STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAWAN PAYNE,

Defendant-Appellant.

UNPUBLISHED
June 15, 2001

No. 221489
Muskegon Circuit Court
LC No. 98-042530-FC

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Defendant was charged with first-degree criminal sexual conduct (CSC), MCL 750.520b, but was convicted of the lesser offense of second-degree CSC, MCL 750.520c, following a jury trial. He was sentenced as a fourth habitual offender, MCL 769.12, to a term of twenty to fifty years' imprisonment. He appeals as of right. We affirm.

Defendant argues that the evidence failed to show that the alleged contact was committed for purposes of sexual gratification and, therefore, does not support a conviction for second-degree CSC. We disagree. "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). In order to support a conviction for second-degree CSC, the jury must determine that "the defined conduct, when viewed objectively, could reasonably be construed as being for a sexual purpose." *People v Piper*, 223 Mich App 642, 645-647; 567 NW2d 483 (1997); see MCL 750.520a(k).

The evidence indicated that defendant forcibly knocked the victim to the ground and dragged her to a more secluded area between some houses. He asked her if he could "get some of that," and also asked if she had ever had sex with a black man or had ever been raped. He then told her to take off her pants and, when she refused, he beat her and choked her so severely that she lost consciousness for a period of time. By the time the victim regained consciousness, defendant had pulled off her pants and shoes and was attempting to penetrate her vagina with his penis. He admitted that he rubbed her vaginal area with his penis. However, he apparently could not achieve an erection and got off her. The victim testified that defendant then inserted two fingers into her vagina. When viewed objectively, defendant's conduct could reasonably be

construed as being for a sexual purpose. Thus, there was sufficient evidence of a sexual purpose to support defendant's conviction for second-degree CSC.

Next, defendant argues that he was denied the effective assistance of counsel. To warrant a remand for a new trial on a claim of 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 Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999); *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). Decisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy. In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the accused. *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998); *People v Kelly*, 186 Mich App 524, 526; 456 NW2d 569 (1990).

Limiting our review to the available record, we find no basis for concluding that defendant's various statements to the police were not voluntarily made. See *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965). Nor is there any basis to conclude that defendant's statements, which were not recorded, were inadmissible. *People v Eccles*, 141 Mich App 523, 524-525; 367 NW2d 355 (1984). Counsel is not required to argue a meritless motion or make a groundless objection. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). Third, the record does not factually support defendant's claim that there was any improper contamination or planting of evidence with respect to the blood on the victim's blue jeans. Fourth, although defendant argues that defense counsel failed to call certain witnesses or present certain evidence, because the substance of this evidence is unknown, defendant has not demonstrated that counsel's failure to call witnesses or present evidence deprived him of a substantial defense that might have made a difference in the outcome of the trial. Nor has defendant overcome the presumption that counsel's decision not to call witnesses and to advise defendant not to testify was part of defense counsel's sound trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). Finally, where the evidence showed that the victim clearly saw defendant's face over a period of several minutes, defendant has failed to demonstrate that defense counsel was ineffective for failing to demand a pre-trial line-up. See *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).

Next, the trial court did not err when it instructed the jury on the cognate lesser included offense of second-degree CSC. The evidence was sufficient to support a conviction of second-degree CSC. *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997); *People v Bailey*, 451 Mich 657, 668; 549 NW2d 325 (1996); *People v Ora Jones*, 395 Mich 379, 388-390; 236 NW2d 461 (1975). Also, defendant had adequate notice that he would be required to defend against a charge of second-degree CSC. *People v Darden*, 230 Mich App 597, 600-601; 585 NW2d 27 (1998); *People v Snell*, 118 Mich App 750, 759; 325 NW2d 563 (1982). Further, there is no indication that the jury's verdict was an improper compromise verdict or a product of misunderstanding. *People v Smielewski*, 235 Mich App 196, 201-202; 596 NW2d 636 (1999).

Defendant's claim that the prosecutor knowingly presented perjured testimony is without merit. *People v Lester*, 232 Mich App 262, 277, 279; 591 NW2d 267 (1998); *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). Defendant has failed to demonstrate anything more than inconsistencies in the testimony, which relate to credibility. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998); *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Further, defendant has failed to demonstrate that the prosecutor suppressed exculpatory evidence or material statements. *Lester*, *supra* at 281-282.

We also reject defendant's claim that reversal is required because of evidentiary error. The record reveals that the trial court admitted the challenged testimony, under a proper instruction, for a limited, nonhearsay purpose. See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999) (setting forth the standard of review for alleged errors regarding the admission of evidence). Furthermore, even if the evidence was improperly admitted, it is not more probable than not that the admission of the testimony was outcome determinative. *Id.* at 495-496.

Finally, defendant is not entitled to resentencing. The court considered proper factors at sentencing and sufficiently articulated its reasons for the sentence. MCR 6.425(D)(2)(e); *People v Fleming*, 428 Mich 408, 417-418, 428; 410 NW2d 266 (1987); *People v Terry*, 224 Mich App 447, 455-456; 569 NW2d 641 (1997). Also, defendant's habitualized sentence does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Affirmed.

/s/ Janet T. Neff
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder