

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

March 13, 2001

Plaintiff-Appellee,

v

TERRANCE A. TAYLOR,

No. 215830
Wayne Circuit Court
LC No. 98-006398

Defendant-Appellant.

Before: Bandstra, C.J., and Saad and Meter, JJ

PER CURIAM.

Defendant appeals by right from his conviction by a jury of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2); MSA 28.788(2)(7). The trial court sentenced him as a third-offense habitual offender, MCL 769.11; MSA 28.1083, to 1½ to 10 years' imprisonment. We affirm.

The prosecutor originally charged defendant, a hairdresser, with assault with intent to commit CSC I after he allegedly attempted to rape a client while styling her hair at his home. At trial, the complainant testified that while in the process of rinsing her hair after giving her a permanent, defendant, among other things, pulled off her underwear, threw her to the ground, covered her mouth, and choked her. Defendant denied the incident occurred and claimed that on the day in question, he asked the complainant to stop touching him in a suggestive manner. At the close of the trial, the trial court instructed the jury on the original charge as well as on the lesser-included offenses of assault with intent to commit CSC II and assault and battery.

Defendant claims, initially, that the prosecutor presented insufficient evidence to sustain his conviction. We disagree. This Court reviews a claim that the evidence was insufficient to support a conviction by considering the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748, amended 441 Mich 1201 (1992).

The elements of assault with intent to commit CSC II, as applied to this case, are: (1) defendant assaulted the victim; (2) defendant intended to engage in sexual contact with the victim for purposes of sexual gratification; and (3) defendant intended to do an act that would have caused personal injury to the victim and intended to use force or coercion to accomplish the

sexual contact. See MCL 750.520c(1)(f); MSA 28.788(3)(1)(f) and *People v Lasky*, 157 Mich App 265, 269-271; 403 NW2d 117 (1987). The complainant's testimony provided sufficient support for these elements. Indeed, her testimony that defendant threw her onto a dresser, threw her to the ground, put his hand over her mouth, and choked her supported the first element. Her testimony that defendant kissed her shoulder and thigh, unzipped and pulled down his pants, pulled off her underwear, threw her to the ground, and told her to open her legs supported the second element. With regard to the third element, the complainant's testimony that defendant threw her onto a dresser, threw her to the ground, covered her mouth, and choked her established that he used force or coercion in an attempt to accomplish the sexual contact and that he intended to cause at least some type of physical injury to the complainant. Considering the evidence in the light most favorable to the prosecutor, we are satisfied that a rational trier of fact could have found that the essential elements of the crime of assault with intent to commit CSC II were proven beyond a reasonable doubt.

Defendant next argues that his conviction must be reversed because of erroneous jury instructions. Specifically, defendant contends that the trial court failed to instruct the jury on the allegedly applicable aggravating circumstance that raised the charge from, essentially, an assault with intent to commit CSC IV to an assault with intent to commit CSC II. The allegedly applicable aggravating circumstance in this case derives from MCL 750.520c(1)(f); MSA 28.788(3)(1)(f) and posits that defendant intended to do an act that would have caused personal injury to the victim and intended to use force or coercion to accomplish sexual contact. See *Lasky, supra* at 269-271.

Defendant, however, did not object to the jury instructions given below. Accordingly, we must analyze this issue using the "plain error" standard of review. See *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). Three requirements must be met to withstand forfeiture under the plain error rule: (1) an error must have occurred; (2) the error must have been plain, i.e., clear or obvious; and (3) the plain error must have affected substantial rights, i.e., it must have affected the outcome of the lower court proceedings. *Id.* at 763-764. If these three elements are established, then an appellate court must exercise its discretion in deciding whether to reverse. *Id.* Reversal is warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or reputation of judicial proceedings. *Id.*

Here, the prosecutor concedes that the jury instruction at issue, by omitting reference to the applicable aggravating circumstance, contained a plain error. Accordingly, we must next determine whether the plainly erroneous instruction affected the outcome of the lower court proceedings. *Id.* In making this determination, we must review the entire record, including both the evidence and the jury instructions. *Id.* at 722 n 18. We conclude that the plain error in this case did not cause the level of prejudice required for reversal under *Carines, supra* at 763-764.

We first note that the trial court instructed the jury on the elements of assault and battery, an essential component of assault with intent to commit CSC II, as follows:

First, that the defendant either attempted to commit a battery on . . . the complainant, or did an illegal act that made [the complainant] reasonably fear an

immediate battery. A battery is a forceful or violent touching of the person or something closely connected with the person.

Second, that the defendant intended either to injure [the complainant] or make [the complainant] reasonably fear an immediate battery.

Because the jurors found defendant guilty of assault with intent to commit CSC II under these instructions, they must have concluded that defendant either (1) attempted to forcefully or violently touch the complainant, or (2) did an illegal act that made the complainant fear a forceful or violent touching. They must further have concluded that defendant either (1) intended to injure the complainant, or (2) intended to make the complainant fear a forceful or violent touching. Finally, in light of the further instructions given by the trial court with regard to the additional elements of assault with intent to commit CSC II, the jurors must have concluded that defendant assaulted the complainant while intending to engage in sexual contact with her for purposes of sexual gratification. Under the facts of this case, the only way the jurors could have reached these myriad conclusions would have been by *accepting the complainant's testimony as credible*. The complainant's testimony strongly supported a finding that defendant intended to cause at least some personal injury to the victim and intended to use force or coercion to accomplish sexual contact. Accordingly, we do not believe that an additional jury instruction with regard to the disputed aggravating element could reasonably have affected the outcome of the case. Defendant's substantial rights therefore were not affected, and reversal based on the erroneous jury instruction is unwarranted. *Carines, supra* at 763-764.

Defendant next argues that his trial attorney provided ineffective assistance of counsel by failing to include the disputed aggravating factor in the jury instruction he requested for assault with intent to commit CSC II. This Court presumes the effective assistance of counsel, and a defendant's burden to prove otherwise is a heavy one. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To determine whether ineffective assistance of counsel occurred, this Court must determine (1) whether counsel's performance was objectively unreasonable, and (2) whether the defendant was prejudiced by counsel's defective performance. *People v Pickens*, 446 Mich 298, 311-327; 521 NW2d 797 (1994); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To convince this Court of prejudice, a defendant must establish “a reasonable probability that, but for counsel's errors, the result [of the proceedings] would have been different.” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Here, the prosecutor concedes that defense counsel's actions were objectively unreasonable and that counsel had no legitimate, strategic reason for failing to request an instruction on the omitted aggravating factor. Nevertheless, as discussed *supra*, defendant cannot establish that the absence of the instruction reasonably affected the outcome of the proceedings. Accordingly, reversal based on the ineffective assistance of counsel is not warranted. *Id.*

Finally, defendant contends that the trial court abused its discretion by failing to allow the testimony of two potential witnesses for the defense: Marcellus Head and Dwight Foster. We review a trial court's decisions regarding the admissibility of evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). An abuse of discretion occurs if an unprejudiced person, considering the facts on which the trial court acted, would find no

justification for the ruling made. *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000).

The defense called Head as a witness to testify that he was with defendant on two occasions when the complainant telephoned or paged defendant for the purpose of seeing defendant socially. Defendant contends on appeal that Head's testimony supported the defense theory at trial that the complainant sought an intimate social relationship with defendant. The trial court precluded most of Head's testimony on the basis of the hearsay rule.

Defendant contends that Head's testimony was not prohibited by the rule against hearsay because it consisted of a prior inconsistent statement of a witness. Prior inconsistent statements of a witness are excluded from the hearsay rule if the prior statements were given under "oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." MRE 801(d)(1). This exclusion did not apply to the instant case because the complainant's alleged statements at issue were not given at a trial or other similar proceeding. Moreover, defendant cites no authority, not even the applicable rule of evidence, in support of his argument that Head's testimony was admissible as a prior inconsistent statement. An appellant may not merely announce a position and leave it up to this Court to search for relevant authority. *Mudge v Macomb County*, 458 Mich 87, 104-105; 580 NW2d 845 (1998).

Defendant additionally contends that Head's testimony was allowable for impeachment purposes under MRE 613. Although his argument is difficult to understand, defendant apparently believes that Head's potential testimony provided extrinsic evidence of a prior statement by the complainant that contradicted her trial testimony. See MRE 613(b). We find nothing in the record, however, to support a finding that Head's potential testimony contained evidence of a prior inconsistent statement by the complainant. Defendant's argument is therefore without merit.

Defense counsel's offer of proof regarding the proposed testimony of Dwight Foster, aged fourteen, was, in part, as follows:

Dwight Foster – Dwight Foster will testify that sometime in May he came into the house and saw the complainant. He came into the house and saw the complainant in the house with a towel around her head and that nothing seemed to be unusual or wrong. He will also testify as to the fact that the door was opened and he was just able to walk right in.

The defense argued that it could establish that the one day that Foster was at defendant's home in May was the day the assault occurred. The court ruled Foster's potential testimony irrelevant and therefore did not admit it. See MRE 402 (evidence that is not relevant is inadmissible).

Defendant contends that Foster's potential testimony was relevant because it would have demonstrated that (1) the door was open, meaning that the neighbors would have heard screams made by the complainant; and (2) nothing out of the ordinary occurred at defendant's house on the day of the incident. We disagree. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Even assuming the defense

proved that Foster was at defendant's home on the day of the alleged assault in this case, we fail to see how Foster's testimony would have made the occurrence of the assault less probable.

The complainant testified that the assault occurred toward the end of her styling appointment, *in the basement of the house* as opposed to the area that Foster observed, and that she immediately fled the house afterwards. Foster's potential testimony about seeing the complainant at defendant's house, acting normally, at some point on the day of the incident was irrelevant, because the parties did not dispute the fact that the complainant received a permanent from defendant before the assault. Moreover, potential testimony about the open door on the main level of the house was irrelevant, since the complainant alleged that the incident took place in the basement. Especially in light of the "abuse of discretion" standard of review, the trial court did not commit error requiring reversal by disallowing Foster's testimony.

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Patrick M. Meter