

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEWIS OTTO MCPHERSON,

Defendant-Appellant.

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UNPUBLISHED

August 21, 2001

No. 218725

Charlevoix Circuit Court

LC No. 98-036209-FH

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree criminal sexual conduct, MCL 750.520c(1)(a) [sexual contact with a person under the age of thirteen]. Defendant was sentenced as a second habitual offender, MCL 769.10, to fifteen to twenty-two and one-half years' imprisonment. We affirm.

Defendant first argues that the evidence was insufficient to sustain his conviction. In particular, defendant claims that the prosecution failed to establish that he had a sexual purpose when he intentionally touched the victim's intimate parts. See MCL 750.520a(k); MCL 750.520c(1)(a); *People v Piper*, 223 Mich App 642, 645, 646-647; 567 NW2d 483 (1997). We disagree. In a sufficiency claim, this Court considers the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

The evidence established that: (1) defendant touched the victim between her legs and on her breasts by putting his hand down her pants and under her clothing; (2) defendant employed threats to silence the nine-year-old victim and other child witnesses; (3) incidents of touching occurred when defendant was in a position of authority over the victim, as well as the other child witnesses; (4) the victim's ten-year-old brother, who witnessed incidents of defendant touching the victim, described the touching as sexual in nature; (5) defendant did not inappropriately touch the victim's brother; (6) defendant attempted to bribe the victim to allow him to touch her intimate parts; and (7) in one instance, defendant forced the victim into his camper and onto his bed and improperly touched her. Considering the evidence in a light most favorable to the prosecutor, a rational trier of fact could reasonably construe defendant's contacts with the

victim's intimate parts as being for the purpose of sexual arousal or gratification and, thus, was sufficient to sustain the conviction. *Nowack, supra*; *Piper, supra* at 647.

Next, defendant raises several claims of ineffective assistance of counsel. Because defendant did not move for a *Ginther*<sup>1</sup> hearing, this Court's review is limited to errors apparent on the record. *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must affirmatively show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). The defendant has to overcome the presumption that the challenged actions might be considered sound trial strategy. *People v Charles Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

First, defendant argues that his counsel's trial strategy of establishing an alibi for one specific incident was completely useless. Defendant's argument is without merit. The evidence established that defendant improperly touched the victim over a period of months; however, only one incident was specified by a particular date. Consequently, it appears that the trial strategy was to establish an alibi for that date and, thus, discredit the other general, nonspecific testimony. Further, in support of that theory, defense counsel attempted to establish that the victim's brother's testimony was a product of his animosity toward defendant, and that the victim's testimony was incredible because she was allegedly known to tell untruths. We will not second-guess the trial strategy merely because it backfired. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Second, defendant argues that his counsel failed to appropriately cross-examine witnesses. Defendant primarily argues that his counsel did not aggressively cross-examine the child witnesses. However, a review of the record reveals that defense counsel elicited sufficient information to illustrate inconsistencies and lack of specificity in their testimony. Trial strategy considerations, including antagonizing the jury and limiting additional damaging testimony, were reasonable concerns potentially mitigated by defense counsel's tactical decisions. Further, how to cross-examine witnesses is a matter of trial strategy that we will not second-guess. See *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999).

Third, defendant complains that his counsel was ineffective for failing to file a motion in limine "or request a hearing" regarding alleged MRE 404(b) evidence. However, defendant has not properly presented this issue for appellate review but has merely announced his position, leaving it to this Court to discover and rationalize the basis for his claims. Consequently, we decline to address this issue. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Fourth, defendant claims that the brevity of his counsel's opening and closing arguments demonstrate a lack of interest in the case. However, opening and closing arguments are a matter of trial strategy. See *In re Ayers, supra*; *People v Harlan*, 129 Mich App 769, 779; 344 NW2d 300 (1983). Further, the entire trial was brief and the record demonstrates that defense counsel's closing argument focused on the inconsistencies and lack of specificity in the trial testimony. In sum, defendant has failed to demonstrate that his counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial.

Next, defendant claims instructional errors warrant reversal. Defendant argues that the trial court failed to provide proper and adequate instruction regarding prior inconsistent statements, other uncharged sex acts, and the prosecutor's burden to prove the time frame and venue as charged in the information. However, defendant failed to object to the instructions given; therefore, this issue is forfeited unless defendant demonstrates plain error that was outcome determinative. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

First, defendant argues that the trial court should have read standard jury instruction, CJI2d 4.5, regarding "impeachment by prior inconsistent statements." However, defendant fails to specify instances of impeachment through the use of any prior inconsistent statements that justify such instruction. Our review of the record reveals that the trial court's failure to instruct the jury using CJI2d 4.5 was not plain error that was outcome determinative.

Second, defendant argues that the trial court failed to instruct the jury regarding other, uncharged sex acts that were testified about by the victim and her brother. Again, defendant fails to cite any specific reference in the record to support his claim that there was testimony regarding uncharged, sexual touchings for which no cautionary instruction was given. The instructions that were given accurately informed the jury about how to view and consider the trial testimony; therefore, reversal is not warranted. See *Lee, supra*.

Third, defendant argues that the trial court erred in failing to instruct the jury on venue and the relevant time frame of defendant's alleged conduct. However, the testimony relevant to these issues was not in dispute. Defendant's theory of defense was that the assaults did not occur, at any place or any time. Further, defendant failed to request such instruction. Under these circumstances, this issue is forfeited. See *People v Belanger*, 120 Mich App 752, 758; 327 NW2d 554 (1982). Therefore, defendant's claim that his trial counsel was ineffective for failing to seek the jury instructions discussed above fails. See *People v Cooper*, 236 Mich App 643, 659; 601 NW2d 409 (1999).

Finally, defendant argues that resentencing is required because the trial court failed to consider all of the proper goals of sentencing, sentenced him vindictively, and imposed a disproportionate sentence. We disagree. We review sentencing decisions for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997).

First, defendant argues that the trial court failed to articulate its consideration of defendant's potential for reformation or rehabilitation when he was sentenced. Although a sentencing court must articulate on the record the criteria considered and reasons supporting its

sentencing decision, it need not expressly mention each goal of sentencing when imposing sentence. *People v Rice (On Remand)*, 235 Mich App 429, 445-446; 597 NW2d 843 (1999). However, contrary to defendant's argument, in this case the sentencing court specifically noted: (1) defendant's prior conviction for attempted second-degree criminal sexual conduct; (2) defendant's failure to participate in the sex offender therapy program during that previous five year incarceration; (3) that these allegations arose shortly after his release from prison, and (4) defendant's denial of wrongdoing in this case. Consequently, it is apparent from the record that the trial court considered defendant's potential for reformation or rehabilitation, as well as the other goals of sentencing, in imposing sentence; therefore, defendant's argument is without merit.

Second, defendant argues that the sentence was vindictive because defendant previously received a lesser sentence in a related case than the sentence that was imposed in this case. However, defendant's argument that the greater sentence is presumed to be vindictive is misguided. This is not a case where defendant was resentenced for the same crime and the second sentence was greater, which would invoke a presumption of vindictiveness. See *People v Mazzie*, 429 Mich 29, 35; 413 NW2d 1 (1987); *People v Lyons (After Remand)*, 222 Mich App 319, 323-324; 564 NW2d 114 (1997). Defendant was sentenced once for his crime against the victim in this case. Comparing the sentence imposed in this case with the sentence imposed in a different case is an inappropriate comparison and does not give rise to a presumption of vindictiveness.

Finally, defendant argues that his sentence was disproportionate. We disagree. We review the proportionality of a defendant's sentence for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001). An abuse of discretion occurs if the sentence is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Crawford*, 232 Mich App 608, 621; 591 NW2d 669 (1998).

In this case, defendant lived on the property where the victim lived, baby-sat for the nine-year-old victim, sexually assaulted her over a period of more than a year, required the victim's brother and others to watch the assaults, employed threats to silence the victim and other child witnesses, attempted to bribe the victim to persuade her to allow him to touch her intimate parts, and applied force, on at least one occasion, to accomplish his criminal purpose. Defendant had recently been released from prison following a conviction for attempted second-degree criminal sexual conduct involving a seven-year-old child when he began sexually assaulting the victim, as well as two other children. Considering defendant's history and the circumstances of this offense, defendant's sentence of fifteen to twenty-two and one-half years was proportionate and did not constitute an abuse of discretion.

Affirmed.

/s/ Donald E. Holbrook, Jr.  
/s/ Mark J. Cavanagh  
/s/ Patrick M. Meter