STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN LEE BIXLER,

Defendant-Appellant.

UNPUBLISHED
September 13, 2002

No. 230535
Macomb Circuit Court
LC No. 00-001285-FC

Before: Meter, P.J., and Saad and R. B. Burns*, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e), and one count of armed robbery, MCL 750.529. The trial court sentenced him as a third habitual offender, MCL 769.11, to four concurrent terms of 300 to 500 months' imprisonment. We affirm.

This case arises from the rape and robbery of a woman in Warren in February 2000. At trial, Andrew Percha, a public safety officer for the city of Center Line, testified that around 3:45 a.m. on February 13, 2000, he saw the complainant, CG, taking off her coat, crying, and walking toward a gas station at the corner of Ten Mile Road and Van Dyke Road. Percha testified that he approached her and that she told him she had been raped.

John Hycki, a paramedic called to the gas station, testified that upon his arrival, he saw CG crying, pulling her hair, kneeling down on the floor, and screaming "don't touch me" and "he hurt me." Hycki testified that CG told him that "her friend or boyfriend had raped her." Marlene Niedermeier, a police officer called to the gas station, similarly testified that upon her arrival, she saw CG curled into a ball and sobbing.

Gail Lippert, a nurse, testified that she works with sexual assault victims. Lippert saw CG on the morning of the incident. She described CG as being "very quiet" and "curled up in a fetal position" when she arrived at the hospital for treatment. Lippert testified that CG was missing a sock when she was brought in but that her other clothing was in good condition, without rips. Lippert testified that CG did not have any bruising or marks on her head but did have "a small red area on her neck."

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

CG testified as follows: She had approximately five glasses of beer on the evening of February 12, 2000. She met defendant for the first time that night at a bar called the Memphis Lounge, he spoke to her about the fact that his wife had left him, and CG danced with him for "a couple of steps." She began walking home from the bar around 2:00 a.m., but defendant stopped her and told her he had a gun in his coat. Defendant punched her in her chest and ordered her into his car, and she saw the gun. Defendant drove her to the Warren Woods Apartments, handcuffed her left hand to the car, and forced her to take off her clothes. He penetrated her vagina with his mouth, penis, and finger. He then undid the handcuff, drove to the Frazho Trailer Park, beat her head against the window, ordered her to strip, raped her again, and demanded that she give him one of her socks. He also demanded that she give him the money in her wallet. He then began driving the car, and CG jumped out of the car at a red light, noted three of the numbers on his license plate, and ran into a gas station.

On cross-examination, CG stated that after her initial few dance steps with defendant, she danced with him again but quit when he began feeling her breasts and her buttocks. Defense counsel pointed out some inconsistencies in CG's testimony as compared to her statements to police regarding the details of her actions that night.

Jeffrey Pierog, a detective with the Warren Police Department, was qualified as an expert "in the area of investigating sexual assault cases." Pierog testified that it was "very common" for a rape victim to give inconsistent statements regarding the rape because of the trauma involved. Pierog testified that CG's demeanor during the hours after the incident was consistent with her having been raped. He indicated that CG's description of her assailant matched a mug shot he had on file of defendant. He also indicated that "without hesitation" CG chose defendant as her assailant from a photographic lineup. Pierog further testified that a semen sample was obtained from CG's vagina and anus and that the sample matched defendant's DNA. According to the lab, the odds of the semen belonging to another were "one in 28.4 trillion."

Pierog testified that he spoke with defendant on the telephone around March 20, 2000, and that defendant stated during the conversation that he had not been in the Memphis Lounge for two years. After defendant's arrest, Pierog interviewed him in person.[1] Pierog testified that defendant did not mention in this interview that he had consensual sex with CG.

On cross-examination, Pierog testified that CG smelled of intoxicants on the morning of the incident. He also testified that on February 21, 2000, CG picked a man other than defendant as her assailant from a group of mug shot photographs. He also admitted that CG wrongly explained the location of some items in the Memphis Lounge when asked about them.

Brendan Brosnan, a Warren police officer, testified that he arrested defendant on March 29, 2000. Defendant had been a passenger in a 1985 Dodge Diplomat at the time of his arrest. Robert Schaffner, another Warren police officer, testified that he searched defendant's van after his arrest and found no weapon or handcuffs, but he noted that defendant could have easily disposed of these items.

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[1] The transcript of this interview has not been provided to this Court for review.

Paul Westrick, another Warren police officer, testified that he searched the Dodge Diplomat for evidence because CG had alleged that the rape took place in that vehicle. Westrick found a pay stub with defendant's name on it in the glove box of the vehicle. He also found an "auto application" with defendant's name on it.

Martin Kroll, another police officer, testified that he found no useable fingerprints on CG's wallet or the contents of her purse, and Michelle Sellars testified that she saw defendant in the Memphis Lounge in November 1999, thus contradicting defendant's earlier statement to Pierog.

Defendant called two witnesses: Bonnie Jean Sellers and Detective Pierog. Bonnie Jean Sellers testified that she was bartending at the Memphis Lounge on the evening in question. She testified that defendant came to the bar two to three times a week from April until December of 1999 and that she also saw defendant at the bar during the early morning hours of February 13, 2000. Sellars testified that on that date, she saw defendant and CG dance together once and that "[h]e was putting his hands all over her and she got irritated with him and left the dance floor." Sellars testified that she was outside with defendant and CG after the bar closed and that she did not see defendant punch CG's chest or point a gun at her. She testified that CG and defendant walked toward a parked blue car and entered it. She offered her personal opinion that CG did not enter the car willingly.

Pierog testified that on the morning of the incident, Nurse Lippert had told him that the red mark on CG's neck appeared to have a scab. He also testified that CG told him in an interview that she continued to dance with defendant even though he was touching her private places. He also stated that in her interview, CG told him that defendant held a gun to her head in the parking lot of the bar.

Defense counsel, with a stipulation from the prosecutor, read into the record a report from Officer Niedermeier. In the report, Niedermeier wrote that CG told her in an interview on the morning of the incident that she was approached by a dark blue Plymouth and that the white male driver of this car exited the vehicle, approached her, put a gun to her head, and forced her into the car.

At the close of testimony, the prosecutor requested that the trial court instruct the jury that it could not consider a consent defense because no evidence of consent had been admitted at trial. The trial court granted the prosecutor's request and told the jury that "[c]onsent is an affirmative defense to [a] sexual assault charge. In this case no evidence of consent has been presented by the defense. Therefore, you are not permitted to consider a consent defense." The jurors subsequently convicted defendant of three counts of first-degree criminal sexual conduct and one count of armed robbery.

Defendant appealed his convictions to this court and sought a remand for an evidentiary hearing on the issue of ineffective assistance of counsel, asserting that two witnesses – Joseph Rastall and Peter Frontera – should have been called at trial to support a consent defense. This Court granted the remand.

At the evidentiary hearing, defendant's trial attorney, Richard Glanda, acknowledged reading Rastall's statement before trial. In this statement, Rastall stated that when he was in the

Memphis Lounge during the early morning hours of February 13, 2000, he saw CG and defendant standing close to one another and heard defendant say, "Come on hon; let's go home now." Rastall further stated that after the bar closed, he saw CG standing outside next to defendant with "their arms intertwined, as if he was holding her."

Glanda admitted that he told the jury in his opening statement that defendant's theory of the case was consent and that Rastall had potentially favorable testimony with regard to this theory. He further admitted that Rastall was available to testify at the time of trial. He stated that he decided to not call Rastall because the content of Rastall's statement – that defendant had his arms intertwined with CG's – lent support to the prosecutor's assertion that CG had been forced into defendant's car. He further stated that his memory of the situation was not good but that "I must have spoke [sic] with him or seen him, as you mentioned, he was here [in the courtroom], and he indicated to me that he wouldn't have helped my client." He explained that he must have spoken with Rastall after his opening statement because otherwise he would not have mentioned Rastall during the statement.

With regard to Frontera, Glanda testified that he heard the name "Pete" mentioned during trial and thus asked CG during cross-examination whether "Pete" was present at the time she left the Memphis Lounge on the morning in question. Glanda denied knowing of Pete's existence before trial because Pete was not listed on the prosecutor's witness list. He admitted that he did not go to the Memphis Lounge before trial to find potential witnesses and that he did not ask for a continuance to try to locate "Pete." Glanda noted that the Warren police had gone through extensive efforts to locate witnesses from the Memphis Lounge; he testified that he did not believe any additional searching for witnesses was needed. He also testified that defendant did not bring Frontera to his attention before or during trial.

Sara Cavanaugh, a paralegal with the State Appellate Defender Office, testified that after the trial, she contacted the Memphis Lounge to attempt to locate someone named "Pete." Cavanaugh testified that she was able to track down Frontera and obtain a statement from him.

Frontera testified that he was working as a bouncer at the Memphis Lounge on the date in question. He stated that after the bar closed, he saw CG walk out with a man and then walk over to a car that had "pulled in." He stated that CG went back to the first man and told him she was going to leave with the second man in the car. Frontera stated that CG got into the car and it departed. Frontera testified that he saw no one hit CG or point a gun at her. He further stated that he would have been available to testify at trial if he had been contacted to do so. He stated that defendant did not look familiar to him. Frontera admitted that CG and her ex-husband did not care for one another, and he implied that he (Frontera) was friendly with the ex-husband.

Glanda testified that before trial, defendant expressed his desire that the defense theory be that the sex was consensual. Glanda stated that defendant changed his mind frequently about whether to testify and that at the time of opening statements, defendant had not definitively decided whether to testify. However, Glanda also testified that based on his conversations with defendant before trial, he assumed that defendant would indeed testify about the allegedly consensual nature of the sex.

At trial, in the jury's absence, Glanda had stated as follows after the prosecutor rested his case:

> . . . I discussed with my client his right to testify, the pros and cons of testifying. If he chose not to testify, his silence could not be used against him. In the normal case, I would leave it up to him. However, in this case being that the defense asserted is consent, at least that's been argued by myself, it appears to me at least that it's necessary for my client to take the stand more or less as [an] affirmative defense, at least put forward in evidence a factual question as to whether it was consent. I explained to [defendant] that . . . it appears to me that if in this case he chose not to testify, that the consent jury instructions may very well not be given or could not be given since there's been nothing put forth[,] no evidence except my statements, which of course are not evidence as to that issue. And I explained this to him, and it's his desire that he wishes not to testify.

The trial court declined to grant relief at the end of the evidentiary hearing, stating that Glanda did nothing wrong with respect to Frontera because nobody had brought Frontera's existence or information to Glanda's attention before trial. The trial court further concluded that no error requiring a new trial occurred with respect to Rastall because Rastall's testimony would not have been particularly helpful. The trial court also noted that Glanda had determined that "more harm than good would be accomplished by [Rastall's] testimony."

On appeal, defendant alleges that Glanda rendered ineffective assistance of counsel in several respects. To establish ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient under an objective standard of reasonableness and that the deficiency likely affected the outcome of the case. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). An attorney is presumed to provide effective assistance; therefore, a defendant bears a heavy burden of proving otherwise. See *Stanaway, supra* at 687. A defendant must overcome the presumption that the challenged action or omission by counsel could conceivably be considered sound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). This Court will not second-guess counsel's trial tactics. *Id.* at 386 n 7.

Defendant contends that Glanda should have objected to a certain part of Pierog's testimony[2] because it amounted to improper vouching of the complainant's testimony. Specifically, defendant takes issue with Pierog's statement that CG's actions were "consistent with somebody being sexually assaulted." While it is true that a line of cases cited by defendant disapproves of this sort of testimony, see, e.g., *People v Peterson*, 450 Mich 349, 376-377; 537 NW2d 857, amended 450 Mich 1212 (1995), these cases cited by defendant refer to *child* victims of sexual abuse. Moreover, even assuming, arguendo, that these cases apply to the instant situation and that Pierog's testimony was erroneous, we discern no basis for reversal. Indeed, we conclude that in light of the additional evidence introduced at trial, the challenged statement by Pierog did not likely affect the outcome of the case or result in a miscarriage of justice. See *Peterson, supra* at 377-378 (admission of "sexual abuse syndrome" evidence subject to harmless-error review). Indeed, Pierog even admitted that he did not "know for sure" whether a

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[2] Defendant also mentions Nurse Lippert's testimony in the body of his argument but does not explicitly argue that Glanda should have objected to her testimony. At any rate, we have reviewed Lippert's testimony and find nothing objectionable in it.

sexual assault against CG had occurred. Defendant has not established a basis for relief under the standards governing ineffective assistance of counsel claims. See *Snider, supra* at 423-424.

Next, defendant contends that Glanda rendered ineffective assistance by failing to object to Pierog's testimony that he obtained defendant's picture for the photographic lineup from a mug shot he found in the police computer system. Defendant correctly notes that a prosecutor may not indiscriminately introduce prior bad acts of a defendant. See MRE 404(b)(1). However, this Court has held that a brief reference to a mug shot photograph being using in a photographic lineup does not constitute error requiring reversal. *People v Drew*, 83 Mich App 57, 61; 268 NW2d 284 (1978). Moreover, in light of the additional evidence introduced at trial, we conclude that the brief reference to a mug shot, with no indication regarding the circumstances under which the mug shot was taken, did not likely affect the outcome of the case. Thus, defendant failed to establish ineffective assistance of counsel with respect to this issue. *Snider, supra* at 423-424.

Defendant next argues that Glanda's failure to call Frontera and Rastall amounted to ineffective assistance of counsel. We disagree. With regard to Rastall, the trial court, which was in a better position than this Court to assess the credibility of the testimony at the evidentiary hearing, concluded that Glanda had determined that "more harm than good would be accomplished by [Rastall's] testimony." Accordingly, defendant has simply not overcome the presumption that Glanda's failure to call Rastall, despite mentioning Rastall in his opening statement, constituted sound trial strategy. See *Knapp, supra* at 385-386. More significantly, we conclude that Rastall's proposed testimony as indicated in his statement simply would not have affected the outcome of the case. Indeed, his testimony would have been consistent with the prosecutor's theory that defendant forced CG into his car.

With regard to Frontera, we agree with the trial court that Glanda's failure to locate this additional witness from the Memphis Lounge was not unreasonable under prevailing professional norms, given Glanda's testimony that defendant did not bring Frontera's existence to his attention before trial. Moreover, we conclude that Frontera's testimony would not have likely affected the outcome of the case, especially given that his testimony about the manner in which CG entered a vehicle after the closing of the Memphis Lounge contradicted the testimony of defense witness Bonnie Jean Sellers.

Defendant once again has not sustained his burden of proving ineffective assistance of counsel. *Snider, supra* at 423-424. He argues that if Glanda had called Frontera and Rastall, the trial court would not have been justified in giving the "no evidence of consent" instruction described above. We cannot discern, however, how Frontera's and Rastall's testimony would have affected the trial court's giving of this instruction, because they in no way testified that the sex between defendant and CG was consensual.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Robert B. Burns