

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY A. FISHER,

Defendant-Appellant.

UNPUBLISHED

June 22, 2004

No. 246335

Wayne Circuit Court

LC No. 02-000986-01

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from jury convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a), for which he was sentenced to concurrent prison terms of fifteen to thirty years and three to fifteen years, respectively. We affirm defendant's convictions but remand for correction of the presentence report. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the evidence was insufficient to sustain the verdicts. Defendant does not challenge the sufficiency of the evidence as it relates to the elements of the offenses. Rather, he contends that because the victim's testimony was inconsistent and not corroborated by any physical evidence, the prosecutor did not prove his guilt beyond a reasonable doubt. We disagree.

The prosecutor did not produce any physical evidence to corroborate the victim's testimony that defendant was the person who abused her. However, the victim's testimony need not be corroborated, MCL 750.520h, and "[t]he prosecutor is not required to present direct evidence linking the defendant to the crime." *People v Saunders*, 189 Mich App 494, 495; 473 NW2d 755 (1991). A positive identification of defendant by witnesses may be sufficient to support a conviction despite the potential unreliability of such testimony. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The victim's prior statements and testimony did conflict with her trial testimony. However, the credibility of identification testimony is a question of fact for the trier of fact and will not be resolved anew on appeal. *Id.* Given that and the fact that witness credibility is a matter of weight, not sufficiency, of the evidence, *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977), we find no merit to defendant's claim.

Defendant next contends that he was denied a fair trial due to ineffective assistance of counsel. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff'd* 468 Mich 233 (2003) (citations omitted).]

Defendant first contends that counsel was ineffective for failing to object to testimony from the victim's mother regarding his reaction when she confronted him about the abuse. While a defendant's tacit admission in the form of the failure to deny an accusation is not admissible as substantive evidence because the "failure to respond to an accusation is not probative of the truth of the accusation," *People v Hackett*, 460 Mich 202, 214-215; 596 NW2d 107 (1999), the evidence in this case did not show that defendant remained silent when questioned about the victim's allegations. Rather, he hung his head and cried and said he was sorry. Defendant's own statement was admissible in evidence against him, MRE 801(d)(2)(A), as was his nonverbal conduct. Cf. *People v Rice (On Remand)*, 235 Mich App 429, 437; 597 NW2d 843 (1999). Because the evidence was admissible, counsel was not ineffective for failing to object to its introduction. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). For the same reason, the prosecutor's comments on the evidence in closing argument was not improper. *Rice, supra*.

Defendant next contends that counsel was ineffective for failing to find and present witnesses to testify that the victim had a boyfriend who could have been the source of the sperm recovered from a sample in the rape kit. He also contends that counsel was ineffective for failing to obtain the victim's panties for DNA testing to exclude him as the source of the sperm.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). "Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense." *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Counsel may be found to be ineffective due to lack of preparedness. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). However, defendant "must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited" the defendant. *Bass, supra* at 253.

Although the victim and her mother were questioned about the existence of a boyfriend, both denied that the victim had a boyfriend during the relevant time period. There is nothing in the record to show that (1) the victim did have a boyfriend, (2) that she was having sexual relations with the boyfriend, or (3) what the boyfriend would have testified to if called. Therefore, defendant has not shown that a reasonable probability exists that, if counsel had found and interviewed and/or called the boyfriend as a witness, the outcome of the trial would have been different. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). As for other witnesses who would have testified in favor of defendant, defendant's representations as to what these uncalled witnesses would have testified to is not sufficient to show "that these witnesses exist, or that their testimony would have benefited defendant had they been called. Thus, there are no errors apparent on the record. Therefore, defendant's argument that he was denied ineffective assistance of trial counsel is without merit." *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

Regarding possible DNA evidence, the record shows only that there was a possibility that any semen that leaked from the victim's vagina could have ended up on her panties. There is nothing in the record to show that (1) that the panties had absorbed any seminal fluid, (2) that any fluid that might have been absorbed contained sufficient DNA for testing, or (3) that DNA testing would have excluded defendant as the donor. Because the record does not establish that the evidence, if it existed, would have substantially benefited the defense, defendant has not shown that a reasonable probability exists that, if counsel had obtained the evidence in question, the outcome of the trial would have been different. *Watkins*, *supra* at 30-31.

Defendant's final argument is that the trial court erred in failing to strike incomplete information regarding three prior arrests from the presentence report. The prosecutor stated at sentencing that she had no objection to the striking of the information and the court appears to have granted defendant's request. The information is still part of the presentence report and the prosecutor concedes that the presentence report should be amended. We agree. MCL 771.14(6); *People v Swartz*, 171 Mich App 364, 381; 429 NW2d 905 (1988).

Defendant's convictions are affirmed. This case is remanded for the purpose of correcting the presentence report by striking the challenged information. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray