

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of Michael Justin Dieterle, Minor.

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner-Appellee,

v
MICHAEL JUSTIN DIETERLE,
Respondent-Appellant.

UNPUBLISHED
September 28, 2004

No. 247778
Oakland Circuit Court
Juvenile Division
LC No. 02-665753-DL

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

MEMORANDUM.

Respondent appeals as of right his juvenile conviction for fourth-degree criminal sexual conduct, MCL 750.520e. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant asserts that he was denied the effective assistance of counsel where his trial attorney stipulated to the admission of the statement of a res gestae witness in lieu of her testimony at trial. To establish an ineffective assistance of counsel claim, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

There is no showing that decision to waive the testimony of the res gestae witness affected the outcome of the case. The witness gave a statement that she did not observe any improper acts on the part of respondent. Respondent has not shown that it was not reasonable trial strategy to rely on this statement, rather than present the witness at trial.

Defendant also asserts that there was insufficient evidence to support the verdict. In determining whether sufficient evidence has been presented to sustain a conviction, a reviewing court must view the evidence in a light most favorable to the prosecution, and determine whether any rational finder of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). The standard of review is deferential: a reviewing court is required to draw all reasonable inferences

and make credibility choices in support of the verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Where two witnesses testified that they observed defendant placing his hand in complainant's pants while she was incapacitated, there was sufficient evidence to support the conviction.

Defendant also argues that the court erred in denying a new trial based on the prosecutor's failure to exercise due diligence to produce a res gestae witness. Where respondent stipulated that it was unnecessary to obtain the witness's presence, there was no basis for granting relief. MCL 767.40a(4).

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood