STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2005
v	No. 256308 Wayne Circuit Court
FIRAS BABBY, Defendant-Appellant.	LC No. 04-003579-01

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a). Defendant was sentenced to two years' probation. We affirm.

I. Basic Facts

Defendant, who was thirty years old at the time of trial, was convicted for an incident of sexual contact with a fourteen-year-old girl while the girl was shopping at defendant's party store. On appeal, defendant argues there was insufficient evidence to prove CSC IV and that he was denied the effective assistance of counsel. We disagree.

II. Sufficiency of the Evidence

Defendant argues that the prosecution presented insufficient evidence of premeditation to support his conviction of CSC IV. We disagree.

A. Standard of Review

This Court reviews de novo a claim of insufficient evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

B. Analysis

A conviction for CSC IV pursuant to MCL 750.520e(1)(a) requires proof of: (1) sexual contact; (2) with a person thirteen to fifteen years of age; (3) by an actor who is five or more years older than the complainant. For purposes of the statute, "sexual contact,"

> includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional 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. (iii) Out of anger. [MCL 750.520a(n).]

In addition, "'[i]ntimate parts' include the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(c). Criminal sexual conduct is a general intent crime. *People v Russell*, 266 Mich App 307, 315; ___ NW2d ___ (2005). However, proof of intentional touching, alone, is not sufficient to establish guilt; the prosecution must also prove the contact can be reasonably construed to be for a sexual purpose. *Id.*; *People v Piper,* 223 Mich App 642, 647; 567 NW2d 483 (1997).

Here, the complainant testified that, on the day of the incident, defendant touched her three times. First, he massaged her shoulders. The second two times he pulled her toward him from behind and held her there for a few seconds by gripping her shoulders with his hands. She reported that he pulled her buttocks into contact with his groin at least once during these events; the second time she may have succeeded in pulling away before contact occurred. There was no physical evidence available, nor were there any other direct witnesses to the incidents.

Defendant challenges the complainant's credibility as well as the overall sufficiency of the evidence. By statute, the testimony of a criminal sexual conduct victim need not be corroborated in prosecutions under MCL 750.520e. MCL 750.520h. Further, in appeals challenging the sufficiency of the evidence, questions of witnesses' credibility are left to the trier of fact, not the reviewing court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). The review of cases involving the credibility of a criminal sexual conduct victim are no exception. See *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Here, the trial court was satisfied that the complainant testified truthfully. The court further found that her behavior was consistent with that of a sexual assault victim. It is not the role of this Court to disturb these findings.

We also find there was sufficient evidence of intentional contact with the clothing covering the "intimate parts" of both the defendant and the complainant. MCL 750.520a(n). As with questions of credibility, questions of intent are left to the trier of fact and, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *Fennell, supra* at 270-271; *Avant, supra*. Here, defendant's intent to touch his groin to the complainant's buttocks may be inferred from complainant's testimony. He made unwanted contact with her three times that day and, twice, she felt pulled toward him and held there until she asked him to release her.

The touching may also be "reasonably be construed as being for the purpose of sexual arousal or gratification [or] done for a sexual purpose." MCL 750.520a(n). The nature of the contact, itself, is strong evidence of a sexual purpose. In addition, complainant reported that, on

a previous occasion, defendant had asked her how old she was; when she told him she was fourteen, he said: "[you] only have four more years." Further, when the complainant's father confronted defendant, defendant he appeared nervous and evasive, indicating consciousness of guilt. For these reasons, the evidence presented was sufficient to prove CSC IV.

II. Effective Assistance of Counsel

Defendant argues, next, that he was deprived of the effective assistance of counsel. He claims his attorney failed to procure evidence, to call or cross-examine particular witnesses, to move for a directed verdict, and to advise defendant of his right not to testify.

A. Standard of Review

Defendant did not request a *Ginther* hearing or otherwise create a supplementary record to support his claims of ineffective assistance. Our review is therefore limited to facts apparent in the lower court record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). The determination whether a defendant has been deprived of his right to the effective assistance of counsel presents a mixed question of fact and constitutional law; as in other contexts, we review the trial court's factual findings for clear error and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

The effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *LeBlanc, supra* at 578. To support a claim of ineffective assistance, defendant must show: (1) the representation fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for the attorney's error, the result of the proceedings would have been different; and, (3) the resulting proceedings were therefore fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Further, this Court "will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *Id.* at 715. Decisions concerning what evidence to present and whether to call or question witnesses are presumed to be matters of strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant argues his counsel should have procured surveillance tape of the store from the date of the incident or, at a minimum, should have questioned the police investigator who had discovered that the tape had been destroyed. However, there is no evidence in the record showing the contents of the tape or how the tape would have aided defendant's case. Further, there is nothing to suggest that the investigator's testimony would have been helpful as the record indicates that he would only have reported that the tape had been destroyed before it had been viewed. Therefore, defendant failed to establish how procuring the tape or cross-examining the investigator in regard to the tape would have affected the outcome of the proceedings.

Defendant also argues that he was denied the effective assistance of counsel because his attorney failed to cross-examine the officer who took the complainant's initial report. Again, there is nothing in the record to suggest this testimony would have been helpful. The officer had simply taken some basic information from the complainant and had advised her to speak with an

investigator. He hardly remembered speaking with her and had not noted her appearance or demeanor in his report. Therefore, defendant failed to establish that cross-examination of the officer who took the complainant's initial report would have affected the outcome of the proceedings.

Similarly, we do not find error in defense counsel's failure to call defendant's mother to the stand. His mother and father had been working in the store on the day of the incidents. His father's testimony confirmed that the complainant had visited the store, but the father was not able to see the back of the store where the alleged contact took place. The mother may have been working closer to the back of the store but, despite her presence at the trial, defense counsel chose not to call her as a witness. Again, there is no evidence of the potential content of her testimony, and, there is nothing to suggest that her testimony would be exculpatory. Thus, defendant offers no evidence to overcome the presumption that his attorney made reasonable strategic decisions at trial regarding the presentation of evidence and examination of witnesses. In addition, nothing in the record suggests that these decisions would have affected the outcome of the proceedings, regardless of whether they could be construed as errors.

Defendant makes two other claims of ineffective assistance. He argues defense counsel should have moved for a directed verdict at the close of the prosecution's case-in-chief and he claims he was not advised of his Fifth Amendment right not to testify. Both claims must fail. When considering a directed verdict for acquittal, a trial court considers the evidence on record at the time of the motion. The court should view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003). Here, as discussed, *supra*, the elements of CSC IV were sufficiently proved during the prosecution's case-in-chief. Thus, a motion for a directed verdict would not have been granted. A claim of ineffective assistance cannot be predicated on the failure to make a frivolous or meritless motion, including a motion for a directed verdict. *Riley, supra* at 142.

Finally, defendant points out that his attorney did not advise him of this right not to testify while on record during the proceedings. However, defendant does not provide any authority that such advice must be given at trial or on the record. Indeed, the closest analogy is to the contrary; a trial court has no duty to ascertain on the record whether a defendant has intelligently and knowingly waived his right to testify. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995), citing *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991). Moreover, defendant does not contend he would not have testified nor that the outcome of the proceedings would have been different had defendant chosen not to testify.

In conclusion, the record does not contain specific evidence of errors or of representation that fell below an objective standard of reasonableness. Even had defense counsel erred, there is no reason to believe an error or combination of errors affected the outcome of the proceedings. Accordingly, defendant has also failed to support his alternative request for remand for a *Ginther* hearing. Defendant did not submit a motion to remand pursuant to MCR 7.211(C)(1), but regardless, for remand to be proper, defendant must submit a supporting "affidavit or offer of proof regarding the facts to be established at a hearing." MCR 7.211(C)(1)(a)(ii). Defendant has provided no such factual support regarding what would have been revealed by absent evidence, testimony or cross-examination. He merely speculates that the evidence may have aided him.

Therefore, he has made no showing of what facts could possibly be revealed at an evidentiary hearing.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra