STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of RAPHAEL DAQUANME JONES, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

V

RAPHAEL DAQUANME JONES,

Respondent-Appellant.

UNPUBLISHED
June 14, 2005

No. 255559
Washtenaw Circuit Court
Family Division
LC No. 03-001040-DL

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

PER CURIAM.

Respondent appeals as of right from an order of disposition entered following delinquency proceedings in which the court determined that respondent committed 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).

Respondent argues 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). This Court reviews the evidence in the 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). 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). "It is for the trier of fact . . . to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The trial court's factual findings are reviewed for clear error. *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). A finding of fact is considered "clearly erroneous if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *Id.* "An appellate court will defer to the trial court's resolution of factual issues, especially where it involves the credibility of witnesses." *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997).

A person commits fourth-degree criminal sexual conduct if he engages in sexual contact with another person and he uses force or coercion to accomplish the sexual contact. MCL 750.520e(1)(b). Sexual contact is defined as the intentional touching of the victim's "intimate parts" or the clothing covering those parts if such touching "can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (i) Revenge[] (ii) To inflict humiliation[or] (iii) Out of anger." MCL 750.520a(n). The term "intimate parts" includes the buttocks. MCL 750.520a(c). Force or coercion includes achieving the sexual contact by the element of surprise. MCL 750.520e(1)(b)(v).

The victim testified that defendant intentionally slapped her buttocks and achieved the touching through the element of surprise. One could reasonably infer that the touching was done for a sexual purpose, given that: (1) the victim was a member of the opposite sex; (2) the touching occurred not long after respondent made uninvited comments of a blatantly sexual nature to the victim; and (3) respondent had no other logical reason for touching the victim's buttocks. This evidence was sufficient to support the verdict, and the trial court's factual findings are not clearly erroneous.

Respondent's second argument is that he is entitled to a new trial due to ineffective assistance of counsel. Our review of this issue is limited to the facts on the record because the trial court did not conduct an evidentiary hearing. *People v Calvin Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

> To prevail on a claim of ineffective assistance of counsel, a 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), mod on other grnds 468 Mich 239-240 (2003) (citations omitted).]

The touching at issue occurred while respondent and the victim were the only two passengers on a vehicle transporting them home from school. Respondent contends that counsel was ineffective for failing to call the van's driver, Jill Settles, to testify on his behalf.

The Michigan Court of Appeals has stated the following regarding its review of trial strategy:

> 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).]

The failure to call witnesses can constitute ineffective assistance of counsel only if the failure deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538;

462 NW2d 793 (1990). "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).

We permitted respondent to supplement the record with an affidavit from Settles. Because it does not contradict the victim's testimony or specifically support respondent's case, we find that the failure to call Settles did not deprive respondent of a substantial defense. See *People v Terry Wilson*, 159 Mich App 345, 354; 406 NW2d 294 (1987). The fact that Settles did not see a reaction from the victim that would cause her to believe the touching occurred is of no moment because the victim testified that she did not react overtly to the touching but "just hurried up and got off the van." Settles stated, consistent with respondent's testimony, that the two students bumped into one another, but she did not affirmatively state that she witnessed the entire episode and that respondent did not touch the victim's buttocks with his hand. Because Settles' affidavit does not substantially help respondent's defense and the trial court that found the statements contained in the affidavit would not have affected the verdict, we conclude respondent has not established a right to relief.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter