

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL BRIAN BURKE,

Defendant-Appellant.

UNPUBLISHED

June 30, 2000

No. 211706

Macomb Circuit Court

LC No. 95-002342-FC

Before: Murphy, P.J., and Collins and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b)(i); MSA 28.788(2)(1)(b)(i), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b)(i); MSA 28.788(3)(1)(b)(i). Defendant was sentenced to concurrent terms of eight to twenty years' imprisonment for each CSC I conviction, and eight to fifteen years' imprisonment for the CSC II conviction. We affirm.

Defendant's sole contention on appeal is that he was denied the effective assistance of counsel. Defendant contends that his trial counsel was ineffective because he failed to confirm his understanding of a report describing DNA test results with a representative of the independent laboratory that conducted the tests, and then based his entire trial strategy on his misinterpretation of those test results. Defendant maintains that defense counsel's error denied him a fair trial.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In order for this Court to reverse due to the ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 314.

The pertinent portion of the report in question reads as follows:

Based on the results listed above, the DNA profiles obtained from the non-sperm and sperm fraction of the panties (Item 5) are consistent with the DNA profile obtained from the reference sample of [complainant] (Item 7) and different than the DNA profile obtained from the reference sample of Carl Burke (Item 8); therefore, [complainant] can not be excluded as the source of the genetic material in these samples. There is no indication of DNA foreign to [complainant] in these samples. Statistical estimates can be calculated upon request for these samples.

Defendant's trial counsel testified at the hearing for a new trial that he understood the test results to mean that there was sperm or seminal fluid present in the sample tested that did not match the DNA characteristics of defendant. In other words, defendant's trial counsel believed that the report was clearly exculpatory. However, the representative from LabCorp, the independent testing facility, testified at trial that the term "sperm fraction" did not mean that sperm or seminal fluid was present in the sample tested, that all of the DNA material present was consistent with complainant, and that there was no DNA present that matched the DNA of defendant or was in any way foreign to complainant. Defendant's trial counsel received the test results a day or two before trial. He acknowledged that he did not speak to the analyst who performed the test or to the representative from LabCorp before trial.

While we agree with defendant that his trial counsel did not adequately prepare for trial, we are not persuaded that prejudice resulted from his lack of preparation. See *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant contends that in trial counsel's opening statement, he lost all credibility with the jury by stating that the scientific evidence would prove that defendant did not "penetrate anybody." We find that although defense counsel may have overstated the value of the DNA evidence in his opening statement, he accurately conveyed the crux of the DNA test results to the jury – the DNA evidence did not implicate defendant in this crime. The DNA evidence in this case was a neutral factor. In fact, defense counsel was able to bolster defendant's case by repeatedly eliciting the conclusion from the LabCorp representative that none of the evidence tested matched the DNA characteristics of defendant.

Although defendant contends that defense counsel's sole strategy was based on his misinterpretation of the DNA test results, the record shows that defense counsel incorporated several well argued themes throughout his defense of defendant: that evidence was mishandled, that the police failed to properly investigate, that the victim was encouraged by an interviewing officer to say that penetration occurred, that the victim was persuaded by her mother to fabricate the charges so that she could gain a stronger bargaining position during the divorce, and that there was inconsistent testimony by prosecution witnesses. Defense counsel clearly did not rely solely on the evidence pertaining to defendant's DNA to exculpate defendant.

Finally, in light of the other evidence presented at trial, including the complainant's testimony, the medical testimony, and defendant's own statements regarding the incident, we are

not persuaded there is a reasonable probability that, but for defense counsel's failure to confirm the DNA test results, the outcome of the proceedings would have been different. *Pickens, supra* at 314.

Affirmed.

/s/ William B. Murphy

/s/ Jeffrey G. Collins

/s/ Donald S. Owens