

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH O. LOGAN, JR.,

Defendant-Appellant.

UNPUBLISHED

May 3, 2002

No. 230163

Wayne Circuit Court

LC No. 00-005408

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(b) (sexual contact through force or coercion), after he slapped his co-worker's buttock and grabbed her breast. He was sentenced to six months' incarceration and appeals as of right. We affirm.

I. Basic Facts and Procedural History

The complainant and defendant were both managers at a McDonald's restaurant. On March 21, 2000 the complainant and defendant were working together. According to testimony adduced at trial, defendant and another employee, Deverell Morgan, were standing in the grill area. When the complainant walked through this area, defendant allegedly "smacked" her on the buttock. Later that same evening, defendant once again touched the complainant's buttock as he passed by her advising, "have a good day." At this time, the complainant did not report these incidents to her immediate supervisor.

On April 4, 2000, the complainant and defendant once again worked the same shift. According to the complainant, this time defendant summoned her to the front counter whereupon he used distasteful terms to describe her breasts, placed his right arm over her shoulders and proceeded to "grab" her left breast. After this incident, the complainant advised the store manager of defendant's conduct. According to plaintiff, she filed a police report the following day. As a result of this incident, defendant was charged with two counts of criminal sexual conduct, fourth-degree. Following a bench trial, defendant was found guilty on both counts. Defendant appeals as of right. We affirm.

II. Sufficiency of Factual Findings

First, defendant argues that the trial court erred because it did not sufficiently articulate its factual findings and conclusions of law supporting defendant's conviction as required by MCR 2.517(A)(1). We do not agree.

MCR 2.517(A)(1) requires a trial court sitting without a jury to make separate findings of fact and conclusions of law before directing entry of the appropriate judgment. MCR 6.403; *People v Johnson (On Rehearing)*, 208 Mich App 137, 141; 526 NW2d 617 (1994). A trial court need not make specific findings as regards each element of the crime to comply with the dictates of MCR 2.517(A)(1). *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992). The purpose underlying this articulation rule is to facilitate appellate review. *Johnson, supra* at 141. Consequently, remand for articulation is not necessary "where it is manifest that the court was aware of the factual issues and resolved them and it would not facilitate appellate review to require further explication of the path the court followed in reaching the result." *Id.* at 141-142; *Legg, supra*.

We review the trial court's findings de novo to the extent necessary to discern whether the trial court was aware of the factual issues and correctly applied the law. *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1991). Our review of the record reveals that the trial court fully complied with the applicable standard.

The instant case presents a classic example of a credibility contest between testifying witnesses which the trial court, as the finder of fact, resolved in the complainant's favor. The complainant testified that defendant slapped her buttock and grabbed her breast resulting in "sexual contact" as required by the governing statute. Furthermore, slapping and grabbing constitute sufficient "force" for purposes of fourth-degree criminal sexual conduct because slapping and grabbing both require an individual to exert strength or power upon the person of another. See *People v Premo*, 213 Mich App 406, 409; 540 NW2d 715 (1995) (wherein the court discussed the definition of the term "force" to conclude that the act of pinching is an act of physical force for purposes of forth-degree criminal sexual conduct.)

The testimony adduced at trial adequately established that defendant engaged in sexual contact with the complainant by the imposition of force or coercion as required to find defendant guilty of criminal sexual conduct in the fourth-degree. On the record here before us, it is clear that the trial court was aware of the factual issues and correctly applied the law; further explication "of the path the court followed in reaching the result" would not facilitate this Court's review. *Johnson, supra* at 141-142; see also *Legg, supra* at 134-135; *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990). In light of the limited evidence and simple legal and factual issues raised by the parties, we find that the trial court's factual findings and conclusions of law meet the requirements of MCR 2.517 (A)(1) and MCR 6.403.

III. Ineffective Assistance of Counsel

Next, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to articulate a defense theory, waived both opening and closing arguments and failed to thoroughly and vigorously cross-examine the complainant. Pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), claims for ineffective assistance of counsel should be raised by a motion for a new trial or evidentiary hearing. Since defendant did not procure a ruling by the trial court on this issue, defendant's claim for the ineffective assistance of counsel is forfeited save for a review of the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To set forth a viable claim for the ineffective assistance of counsel, defendant must establish deficient performance by counsel and a reasonable probability that but for that deficiency, the result would have been different. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) citing *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996); *Snider, supra*, at 423-424.

A review of the record does not support defendant's position. The trial was very short and essentially a question of the complainant's credibility. The trial court was clearly aware of the issues. A party's theory of the case necessarily derives from the specific evidence that trial counsel decides to produce along with certain witnesses trial counsel decides to present. These are matters of and concerning trial strategy. See *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will decline to substitute its judgment for that of counsel on matters pertaining to trial strategy and with the benefit of hindsight, will similarly decline to assess trial counsel's competence. *Rockey, supra* at 76-77.

Defendant also cites trial counsel's waiver of opening and closing argument as an additional basis supporting his claim for the ineffective assistance of counsel. Again, we disagree. The central issue at trial revolved around the complainant's credibility. We find no support in the record that the outcome of the trial would have been different had trial counsel delivered an opening and a closing argument to the court. Moreover, the prosecutor waived argument as well. We find that defense counsel's decision to forego opening and closing argument was a matter of sound trial strategy which we decline to review or otherwise disturb.

Finally, defendant argues that defense counsel failed to vigorously and thoroughly cross-examine the complainant regarding allegedly inconsistent statements made by the complainant and contained in an investigator's report compiled in response to the incident. We do not agree. A review of the record does not reveal that defense counsel failed to adequately cross-examine the complainant. Moreover, the investigator's report to which defendant refers is not part of the record and the alleged "error" in failing to refer to the report is not apparent on the face of the existing record. Consequently, this alleged error is beyond the scope of this Court's review.

Accordingly, we find that defendant failed to overcome the presumption of effective assistance of counsel and further establish that but for these alleged errors, the outcome of the trial would have been different. *People v Sabin (On Second Remand)*, 242 Mich App 656, 559; 620 NW2d 19 (2000); *Rockey, supra* at 76.

Affirmed.

/s/ Jessica R. Cooper

/s/ Harold Hood

/s/ Kirsten Frank Kelly