

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY VENTERS,

Defendant-Appellant.

UNPUBLISHED

November 12, 2002

No. 232890

St. Joseph Circuit Court

LC No. 99-009738-FH

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, on one count of second-degree criminal sexual conduct (CSC 2), MCL 750.520c(1)(a)(sexual contact with a person under the age of thirteen). Defendant was sentenced to a term of nineteen months to fifteen years' imprisonment. We affirm.

I. BASIC FACTS

Defendant was prosecuted for having sexual contact with the twelve-year-old female victim in April of 1999. The victim was the daughter of defendant's girlfriend. At various times and in various locations, defendant and his girlfriend lived together along with the victim and the girlfriend's other two children.¹ This included a time span in 1999 spent in the home of the victim's aunt² and at the Wood Motel. The jury heard testimony from the victim, the victim's mother (defendant's girlfriend), the victim's aunt, and defendant.

The victim testified that she lived with her siblings, her mother, and defendant at her aunt's house for several months in 1999. She asserted that there were four separate incidents in which defendant acted inappropriately. The first incident, which formed the basis of the CSC 2 charge and conviction, occurred at the aunt's house while the victim was sitting on a loveseat and playing with dolls with a young relative. The victim claimed that defendant came up behind her and with one hand grabbed her breast. Not until she told defendant to stop three or four

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

¹ These were not defendant's children, and defendant testified that he has no children of his own.

² This was the sister of the victim's mother.

times and threatened to call police did defendant remove his hand. The victim testified that she did not know the whereabouts of her mother and her aunt at the time of the assault. She stated that the assault took place after she returned home from a birthday party at another relative's house. The victim indicated that she told her aunt, on the day of the incident, that something bad happened. She told her mother that defendant was doing stuff he should not be doing, and she told her grandmother that bad stuff was happening. However, the victim could not recall when she spoke to her mother and grandmother, and she could not recall the date of the assault.

The second incident occurred at the aunt's house while the victim was sitting on a couch watching television. Defendant approached her and requested that she perform fellatio on him. The victim refused and defendant left. She could not identify the date on which this incident occurred.

The third incident also occurred at the aunt's house while the victim was sitting on the porch speaking on a cordless phone. Defendant asked her if she remembered him touching her breast and requesting fellatio and whether it made her feel good. The victim responded that she remembered the incidents but told defendant that it did not make her feel good. Defendant then left and went into the house. The victim did not know the whereabouts of her mother or her aunt at the time of defendant's comments. On cross-examination, the victim could not recall the time frame between the third incident and the prior two incidents.

The fourth incident³ occurred at the Wood Motel while the victim was sitting on a bed watching television. According to the victim, defendant, who was standing, leaned over and kissed her on the cheek, which made her very uncomfortable. The victim did not tell anyone about the kiss, nor was she sure when it took place.

The victim testified that she told school officials of defendant's inappropriate behavior after officials pressed her about the reasons she was missing so much school. This led to an investigation by the Family Independence Agency (FIA) and the police and eventually led to defendant's arrest. The record indicates that the matter came to the school's attention on May 5, 1999.

On cross-examination, the victim testified that the incident involving defendant grabbing her breast (further referenced as the "assault") did not occur at the time of a birthday party. She further testified that she did not recall testifying at the preliminary examination to the effect that the assault occurred on April 30, 1999, that she did not tell her mother about the assault, that she told her aunt about the assault on April 30, 1999, and that her aunt was at the movies at the time of the assault. The victim did not recall telling FIA personnel that the assault took place on April 30, 1999. The victim then testified that she told her mother and grandmother about the assault before telling school personnel. Regarding the kissing incident at the motel, the victim testified that she did not recall testifying at the preliminary examination that her mother had left the motel

³ We note that it is difficult to decipher from the record the chronological order in which the four incidents unfolded. It is clear that incident three occurred after the first two incidents because of the reference to those prior events. However, it is unclear whether the fourth incident actually followed the first three or preceded them, or if the sexual contact incident occurred before or after defendant requested oral sex.

for donuts and milk, that she, the victim, was wearing a cheerleading shirt, and that the kiss occurred right before Christmas eve.

The victim's mother testified that she, defendant, the victim, and her other children had lived together with her sister for a period of time and had lived together for some time at the Wood Motel. However, she could not recall when they lived in those places, not even the particular years. She did not recall the victim ever saying that anything was going on with defendant. The mother claimed that she first found out about defendant's inappropriate behavior after the school became involved.

The victim's aunt testified that she, her sister, and her sister's children, including the victim, lived in the aunt's home from January to November 1999, and that defendant lived with the group from January to March 1999. The aunt further testified that defendant refused to leave her home after she confronted him about the victim's claims of abuse.

Defendant denied ever grabbing the victim's breast, and he denied ever making any sexually suggestive comment to the victim about performing fellatio. He also denied the incident in which the victim claimed that defendant asked her if she enjoyed being touched on the breast and being asked to perform fellatio. Additionally, defendant denied kissing the victim on the cheek in the Wood Motel.

Defendant did state that on one occasion, at the aunt's house, he approached the victim from the rear and innocently put his arm around her, telling the victim that he loved her. He also acknowledged that he had once innocently kissed the victim on the cheek, and that he had at one time asked the victim whether she masturbated.

Regarding the time frame of events and defendant's living arrangements, defendant testified that in the first couple months of 1999, he lived at the Wood Motel, the Salvation Army shelter, and at another friend's apartment; he claims that he did not reside with his girlfriend or the victim during this period of time. According to defendant, he resided with the victim and his girlfriend at the aunt's house from approximately March through June 1999.

II. ANALYSIS

A. Ineffective Assistance of Counsel

Defendant first argues that trial counsel was ineffective because he failed to adequately impeach the victim with prior inconsistent statements made by the victim to the police and statements made by the victim at the preliminary examination. Defendant also argues that the prosecutor should have revealed these inconsistent statements to the jury. We reject defendant's arguments.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Our review is limited to the record because no *Ginther*⁴ hearing occurred. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant acknowledges that trial counsel did impeach the victim with some of her preliminary examination testimony, but it was insufficient. Specifically, defendant argues that trial counsel should have impeached the victim regarding preliminary examination testimony in which the victim testified, as to the time of the assault, that defendant did not touch her breast very long, that her mother and aunt were at the movies, that she phoned her grandfather right after the assault to find out when they would return from the movies, and that her cousin was outside fighting and the police came over because of the fight.

Defendant argues that trial counsel should also have impeached the victim regarding statements in a police report made by the victim to police on May 5, 1999, in which she stated that defendant grabbed her breasts outside of her aunt’s house while her mother was inside preparing dinner, that she did not tell her mother because she knew what her mother would say, and that defendant requested oral sex at the Wood Motel, not at her aunt’s house.

The prosecutor’s position is that trial counsel declined to excessively impeach the victim as a matter of sound trial strategy. We agree.

We first note that defendant takes portions of the report out of context and that the report, although containing discrepancies in relation to the victim’s trial testimony, is, in our opinion, much more damaging to defendant than the victim’s trial testimony. The discrepancies could reasonably have been explained by the prosecutor to the jury as the result of a scared young child being victimized by defendant. On the second day of trial, on the record and outside the presence of the jury, defense counsel discussed the possibility of calling an FIA worker to the

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

stand to testify about revelations made by the victim that could be deemed inconsistent with the victim's trial testimony. However, counsel declined to do so, with defendant's approval, because the worker's testimony would also have bolstered the victim's testimony in many aspects.

Although trial counsel may have pressed the victim further concerning contradictory preliminary examination testimony, defendant has not overcome the presumption that it was a matter of sound trial strategy not to do so, where counsel had already impeached the victim to some degree, the victim was crying on the stand, and continued impeachment may have inflamed the jury against defendant.

Moreover, with regard to prejudice, defendant has not shown the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, where the victim was consistent with her story that defendant grabbed her breast. In light of our findings, there is no legitimate basis for defendant's claim that the prosecutor committed misconduct by failing to reveal prior inconsistent statements of the victim to the jury.

B. Sufficiency of the Evidence

Defendant next argues that there was insufficient evidence to support the conviction because the victim's testimony was inconsistent and not credible. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515.

The elements of CSC 2 are that the defendant engaged in sexual contact with another person and that person was under the age of thirteen. MCL 750.520c(1)(a); *People v Mary Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). Sexual contact "includes the intentional touching of the victim's . . . intimate parts or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification [or] done for a sexual purpose" MCL 750.520a(l).

There was sufficient evidence that defendant committed CSC 2, where the victim testified consistently that defendant grabbed her breast, and where there was no dispute that the victim was under the age of thirteen at the time of the assault. The victim's testimony was not required to be corroborated in order for the jury to convict defendant. MCL 750.520h. Additionally, there was evidence, defendant's statements concerning oral sex, showing that his actions were committed for the purpose of sexual arousal or gratification. Moreover, defendant's argument focuses on the victim's credibility, which is properly left to the jury to determine, not this Court.

C. Prior Acts

Defendant finally argues that his due process rights were violated when the trial court allowed the prosecutor to present similar acts evidence, i.e., the three incidents not involving sexual contact. We disagree.

The admission of similar acts evidence pursuant to MRE 404(b) is reviewed for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).⁵ The *Knapp* panel stated:

Pursuant to MRE 404(b), evidence of other crimes or wrongs "is not admissible to prove the character of a person in order to show action in conformity therewith." However, other acts evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." MRE 404(b). Other acts evidence must be offered for a proper purpose under the rule, the evidence must be relevant, and its probative value must not be substantially outweighed by unfair prejudice. [*Knapp*, *supra* at 378-379, citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

It is insufficient for the proponent of the evidence to merely recite one of the purposes articulated in MRE 404(b). *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). The proponent must also explain how the evidence relates to the recited purposes. *Id.*

Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. . . . The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. [*Id.* at 387-388 (citation omitted).]

Here, we first note that two of the incidents involved comments concerning oral sex and not "acts." Former statements do not constitute prior acts for purposes of MRE 404(b). *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988). Regardless, those statements were relevant as to intent and motive, which are proper purposes under MRE 404(b), where the prosecutor was required to establish that defendant's actions were for the purpose of sexual arousal and gratification. MCL 750.520c(1) and 750.520a(l). We do not find that the probative value was substantially outweighed by unfair prejudice. MRE 403. Concerning the kissing incident, defendant himself testified that he had once kissed the victim on the cheek. Any error would be harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

⁵ Defendant preserved the issue through a pretrial motion.

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Robert J. Danhof