

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELANO R. JENKINS, JR.,

Defendant-Appellant.

UNPUBLISHED

July 27, 2001

No. 218014

Recorder's Court

LC No. 97-006688

Before: Hoekstra, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

A jury convicted defendant Delano Jenkins of third-degree criminal sexual conduct, (CSC III).¹ The trial court sentenced Jenkins to a term of three to fifteen years' imprisonment. We affirm.

I. Basic Facts And Procedural History

According to the complainant, Jenkins' fourteen-year old neighbor, she was sitting on her porch in May 1997, when she saw Jenkins sitting on his porch, alone, next door. The two were well acquainted, so Jenkins asked her to come over to see his new house. As Jenkins showed her the house, the two eventually went to the basement. After some preliminary conversation, Jenkins asked the complainant to have sex with him. She declined, but Jenkins pushed her onto the couch and told her "[w]on't nobody have to know, you won't have to tell nobody." The complainant tried to leave three times, but Jenkins physically prevented her from leaving. Jenkins then removed her underwear and pants with one hand, while using his other arm to restrain her. Jenkins pulled his own shorts down to his ankles, inserted his penis into her vagina, and proceeded to sexually assault her for approximately fifteen to thirty minutes. The assault ended when an unknown person knocked on the window. Jenkins reportedly warned the complainant not to tell anyone about the incident.

The complainant kept the assault a secret for a week, but eventually told her sister about it because she thought she had missed her period. The complainant, however, told Jenkins' fiancée

¹ MCL 750.520d.

that these rape allegations were false. Several days later, the complainant told her mother that Jenkins had raped her. The police were finally contacted after Jenkins allegedly struck the complainant across the face. After this incident, while obtaining a personal protection order against Jenkins, the complainant told the police about the sexual assault.

Nirmala Bhaya, M.D., a physician in the emergency room at Children's Hospital of Michigan in Detroit, examined the complainant. Bhaya testified that, after examining the complainant she determined that the complainant's hymenal ring was "interrupted" in two places, though it appeared to have healed. Bhaya concluded that any interruption would have probably occurred more than a week or two before the examination, but could have occurred as long as three months before the examination. Bhaya could not determine precisely whether the interruption occurred in May 1997. Bhaya noted that the hymenal ring ordinarily disappears in women who have engaged in intercourse multiple times. Bhaya did not take any samples from the complainant during the examination because she did not present any signs of discharge or infection, and it was too late to detect any sperm.

Jenkins denied committing the sexual assault claiming, instead, that he was watching television with friends at the time. His sister supported his defense, stating that numerous people were in her brother's house, including in the basement watching television, the entire evening the sexual assault allegedly occurred. She could confirm that the complainant was not in the house at the time she (Jenkins' sister) was there. Jenkins' fiancée, April Magee, also said that there were many people in the house that day. Magee left Jenkins' house around the time when the complainant said that she had been sitting on her porch, but Magee did not see her there. Jenkins did not testify on his own behalf.

II. The Complainant's Virginity

A. Preservation And Standard Of Review

Jenkins argues that he was denied the right to a fair trial when the prosecutor made more than one statement to the jury that the complainant was a virgin before the offense and elicited testimony on that matter at trial. Because Jenkins failed to object to the prosecutor's comments and the testimony at issue, he failed to preserve this claim of constitutional error.² Consequently, we must determine whether this was plain error that affected his substantial rights.³

B. MRE 404(a)(3)

During her opening statement, the prosecutor stated that the complainant was a virgin before this incident. During direct examination, the complainant testified that she had not had sex before Jenkins sexually assaulted her. During closing argument, the prosecutor again referred to the complainant's virginity. Jenkins contends this testimony and these arguments constitute error requiring reversal under MRE 404(a)(3), which states:

² See *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000).

³ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

* * *

(3) In a prosecution for criminal sexual conduct, evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin or semen, pregnancy or disease.

As Jenkins points out, in *People v Bone*,⁴ this Court held that MRE 403(a) “preclude[s] the use of evidence of a victim's virginity as circumstantial proof of the victim's current unwillingness to consent to a particular sexual act.” Unlike the situation in *Bone*, the prosecutor in this case did not use this evidence to demonstrate the complainant's lack of consent. Lack of consent was a matter in dispute in *Bone* because the defendant conceded having sexual contact with the complainant in that case.⁵ Rather, here Jenkins denied sexual contact with the complainant and the prosecutor used evidence of the complainant's virginity to explain the circumstantial physical evidence of penetration and why the complainant would delay in reporting the crime. As the *Bone* opinion acknowledges, the rules of evidence function on a principle of multiple admissibility.⁶ Stated another way, “[t]hat our Rules of Evidence preclude the use of evidence for one purpose simply does not render the evidence inadmissible for other purposes.”⁷ Thus, because this evidence was not used to demonstrate lack of consent on the basis of the complainant's good character as a virgin but was, instead, used to demonstrate other issues relevant at trial, there was no plain error affecting Jenkins' substantial rights that would merit reversal on this basis.

Even if it were error to allow these arguments and this testimony, we still would not find error requiring reversal. As we discuss below, Jenkins also resorted to challenging the complainant's credibility by inquiring into her sexual history, suggesting that she had engaged in sex with at least one other person, contrary to her testimony that she was a virgin. While Jenkins was not the first to raise the issue of the complainant's virginity, he cannot now benefit from an issue he also attempted to exploit at trial.⁸

⁴ *People v Bone*, 230 Mich App 699, 702; 584 NW2d 760 (1998).

⁵ *Id.* at 701.

⁶ *Id.* at 702, n 3.

⁷ See *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

⁸ See *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

III. Ineffective Assistance Of Counsel

A. Preservation And Standard Of Review

Jenkins contends that his counsel was ineffective for failing to object to the evidence and arguments concerning the fact that the complainant was a virgin. He also contends that his attorney was ineffective for failing to call certain witnesses at trial in order to present a defense. He preserved this issue as a whole by moving for a new trial.⁹ We review this constitutional issue de novo.¹⁰

B. Legal Standard

We adhere to the United States Supreme Court's standards for ineffective assistance of counsel claims:¹¹

“A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.”¹²

C. Failure To Object

While Jenkins correctly notes that his attorney did not object to the arguments and evidence concerning the complainant's virginity, we cannot find fault with this decision. Defense counsel's trial strategy appeared to include impeaching the complainant's testimony by suggesting that she had previous sexual experience.¹³ It would have made no sense, in the context of this strategy, to risk excluding this evidence by objecting when the prosecutor essentially set up the point on which defense counsel intended to impeach the complainant. Moreover, because this evidence was properly admitted, defense counsel was not obligated to

⁹ *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

¹⁰ *People v Toma*, 462 Mich 281, 310; 613 NW2d 694 (2000).

¹¹ See *People v Lloyd*, 459 Mich 433, 445-446; 590 NW2d 739 (1999).

¹² *Id.* at 446, quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

¹³ See *Toma*, *supra* at 301; *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995).

make a meritless argument to the trial court.¹⁴ Thus, Jenkins has failed to demonstrate that his trial counsel's performance was deficient in this respect.

D. Defense Witnesses

Jenkins argues that his trial counsel was ineffective for failing to call witnesses who would have corroborated his defense that he was watching basketball with friends in the basement of his house at the time the complainant testified the sexual assault occurred there. He failed to present this issue for appeal when he did not list it in the statement of questions presented.¹⁵ In any event, according to the testimony at the *Ginther*¹⁶ hearing, Jenkins' trial counsel decided not to call these other witnesses to testify at trial, in part, because they were Jenkins' friends and, therefore, not credible. Having heard three of these potential witnesses testify at the *Ginther* hearing, the trial court agreed that they were not credible and defense counsel's decision not to call them for that reason was a matter of trial strategy. We agree, especially in light of the presumption that certain trial matters, such as which witnesses to call to testify, are presumed legitimate strategy and not subject to second-guessing on appeal.¹⁷

IV. Right To Confrontation

Jenkins contends that he was denied his rights under the Confrontation Clause of the Sixth Amendment when the trial court prevented him from continuing to inquire into the complainant's sexual history contrary to Michigan's rape shield statute.¹⁸ Defense counsel's remarks on the record indicated that he intended to comply with this limitation on questioning voluntarily, indicating that he had waived any related issue.¹⁹ However, even if defense counsel merely forfeited this issue by not objecting that Jenkins had a Sixth Amendment right to pursue this issue, we would not conclude that there was plain error affecting his substantial rights.²⁰ The purpose of this inquiry was to impeach the complainant's credibility. Defense counsel was able to do this a number of times by pointing out the inconsistencies in the way the complainant initially reported the alleged sexual assault to her family and friends, the time she waited to tell anyone that this occurred, his sister's and fiancée's observations concerning the probability that the assault could have happened undetected in the house when so many other people were there, and even through other subtle suggestions that the complainant was not truly chaste. Thus, even if the trial court may have erred in preventing this questioning, it had no significant effect on the proceedings.²¹ Therefore, Jenkins is not entitled to relief on this basis.

¹⁴ *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

¹⁵ MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

¹⁶ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

¹⁷ See *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

¹⁸ MCL 750.520j.

¹⁹ *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

²⁰ See *Carines*, *supra*.

²¹ See *id.* at 763 (discussing prejudice).

V. Sufficiency Of The Evidence

A. Standard Of Review

Jenkins asserts that there was insufficient evidence to support his CSC III conviction. Specifically, he challenges the evidence of force and coercion necessary to convict him under MCL 750.520d. Case law does not specifically define a standard of review for a challenge to the sufficiency of the evidence. Instead, we take our cue on this point from the legal test we apply. To determine whether the evidence of this element of the crime was sufficient to convict Jenkins, we must review the evidence in the light most favorable to the prosecution to resolve whether a reasonable juror would conclude that he was guilty beyond a reasonable doubt.²² Despite this preferential perspective on the inferences that can be drawn from the evidence, we conclude that this review is de novo because it entails examining the evidence on the record without according any deference to the jury, which positively concluded that the evidence was sufficient when convicting Jenkins.

B. Aggravating Circumstance

MCL 750.520d(1) makes sexual penetration illegal when at least one of three separate aggravating factors exists. The second of these three aggravating factors exists when “[f]orce or coercion is used to accomplish the sexual penetration.”²³ The CSC III statute²⁴ specifically refers to MCL 750.520b(1)(f) to define the five circumstances that demonstrate force and coercion:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

²² *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

²³ MCL 750.520d(1)(b).

²⁴ *Id.*

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.^[25]

The complainant's testimony in this case clearly fits the definition of force or coercion under MCL 750.520b(1)(f)(i). She testified that she tried to get up to leave several times, but that Jenkins, who was bigger than she was, pushed her back, evidently pinning her onto the couch. A reasonable juror could conclude from these circumstances that Jenkins used physical force to accomplish the penetration. Though Jenkins claims that the complainant's testimony was incredible because of inconsistencies in the way she reported, denied, and then again reported the crime, the jury, not this Court, was in the best place to determine whether she gave credible testimony.²⁶ Further, the complainant gave uncontested testimony that she was fourteen at the time of the crime, which was sufficient evidence to find that the aggravating factor in MCL 750.520d(1)(a)²⁷ existed in this case, also supporting the CSC III conviction.

VI. Sentencing

In his statement of the questions presented, Jenkins contends that the trial court abused its discretion in imposing a disproportionate sentence. However, he has failed to make any argument or cite any authority whatsoever regarding this issue. Thus, we conclude that he has abandoned this issue.²⁸

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Patrick M. Meter

²⁵ MCL 750.520b(1)(f)(i) - (v).

²⁶ See *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000).

²⁷ MCL 750.520d(1)(a) makes illegal sexual penetration of a person "at least 13 years of age and under 16 years of age."

²⁸ See *People v Bean*, 457 Mich 677, 685, n 13; 580 NW2d 390 (1998); *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).