

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JOSEPH COOK,

Defendant-Appellant.

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UNPUBLISHED

December 28, 2001

No. 226731

Oakland Circuit Court

LC No. 99-169250-FH

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(b). Defendant was sentenced to two to fifteen years in prison. We affirm.

Defendant's first issue on appeal is that he was denied a fair and impartial trial due to the improper actions of the prosecution when, during cross-examination, it asked defendant whether the prosecution's witnesses were being untruthful. We disagree.

Defendant did not object to the questions asked by the prosecution during trial. In *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), this Court held that appellate review of allegedly improper conduct by the prosecution is precluded where the defendant fails to timely and specifically object. *Id.* Therefore, under the rule adopted in *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999), this Court will only review the defendant's claim for plain error that affected defendant's substantial rights.

MCR 2.613(A) provides:

(A) An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

Similarly, MCL 769.26 provides:

No judgment or verdict shall be set aside or reversed or a new trial be

granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

This statute is consistent with the Supreme Court's authority to regulate practice and procedure, and merely means that appellate courts should not reverse a conviction unless there is a plain error affecting the defendant's substantial rights. *Carines, supra*, 460 Mich 761-762. Defendant bears the burden of showing prejudice, i.e., that the error affected the outcome of the proceedings. *Id.*

Defendant asserts that the prosecution improperly elicited testimony during its cross-examination of defendant explicitly indicating that the prosecution's witnesses were untruthful. Indeed, it is "not proper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses since a defendant's opinion on such a matter is not probative, and credibility determinations are to be made by the trier of fact." *People v Loyer*, 169 Mich App 105, 117; 425 NW2d 714 (1988), citing *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Defendant's opportunity for a fair trial may have been jeopardized when the prosecution interjected improper questions, such as asking defendant about the propensity of the prosecution's witnesses for a lack of truthfulness when extrapolated from defendant. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Consequently, this Court must turn to the question of the harmlessness of the error in its analysis of this issue utilizing the "plain error" test of *Carines, supra*, 460 Mich 761-762. As the record reflects, the prosecution's questions required defendant to testify that the witnesses were lying:

*Q.* And so again, to use [defense counsel's] words, therefore, [the victim] is being untruthful?

*A.* Yes, sir.

*Q.* And this was a consensual act between you two?

*A.* Yes, sir.

*Q.* So again, [the victim] is therefore being untruthful?

*A.* Yes, sir. . . .

However, the trial court specifically instructed the jurors that it was their duty to determine the credibility of witnesses and that "the lawyers' questions to the witnesses are not evidence." Thus, we find that there was no prejudice to defendant, and his substantial rights were not affected as the trial court made it clear that the jury was to determine the witnesses' credibility.

Defendant also argues that he was denied the effective assistance of counsel due to defense counsel's failure to object to the prosecution's improper questioning of defendant, and that defense counsel's failure to object was not sound trial strategy. We disagree.

To establish a denial of effective assistance of counsel, a defendant must demonstrate 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 Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Furthermore, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Id.*

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to "effective" assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), on remand 839 F2d 1401 (CA 10, 1988), after remand 900 F2d 1511 (CA 10, 1990); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *Id.* at 596.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway, supra*, 446 Mich 687; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that, but for counsel's error, the result of the proceeding would have been different, *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994), or "by showing a failure to meet a minimum level of competence," *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Also, the defendant's evaluation of counsel's performance is irrelevant. *People v Mitchell*, 454 Mich 145, 151 n 6, 167; 560 NW2d 600 (1997), habeas corpus gtd sub nom *Mitchell v Mason*, 60 F Supp 2d 655 (ED Mich, 1999).

Defendant maintains that the effect of the alleged errors by counsel was prejudicial to his case, thereby denying defendant a fair trial. However, defendant fails to demonstrate that counsel's performance was objectively unreasonable so as to deprive him of a fair trial, as the challenged action by counsel may very well have been part of a sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

The evidence presented by the prosecution was substantial, and the victim's testimony was unequivocal as to the nonconsensual nature of the incident. Due to the strong evidence of defendant's guilt, and because the claimed errors did not compromise defendant's theory of the case, we conclude that no reasonable trier of fact could have found for acquittal if these alleged errors did not occur.

Furthermore, the questions presented by the prosecution during cross-examination did not rise to the level where defendant was prejudiced by the improper bolstering of the credibility of prosecution witnesses, or by allowing an opinion on defendant's guilt to be expressed. Admittedly, the prosecution's strategy was to discredit defendant by inviting him to label the prosecution witnesses liars. However, the substance of the exchange indicates that defendant dealt rather well with the questions, and defendant's counsel's failure to object did not affect the outcome of the proceedings, and, indeed, may have been sound trial strategy.

Defendant has failed to affirmatively demonstrate that counsel's performance was objectively unreasonable. *Pickens, supra*, 446 Mich 303. Defendant has also failed to overcome the presumption that the challenged action might be considered sound trial strategy. Consequently, defendant has failed to overcome the presumption that he received effective assistance of counsel at trial. We fail to discern how defendant was harmed by the prosecution's queries or defense counsel's failure to object to the prosecution's line of questioning.

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Peter D. O'Connell