

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL STEELE,

Defendant-Appellant.

UNPUBLISHED

October 15, 2002

No. 234049

Wayne Circuit Court

LC No. 00-007540

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction following a bench trial of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b). The trial court sentenced him to two years' probation. We affirm.

At trial, the complainant, SF, testified as follows: On April 4, 2000, she was at her home in Detroit around 7:00 p.m. At that time, defendant, a friend of her husband's, came over to change some fuses for her because her husband was at work and could not do it himself. Defendant asked SF to bring some hand lotion downstairs, where the fuse box was located, because he would need to use it later. SF, who was wearing a snap-up jacket, fastened to her neck, and no bra, complied with this request. After defendant completed his work on the fuse box in the basement, he asked SF to come downstairs with him so that he could show her which fuse he had changed. SF came downstairs, at which point defendant asked her to sit down and asked her where the lotion was located. Defendant then came toward SF, grabbed her wrist, pulled open her jacket, and grabbed her breasts. He stated, "it's no secret what your breasts do to me" and began rubbing his penis through his pants. SF objected to his actions, and defendant apologized but then mentioned her breasts again, stating that he requested the lotion because he wanted to make himself ejaculate on SF's chest. Defendant stated that he had wanted to have sex with SF for two years but had not said anything about it because he was a friend of her husband's. Eventually, defendant left the house, claiming that he could not believe what he had just done.

SF testified that after she reported defendant's actions to the police two days later, defendant called her and threatened her and her children. SF denied flirting with defendant on the day in question.

On cross-examination, SF admitted that her first thought after the assault was that her husband might have set up the encounter with defendant. She also admitted that in her statement to the police, she did not mention that defendant had threatened her and her children over the telephone.

SF's husband, KF, testified that he asked defendant to change a fuse for his wife on the day in question and that he was very angry with defendant after his wife told him what happened. He further testified that a few days after the incident, defendant appeared at his (KF's) place of employment, a car wash, and tried to hit him, after which KF hit defendant with a metal pipe. KF admitted on cross-examination that the police report regarding his confrontation with defendant at the car wash differed from his trial testimony and that he had been "evasive" in his statement to the police regarding the confrontation. KF also testified on cross-examination that he did not argue with his wife over the sexual contact incident; this contradicted SF's earlier testimony.

Detroit Police Sergeant Martin Gaynor testified that he interviewed defendant a few days after the sexual contact incident. Gaynor testified that defendant told him the following: When he arrived at SF's house to change some fuses, SF was wearing "a nursing top with only the top button buttoned" and her breasts were exposed because she wore no bra. While defendant was reaching toward the fuse box in the basement, SF came up behind him so that her breasts were on his back. She then came around to his side, and her breasts were on his arm. He told her that she was going to make him excited because she had "[her] breasts out on me." He told her to "get the lotion" so he could masturbate. She then laughed, went upstairs to answer the telephone, came back downstairs, and said that she did not want to cheat on her husband. Defendant then fixed the fuses and left. He did not touch SF's breasts. He did not tell SF that he wanted to have sex with her, but SF told him that she wanted to have sex with him.

The prosecutor presented no further witnesses, and defense counsel stated, "At this time, having discussed with [defendant] his absolute right to testify in this matter, [defendant] and I have decided that he's going to waive his right to testify, and we're going to rest at this time" The court asked no questions of defendant.

The court then convicted defendant of fourth-degree criminal sexual conduct, finding that he did seize SF's breasts. The court stated, "The question of force I think is patently demonstrated by the opening of the three snaps described by [SF]."

On appeal, defendant contends that his trial attorney rendered ineffective assistance of counsel in several respects. Because defendant did not raise this issue below, our review is limited to mistakes apparent from the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Under the two-pronged test for establishing ineffective assistance of counsel, defendant must show that counsel's performance was deficient according to an objective standard of reasonableness and that the deficiency was so prejudicial that it deprived defendant of a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). On this latter point, defendant must demonstrate a reasonable probability that but for counsel's unprofessional error or errors, the trial outcome would have been different. *Id.* at 302-303. This Court presumes effective assistance of counsel, and a defendant bears a heavy burden to overcome this presumption. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant contends that his attorney erred by failing to obtain the jacket worn by SF on the day in question because “[a]n examination of the jacket was crucial to the issue of whether the alleged groping occurred.” We fail to discern how the introduction of the jacket would have aided defendant’s case. Indeed, SF did not claim at trial or in her statements to police that defendant ripped her jacket during the assault. The jacket closed with snaps, meaning that it easily could have been pulled open without causing any damage. Defendant has failed to demonstrate that counsel’s failure to examine the jacket or to introduce it at trial was unreasonable under prevailing professional norms or that it affected the outcome of the trial. *Toma, supra* at 302-303.

Defendant further contends that defense counsel erred by failing to call defendant to testify at trial. This allegation is patently without merit, because the only record evidence on this issue indicates that defendant himself freely decided to refrain from testifying. Nothing indicates that defense counsel cajoled defendant into making this decision or otherwise violated prevailing professional norms.

Finally, defendant points to his statement at sentencing that he agreed to submit to a polygraph examination when asked to do so by the police. Apparently, the police did not administer the test. Defendant claims on appeal that “[i]f the police were not willing to provide the test, it was incumbent upon trial counsel to secure one.” In light of the existing record, defendant has once again utterly failed to demonstrate that a polygraph examination would likely have affected the outcome of the case, and appellate relief is unwarranted. *Id.*

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter