

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS DESHAWN KING,

Defendant-Appellant.

UNPUBLISHED

December 16, 2004

No. 249426

Wayne Circuit Court

LC No. 03-002320-01

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his charges and subsequent convictions of armed robbery, MCL 750.529, four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c), and one count of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

On October 4, 2002, the sixteen year old victim testified that defendant called her at her brother's home around 9:00 pm and asked her to accompany him to his friend's house. The victim agreed and they drove to an apartment complex, where they sat in the car and spoke for over an hour. Defendant removed a gun from his waist and put it under the seat. Eventually, defendant pointed the gun at the victim's head and asked her to give him all her money and to take her clothes off. The victim was told to step into the back seat of the car, and to comply with defendant's demands. Defendant then proceeded to have oral and vaginal sex with the victim, despite her saying she did not want to have sex with him. After they were done, they drove to a nearby gas station where defendant's car stalled. The victim went into the bathroom, came out, and found defendant had left. She contacted her mother who picked her up. She told her mother what had happened, and they drove to the hospital, where doctors examined the victim. Doctors reported traces of semen; however, defendant contends that it was consensual while the victim stated that it was not. In a bench trial, the court found the victim more credible and found defendant guilty on all counts.

II. SUFFICIENCY OF EVIDENCE

A. Standard of Review

Defendant contends that the evidence was insufficient to sustain the verdict. A challenge to the sufficiency of the evidence in a bench trial is reviewed de novo on appeal. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002). This Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001), lv den 467 Mich 900 (2002). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

B. Analysis

Although defendant contends that the evidence was insufficient to sustain the verdicts, he does not dispute that the prosecutor presented evidence from which a rational trier of fact could conclude that each element of the crimes charged had been proved beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). Rather, he contends that the victim's behavior during the incident was so irrational and her testimony so inconsistent that she was not a credible witness.

Witness credibility is a matter of weight, not sufficiency, of the evidence. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). That aside, "the trial judge, as trier of fact, has the duty to weigh the testimony and assess the credibility of the witnesses." *People v Snell*, 118 Mich App 750, 755; 325 NW2d 563 (1982). The trial court is in the best position to judge credibility; therefore, this Court will not substitute its judgment for that of the trial court but will defer to the trial court's resolution of factual issues that involve the credibility of witnesses. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997); *People v Martin*, 199 Mich App 124, 125; 501 NW2d 198 (1993). The trial court gave a cogent and rational explanation for accepting the victim's testimony. That explanation was based on the evidence introduced at trial and thus was not clearly erroneous. The fact that the trial court chose to believe the victim despite defense counsel's attempts to impeach her does not constitute reversible error. *Snell*, *supra* at 756. See also *People v Matthews*, 53 Mich App 232, 243; 218 NW2d 838 (1974).

III. PROSECUTORIAL CONDUCT

A. Standard of Review

Defendant next contends that he was denied a fair trial due to prosecutorial misconduct. The issue has not been preserved because defendant did not object at trial. Therefore, reversal is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); See also *People v Carines*, 460 Mich. 750, 764; 597 N.W.2d 130 (1999) (holding that the plain error rule even extends as far as "unpreserved claims of constitutional error.")

B. Analysis

Defendant also contends that the prosecutor improperly vouched for the victim's credibility when she stated during rebuttal argument that the victim "may not have made the best decisions, but she is telling the truth." As is clear from the context of the prosecutor's argument as a whole, she permissibly argued from the evidence that the victim was credible. *People v*

Howard, 226 Mich App 528, 548; 575 NW2d 16 (1997); *People v Stacy*, 193 Mich App 19, 29; 484 NW2d 675 (1992). We find no error.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

Defendant next contends that he is entitled to a new trial due to ineffective assistance of counsel. Defendant failed to raise this claim below in a motion for a new trial or at an evidentiary hearing; therefore, 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).]

B. Analysis

It is defendant's theory that the victim fabricated the charges, either because she was retaliating against him for getting into a fight with her uncle, or because of some unknown problems with her mother, and counsel was ineffective for failing to elicit such testimony.

Decisions regarding what evidence to present and whether to call or cross-examine 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 Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). "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).

The record shows that counsel did not question the victim and her mother about problems between the two of them or about defendant's fight with the victim's uncle and that he did not call the uncle or gas station attendant to testify. However, there is nothing in the record to substantiate defendant's claims. There are no errors apparent on the record and nothing to demonstrate that a reasonable probability exists that, if counsel had questioned the victim and her mother further or had called the other witnesses to testify, the outcome of the trial would have been different. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002)

Defendant also contends that counsel was ineffective because he failed to subpoena phone records to prove that the victim had paged him and thus demonstrate conclusively that her testimony was not wholly credible.

The record shows that defense counsel cross-examined the victim on the issue of whether she had paged defendant. Counsel developed the issue and sufficiently attacked the victim's credibility on that point, and his failure to obtain and present documents to further impeach her testimony did not constitute a serious error warranting reversal. *People v Traylor*, 245 Mich App 460, 465; 628 NW2d 120 (2001). Moreover, because the trial court acknowledged that the victim's credibility was possibly compromised on that point but nonetheless chose to believe her testimony about the crimes, it is unlikely that had counsel conclusively demonstrated that the victim did page defendant, the outcome of the trial would have been different.

Defendant contends that counsel was ineffective for encouraging him to waive his right to testify. "The decision to call or not call the defendant to testify is a matter of trial strategy." *People v Alderete*, 132 Mich App 351, 360; 347 NW2d 229 (1984). The record shows that counsel discussed the matter with defendant, but it was defendant's own decision not to testify. To the extent counsel advised defendant against taking the stand, such advice was a matter of trial strategy, which this Court will not second-guess. *Rockey, supra*.

Finally, defendant contends that counsel was ineffective for advising him to waive his right to a trial by jury. This is a matter of trial strategy, *People v Johnson (On Rehearing)*, 208 Mich App 137, 142; 526 NW2d 617 (1994). Apart from the fact that defendant's statements on the record show that it was his own decision to waive a jury, the record does not show that counsel's advice was deficient or inadequate.

Affirmed.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Bill Schuette