

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JOSEPH TRESSLER,

Defendant-Appellant.

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UNPUBLISHED

May 6, 2004

No. 240587

Hillsdale Circuit Court

LC No. 01-259276-FH

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of one count of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a), and two counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a). Defendant was sentenced to concurrent terms of 85 to 180 months' imprisonment for the CSC III conviction, and 16 to 24 months' imprisonment for each CSC IV conviction. We affirm.

Defendant's convictions stem from an assault that occurred at his parents' home on March 20, 2001. The complainant was visiting defendant's younger sister. The complainant and defendant's sister babysat defendant's three children while defendant went bowling with his parents. The complainant testified that at approximately midnight, defendant and his parents returned home. The complainant, defendant's sister, and one of defendant's children were lying on the living room couch. Defendant's other two children were asleep on the living room floor. The complainant testified that while the others in the room were asleep, defendant approached her and sexually assaulted her as she lay on the couch.

Defendant moved post-conviction for a new trial based on an allegation of ineffective assistance of counsel. Defendant argued that counsel should have presented evidence that his mother was in a chair in the living room throughout the night. The trial court denied the motion, concluding, in part, that this evidence was cumulative. On appeal, defendant again argues that counsel was ineffective for failing to call his mother to testify. We disagree. A trial court's decision to deny defendant's motion for a new trial is reviewed by this Court for an abuse of discretion. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001). The underlying issue of effective assistance of counsel presents a question of constitutional law that is reviewed de novo on appeal. *Id.*

To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy a two-pronged test. First, a defendant must show that the acts of trial counsel do not satisfy an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Second, the “defendant must show that but for counsel’s error there is a reasonable probability that the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable.” *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Defendant fails to establish that this defense would have affected the outcome of his trial. Here, the trial court, after holding a *Ginther*<sup>1</sup> hearing, determined that the mother’s testimony would have been cumulative. We find no error. Defendant’s sister testified that she was in the room at the time as well and that the assault did not occur. Jessica testified that defendant fondled her and digitally penetrated her despite her repeated protestations. This testimony alone is sufficient to sustain defendant’s criminal sexual conduct convictions. MCL 750.520h. Deferring to the jury’s superior ability to judge witness credibility, *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998), and given the weight of the evidence actually introduced at trial, we conclude that defendant has not established the “prejudice” prong of the test for ineffective assistance of counsel. See *People v Carbin*, 463 Mich 590, 604-605; 623 NW2d 884 (2001).

We affirm.

/s/ Helene N. White  
/s/ Jane E. Markey  
/s/ Donald S. Owens

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).