charged with second-degree criminal sexual conduct for having had sexual contact with a person under age thirteen. *People v Norman*, 184 Mich App 255, 260-261;

457 NW2d 136 (1990). The evidence showed the complainant was under thirteen when the incident occurred. The prosecutor did not allege defendant used force or coercion or that the complainant was mentally or physically incapacitated. Rather, defendant was charged with having had sexual contact with a person under the age of thirteen. Fourth-degree criminal sexual conduct was not a necessarily included lesser offense of second-degree criminal sexual conduct in this case because the greater offense could have been committed without defendant having committed the lesser offense. *Id.*

Defendant next argues insufficient evidence existed to support his conviction. We disagree. We review claims of insufficient evidence in the light most favorable to the prosecution to determine whether there was sufficient evidence to justify a rational trier of fact in finding the essential elements of an offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Hutner,* 209 Mich App 280, 282; 530 NW2d 174 (1995).

Second-degree criminal sexual conduct is committed if a person engages in sexual contact with another person who is under thirteen years of age. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a); *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). Sexual contact has been defined as touching that can reasonably be construed as being for the purpose of sexual arousal or gratification. MCL 750.520a(k); MSA 28.788(1)(k); *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997); *Piper, supra* at 645. A defendant's specific intent is not an essential element of the offense as long as the touching can reasonably be construed as being for the purpose of sexual arousal or gratification. *People v Fisher*, 77 Mich App 6, 13; 257 NW2d 250 (1977).

The evidence presented in this case revealed that when the complainant was twelve years old, she went to defendant's house with Anajanette and spent the night there. She awoke to find defendant kneeling by the side of the bed, touching her vaginal area with his hands underneath her clothing. She was able to see defendant's face because of the light from the television and told him to stop. He replied he would be back and crawled out of the room. The complainant immediately woke Anajanette and told her what had happened. She was very scared and was crying at the time. She told Anajanette to lay in front of her so she could sleep next to the wall because she was scared of defendant. She also asked Anajanette if they could catch a bus home. When the complainant arrived home in the morning, she was very nervous and excited and told her mother defendant had been feeling her and that he had molested her. There had been no problems between the complainant and defendant prior to that point. We find this evidence sufficient to justify a rational trier of fact in finding beyond a reasonable doubt that defendant committed second-degree criminal sexual conduct. Moreover, although Anajanette's testimony supported the complainant's testimony, it was not necessary that the complainant's testimony be corroborated. MCL 750.520h; MSA 28.788(8); *People v Smith*, 149 Mich App 189, 195; 385 NW2d 654 (1986).

Defendant's final argument on appeal is the prosecutor engaged in prosecutorial misconduct. We again disagree. Because defendant failed to preserve this issue, we will reverse only if a curative instruction could not have eliminated the prejudicial effect of the prosecutor's comments or if failure to review the issue would result in a miscarriage of justice. *Avant*, *supra* at 512; *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

Prosecutorial misconduct is reviewed on a case by case basis, considering contested remarks in context, as a whole, and in light of defense arguments. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996); *People v Lawton*, 196 Mich App 341, 353, 355; 492 NW2d 810 (1992). Once a defendant opens the door to an issue on direct examination, the prosecutor may then question the defendant on the matter during cross-examination. *People v Lukity*, 460 Mich 484, 498; 596 NW2d 607 (1999); *People v Gibson*, 71 Mich App 543, 547; 248 NW2d 613 (1976).

Defendant argues the prosecutor erred by cross-examining defendant about the circumstances of Anajanette's failure to appear in court. Defendant, however, opened the door to this line of questioning during his direct examination. *Lukity, supra* at 498; *Gibson, supra* at 547. While the prosecutor questioned defendant in more detail regarding his living situation and Anajanette's absence, the prosecutor's cross-examination of defendant merely drew out details of matters raised by defendant himself. *People v McIntire*, 232 Mich App 71, 109; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999).

Defendant also contends the prosecutor impermissibly shifted the burden of proof by implying during closing arguments that defendant was somehow involved with Anajanette's failure to appear. A prosecutor is permitted to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). A prosecutor's arguments regarding the weight and credibility of the witnesses and evidence presented by a defendant do not shift the burden to the defendant to prove his innocence, but rather, question the reliability of the testimony and evidence presented. *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995).

The prosecutor merely insinuated that, contrary to defendant's testimony, defendant had been involved with Anajanette's failure to appear in court. This argument pertained to the evidence in the case and particularly to defendant's own testimony. The implication that defendant had something to do with Anajanette's absence was a reasonable inference from the evidence, and it did not shift the burden to defendant to prove his innocence. *Kelly, supra* at 641; *Fields, supra* at 107.

Affirmed.

/s/ Jane E. Markey
/s/ Roman S. Gribbs
/s/ Richard Allen Griffin