

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY ALLEN PARKS,

Defendant-Appellant.

UNPUBLISHED

May 18, 2004

No. 244553

Shiawassee Circuit Court

LC No. 02-007574-FC

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). Defendant was sentenced to 84 to 180 months' imprisonment. We affirm.

This case arises out of defendant's sexual abuse of his nine-year-old stepdaughter. Defendant first argues that the evidence at trial was insufficient to support his conviction for first-degree criminal sexual conduct. We disagree. In determining whether the prosecution presented sufficient evidence to sustain a conviction, we review the record de novo and consider the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999); *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). We are required to draw all reasonable inferences and make credibility determinations in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Under MCL 750.520b(1)(a), "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person" who "is under thirteen years of age." MCL 750.520a(o) defines sexual penetration as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."

In the instant case, defendant does not dispute that the victim was less than thirteen years old at the time of the offenses. But he asserts that the victim's testimony was insufficient to support a finding of guilt for first-degree criminal sexual conduct, because she gave inconsistent testimony at trial, was only eleven years old at the time of trial, had suffered a closed-head injury

several years earlier, and had behavioral and emotional problems. But defendant overlooks this Court's reluctance to interfere with the jury's role in evaluating witness credibility. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, mod 441 Mich 1201 (1992).

The victim testified that on one occasion, defendant followed her into the bathroom, placed her on the counter, and inserted one of his fingers into her vagina. On another occasion, defendant again followed the victim into the bathroom and inserted his penis into her mouth. Therefore, the victim's testimony describes conduct that falls within the statutory definition of "sexual penetration." Additionally, a doctor qualified as an expert in pediatrics with an emphasis on sexual abuse examined the victim, and testified that based on her account of events, it was his opinion that she had been fondled. That is, "some one had touched her using their hands or fingers . . . in the vaginal area." The doctor explained that although the victim did not exhibit signs of physical abuse, it is more common than not to show no physical signs of abuse in fondling cases. The victim also gave the same account of events of the sexual assaults to several individuals, including the school social worker, the Family Independence Agency protective service worker, the investigating police officer on the case, and her grandmother with whom she went to live after the incidents.

On direct examination, the victim testified that following one of the incidents, defendant threatened that if she told on him, he would kill her. On cross-examination, defense counsel elicited an apparent inconsistency in the victim's testimony, when she was unable to recall whether defendant threatened her after the first or second incident. The jury was also aware that the alleged instance of abuse occurred when the victim was nine years old, and that she was eleven years old at the time of trial. Additionally, the jury was aware of the closed-head injury the victim sustained when she was younger, which caused her to suffer from seizures for which she takes medication, as well as her behavioral and emotional problems, including disruptive behavior disorder.

We reject defendant's argument that the victim's testimony should be disregarded because of her somewhat inconsistent testimony, her age at the time of the alleged abuse, the closed head injury she suffered years before, and her pre-existing behavioral and emotional problems. The jurors heard testimony regarding all of these conditions and characteristics, and apparently found her testimony to be credible. Therefore, we decline to disturb this decision on appeal. *Wolfe, supra* at 514-515. Viewed in the light most favorable to the prosecution, the evidence was sufficient to establish the essential elements of first-degree criminal sexual conduct, and a rational jury could have found that the prosecution proved all the elements of the crimes beyond a reasonable doubt. Therefore, defendant is not entitled to relief on this basis.

Defendant next argues that the trial court erred in granting the prosecutor's motion in limine to exclude evidence that the victim allegedly made similar false allegations against her grandfather. Specifically, defendant argues that he should have been allowed to question the victim and other witnesses concerning such evidence for impeachment purposes, to show that the victim made false accusations in the past, and that the accusations in the instant case were also false. Generally, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003). But where a defendant fails to make an adequate offer of proof pursuant to MRE 103(a)(2), our review is limited to plain error affecting a defendant's substantial rights. *People v Hampton*, 237 Mich

App 143, 154; 603 NW2d 270 (1999); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Our Supreme Court has held that a “defendant should be permitted to show that the complainant has made false accusations of rape in the past.” *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). “Such false accusations are relevant in subsequent prosecutions based upon the victim’s accusations because the fact that the victim has made prior false accusations of rape directly bears on the victim’s credibility and the credibility of the victim’s accusations in the subsequent case, and preclusion of such evidence would unconstitutionally abridge the defendant’s right to confrontation.” *People v Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991).

However, “the defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted,” and “[u]nless there is a sufficient showing of relevancy in the defendant’s offer of proof, the trial court will deny the motion.” *Hackett, supra* at 350; MCL 750.520j(2). In *Williams, supra* at 272, the defendant sought to elicit testimony that the victim had made a prior false accusation of being sexually abused by her uncle. However, he was “unable to offer any concrete evidence” to establish that the victim made such an accusation. *Id.* “Rather, what defense counsel endeavored to do was to put the victim’s mother and, apparently, one other witness on the witness stand and question them under oath concerning the truth or falsity of the victim’s prior accusation, in hopes that their answers would reveal that the prior accusation was false. In short, defense counsel had no idea whether the prior accusation was true or false and no basis for believing that the prior accusation was false. Counsel merely wished to engage in a fishing expedition in hopes of being able to uncover some basis for arguing that the prior accusation was false.” *Id.* at 273-274.

Similarly, in the instant case, defendant failed to offer any concrete evidence establishing that the victim had made a prior false accusation of being sexually abused by her grandfather. Pursuant to MRE 103(a)(2), error may not be predicated upon a ruling which excludes evidence, unless a substantial right of the party is affected, and the substance of the evidence was made known to the court by an offer of proof. Defense counsel admitted that he did not know the age of the victim at the time of the alleged prior false accusation, guessed that she was four years old, and merely stated that reports had been made to the Family Independence Agency and that as a result, the victim was examined by a doctor at that time. The evidence proffered by defense counsel simply did not constitute an adequate offer of proof under MCL 750.520j(2). The prosecution explained that no charges had been filed, no conviction had been obtained, no juvenile court proceedings had occurred, and no findings had been made on the matter in any respect. Additionally, at the preliminary examination, the victim testified that no one other than defendant had ever touched her in a “bad” way. Further, the prosecutor stated that as of the date of trial, the victim had no memory of the alleged sexual encounter with her grandfather.

In *Williams, supra* at 274, this Court indicated that “an evidentiary hearing in this regard should not be used as a fishing expedition,” and that “if defendant had evidence of a prior false accusation, that could be presented to the court.” “But defendant was not entitled to have the court conduct a trial within a trial to determine whether there was a prior accusation and whether that prior accusation was true or false.” *Id.* Similarly, in the instant case, defendant was not entitled to use the trial as a forum to determine the existence of a prior accusation made by the

victim against her grandfather, and whether that accusation was true or false. Defendant failed to make the requisite offer of proof required by MCL 750.520j(2); therefore, the trial court did not abuse its discretion in granting the prosecutor's motion in limine to exclude evidence that the victim allegedly made similar false accusations against her grandfather. Defendant has not demonstrated plain error affecting his substantial rights; therefore, he is not entitled to relief on this basis.

Finally, defendant argues that he was denied the effective assistance of counsel. Specifically, defendant argues that his trial counsel was ineffective for the following reasons: failing to call witnesses that were present at trial to testify that he did not have a propensity to commit the alleged crimes, and that his reputation was contrary to engaging in such activity; failing to elicit testimony concerning the victim's behavior; requiring defendant to deliver subpoenas to defense witnesses; and failing to persuade the trial court to allow in evidence of the victim's alleged prior false accusations against her grandfather. We disagree. "Because defendant failed to move for a new trial or request a *Ginther*¹ hearing below, our review of this issue is limited to mistakes apparent on the appellate record." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *Id.*

"For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id.* "As for prejudice, a defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

Defendant avers that his attorney's performance was deficient because he did not call witnesses to testify that he lacked the propensity to commit the alleged crimes and that his reputation was contrary to engaging in such activity. However, defendant fails to mention that his attorney called four witnesses, all of whom had shared a house with defendant, who testified that they had never seen defendant exhibit any inappropriate sexual behavior toward the victim or any of the other five children living in the house. Calling additional witnesses would have merely been cumulative, and trial counsel is not ineffective for deciding, as a matter of trial strategy, to refrain from eliciting cumulative testimony. As to failing to elicit testimony concerning the victim's behavior, much evidence was adduced during the prosecutor's case-in-chief concerning the victim's behavioral problems, and again, trial counsel is not ineffective for deciding, as a matter of trial strategy, to refrain from eliciting cumulative testimony. Because there is no evidence on the record to support defendant's assertion that his counsel was ineffective for requiring him to deliver subpoenas to defense witnesses, he has effectively waived the issue for review. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Finally,

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

as noted above, the trial court properly determined that evidence concerning the victim's alleged prior false accusations against her grandfather was inadmissible, and defense counsel is not ineffective for failing to further pursue what would have amounted to a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant has failed to demonstrate a reasonable probability that, even if defense counsel had not made the errors he alleges, the outcome of the proceedings would have been different. Defendant has failed to meet his burden of proving ineffective assistance of counsel, and is not entitled to relief on this basis.

We affirm.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald