STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 27, 2000
v	No. 219687 Washtenaw Circuit Court
KERRY CHRISTOPHER HUTCHINSON, Defendant-Appellant.	LC No. 97-009189-FH

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), and assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). He was sentenced to concurrent terms of 7 to 15 years' imprisonment for the second-degree CSC conviction and 6-1/2 to 10 years for the assault conviction. He appeals as of right. We affirm.

The victim, age sixteen, testified that she was assaulted at approximately 4:00 a.m., while walking down the street. Her attacker dragged her into a lumberyard parking lot, hit her in the face and head, and forced her to the ground. He subsequently unzipped her blue jeans and placed his hand down her pants. As the victim struggled, a stranger intervened and pulled defendant off the victim. She was able to run across the street to a motel, where she immediately called police. The police arrived and apprehended defendant in the area of the lumberyard. He was sweating and breathing heavily. In addition, defendant had grass stains on his knees, and his knuckles were dirty and scraped. The police brought the victim over for an on-the-scene identification and she immediately identified defendant as the person who attacked her. At trial, defendant denied attacking the victim and claimed mistaken identity.

Defendant first argues that the on-the-scene pretrial identification was improper because it was unduly suggestive and violated his right to counsel under *People v Anderson*, 389 Mich 155, 168-169; 205 NW2d 461 (1973). Because defendant did not raise this issue in the trial court, appellate relief is precluded absent a showing of plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). In *People v Winters*, 225 Mich App 718, 721-727; 571 NW2d 764 (1997), this

Court considered the issue of on-the-scene identifications, similar to that involved here. In that case, this Court held that "it is proper and does not offend the *Anderson* requirements for the police to promptly conduct an on-the-scene identification." *Id*. at 727. Such identifications are a reasonable and indispensable police practice "because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance." *Id*. at 728. As in *Winters*, this "on-the-scene corporeal identification, within minutes after the [crime] occurred, was not only reasonable, but necessary police practice." *Id*. at 728-729. Thus, defendant has not shown that the on-the-scene identification constituted plain error.

Next, defendant argues that he was denied a fair trial because of prosecutorial misconduct. Because defendant did not object to the challenged conduct at trial, he must demonstrate either that the alleged misconduct was so egregious that a curative instruction could not have eliminated any prejudice or that manifest injustice would result from our failure to review this issue. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999); *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

First, defendant argues that the prosecutor impermissibly vouched for the credibility of the victim. "This Court evaluates the remarks of a prosecutor in the context in which they were made to determine whether a defendant was denied a fair and impartial trial." *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). The challenged remarks, viewed in context, do not suggest that either the government or the prosecutor had some special knowledge that the victim was testifying truthfully. Rather, the prosecutor's statements constituted proper comment with respect to the evidence and the reasonable inferences that could be drawn from that evidence, as it related to the parties' theories of the case. Accordingly, those remarks were not improper. *People v Bahoda*, 448 Mich 261, 276; 531 Mich 659 (1995); *McElhaney*, *supra* at 284.

Next, defendant argues that the prosecutor improperly denigrated defense counsel for questioning the thoroughness and sufficiency of the police investigation. However, we find that the challenged remarks were permissible responses to defense counsel's closing arguments. *Vaughn*, *supra* at 39. The prosecutor's statements referring to the fact that defendant "picked the victim and . . . the attending witnesses," likewise were responsive to defense counsel's remarks, which attacked the character and credibility of the victim and her friends who testified. In this context, the remarks did not deny defendant a fair trial. Because defendant has not demonstrated that a curative instruction could not have eliminated any prejudice, and has not demonstrated that manifest injustice would result from our failure to review the alleged prosecutorial misconduct, defendant is not entitled to relief on this issue.

Next, defendant argues that reversal is required because the trial court failed to sua sponte instruct the jury on the defense of voluntary intoxication. We disagree. In the absence of a request, a trial court is not obligated to instruct on a particular defense unless the defense is central to the defendant's case. *People v Glover*, 154 Mich App 22, 35; 397 NW2d 199 (1986); *People v Morris*, 99 Mich App 98, 100-101; 297 NW2d 623 (1980). As this Court has previously held, it "is a very difficult question for a trial judge to determine if an instruction must be given on a defense which apparently comes out in testimony when trial counsel has not raised the question." *Glover*, *supra* at

35. In this case, defendant's trial counsel pursued a defense of mistaken identity. While there was evidence that defendant had been drinking on the evening of the assault, defense counsel never suggested that defendant committed the charged crimes in an intoxicated state. Rather, defense counsel argued that defendant had been misidentified. Under these circumstances, a defense of intoxication was not "central" to defendant's case. *Morris*, *supra* at 100. Thus, the trial court was under no duty to sua sponte instruct the jury on the defense of voluntary intoxication.

Defendant next argues that he was denied the effective assistance of counsel. Because defendant did not raise this issue in an appropriate motion in the trial court, appellate relief is precluded unless the alleged deficiencies are apparent from the existing record. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To warrant a new trial based on ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998), citing *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must also overcome the presumption that the challenged action might be considered sound trial strategy and must establish a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Hoag*, *supra* at 6; *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

First, because defendant has not demonstrated that the prompt, on-the-scene identification was improper, *Winters*, *supra*, he has not shown that defense counsel was ineffective for failing to challenge the identification procedure in the trial court. Trial counsel is not required to advocate a meritless position. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). Second, contrary to what defendant argues, the record indicates that defense counsel pursued a defense at trial, that being mistaken identification. Under the circumstances, counsel's strategy was not objectively unreasonable. Further, in light of this defense strategy, defense counsel was not ineffective for failing to request an instruction on the defense of intoxication. Finally, defendant has not demonstrated that defense counsel's failure to call any witnesses deprived defendant of a substantial defense affecting the outcome of trial. *Hoag*, *supra*.

Defendant also challenges his sentences, arguing that the trial court failed to properly articulate the basis for imposing those sentences, and arguing that the sentences are disproportionate under *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). We disagree. First, the trial court satisfied the articulation requirement by referring to the sentencing guidelines and imposing a sentence within those guidelines. "A trial court's reliance on the sentencing guidelines in imposing a minimum sentence constitutes sufficient justification for that sentence and no further explanation beyond the trial court's statement that it is following the guidelines is necessary." *People v Broden*, 428 Mich 343, 354; 408 NW2d 789 (1987). Second, sentences which fall within the range recommended by the sentencing guidelines are presumptively proportionate. *Id*. at 354-355. At the time of the instant offense, defendant was on probation for prior child abuse convictions. Additionally, his record included a felony assault conviction and several misdemeanor offenses. Considering defendant's past criminal history and

the circumstances of the offense, defendant's sentences do not violate the principle of proportionality. *Milbourn*, *supra* at 635-636.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski
/s/ William C. Whitbeck