

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AGRONI BARDHI,

Defendant-Appellant.

UNPUBLISHED

December 18, 2007

No. 273717

Wayne Circuit Court

LC No. 06-004640-01

Before: Saad, P.J., and Owens and Kelly, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b) (sexual contact accomplished through force or coercion), and sentenced to two years' probation. He appeals as of right. We affirm.

The victim worked at a Coney Island restaurant in Detroit. Defendant was her employer. On November 24, 2005, defendant called the victim into his office. After the victim entered the office and shut the door, defendant kissed her on the lips, touched her breasts, and slid his hand into her pants and touched her genitals. Shocked, the victim told defendant to stop and quickly left the office. She confronted defendant about the incident in his office two days later and recorded his apology on a digital recording device. The recording was played for the jury. At trial, defendant presented witnesses who testified that they saw the victim at the restaurant two days after the alleged assault, but did not witness a confrontation between defendant and the victim.

I. Ineffective Assistance of Counsel

Defendant argues that his counsel was ineffective for not having him testify and that the trial court erred when it denied his request for a *Ginther*¹ hearing on this issue. We disagree. To establish ineffective assistance of counsel, the defendant has the burden to show that counsel made an error so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance so prejudiced defendant that he was deprived of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The decision whether to have defendant testify was a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). We will not substitute our judgment for that of trial counsel regarding matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Defendant's primary complaint is that the trial court denied his motion without conducting a *Ginther* hearing.

A *Ginther* hearing is necessary when a defendant's claim of ineffective assistance of counsel is dependent on facts not apparent from the record. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Although defendant claims that he was not aware that the decision whether to testify was personal to him, the trial court record indicates that the court advised defendant that he had an absolute right to either testify or not testify and that, in response, defendant admitted that he was aware of this right, discussed it with counsel, and decided not to testify. Defendant also submitted a posttrial affidavit in which he identified a strategic reason for not testifying (i.e., because the jury would recognize the voice on the recording as defendant's voice).

Defendant now argues that testifying and offering an explanation for his statements on the recording would have been a better strategic decision. However, this strategy would have been inconsistent with the testimony of his witnesses, who claimed that they never saw the victim meet with defendant in the back room where the recorded conversation allegedly occurred. Regardless, an evidentiary hearing was not required in order to show that there was an alternative strategy available because, even if there was, we will not second-guess counsel on matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *Avant, supra* at 508; *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Counsel was not ineffective merely because the strategy used at trial did not work. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Accordingly, defendant has failed to establish a claim of ineffective assistance of counsel, and the trial court did not err when it denied defendant's request for a *Ginther* hearing on this issue.

II. Admission of 404(B) Evidence

Defendant claims that he was denied a fair trial when the trial court admitted the victim's testimony that defendant had touched her buttocks on a prior occasion. Because defendant did not challenge this testimony at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

Defendant argues that the victim's testimony was not sufficiently similar to the charged acts to be admissible under MRE 404(b)(1), which generally governs the admission of evidence of other bad acts. However, the record discloses that defense counsel affirmatively used the evidence to attack the victim's character and to suggest that the charged claims lacked credibility. We note that in a prosecution for criminal sexual conduct, MRE 404(a)(3) allows "evidence of the alleged victim's past sexual conduct with the defendant" for the purpose of proving a victim's character. In any event, the prior incident was relatively innocuous compared to the charged offense, and defense counsel elicited that the victim did not do anything about the prior incident, did not tell any co-employee, did not report the matter to the police, and continued working at the restaurant. Thus, defendant has failed to show plain error affecting his substantial rights.

III. Jury Instructions

Defendant argues that the trial court erred when it failed to give the jury an alibi instruction and a cautionary instruction advising the jury that it could not consider evidence of defendant's prior bad acts for the purpose of proving his character. We disagree. Because defendant did not request these instructions at trial, we review this issue for plain error affecting his substantial rights. *Carines*, *supra* at 763-764, 774.

The record does not indicate that defendant ever filed a notice of alibi, which is required before a defendant may assert an alibi defense. MCL 768.20(1). Further, a trial court is not required to give a jury instruction that is not supported by the evidence. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). "Alibi testimony has been defined as 'testimony offered for the sole purpose of placing the defendant elsewhere than at the scene of the crime.'" *People v McGinnis*, 402 Mich 343, 345; 262 NW2d 669 (1978), quoting *People v Watkins*, 54 Mich App 576, 580; 221 NW2d 437 (1974). In this case, the evidence established that defendant and the victim were both present in the restaurant at all relevant times. Defendant did not argue at trial that he was elsewhere when the offense was committed; he only claimed that other employees did not notice him alone with the victim. Because the evidence did not support an alibi defense, the trial court's failure to give an alibi instruction was not plain error. Further, defense counsel was not ineffective for failing to request an alibi instruction because counsel is not required to make frivolous or meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Further, the trial court did not err when it failed to give a cautionary instruction advising the jury that it could not consider the evidence that defendant had previously touched the victim's buttocks as evidence of his bad character. As discussed previously, this incident was relatively innocuous compared to the charged offense, and defense counsel established through questioning that the victim did not do anything about this incident, did not tell any co-employee, did not inform the police, and continued working at the restaurant. In light of defense counsel's questioning, the trial court's failure to give a cautionary instruction in the absence of a request was not plain error. Further, defense counsel's decision to minimize the significance of this incident through questioning, in lieu of requesting a cautionary instruction characterizing the incident as a prior improper act, was a matter of trial strategy, and defendant has not overcome the presumption of sound strategy. *Avant*, *supra* at 508.

IV. Right to Testify

Defendant argues, as a separate issue on appeal, that he was denied his constitutional right to testify. As explained previously, the decision whether to have defendant testify was a matter of trial strategy, *Dixon*, *supra* at 398, and defendant has not overcome the presumption of sound strategy. To the extent that defendant argues that the trial court had an independent obligation to ensure that he was aware of his right to testify, there is no such requirement in Michigan. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991). Even if there were, however, the trial court advised defendant on the record of his right to testify and defendant informed the court that he was aware of this right and had decided not to testify. Accordingly, there is no merit to this issue.

V. Prosecutorial Misconduct

Next, defendant argues that improper remarks by the prosecutor during closing and rebuttal arguments denied him a fair trial. Issues of prosecutorial misconduct are generally decided case by case to determine whether the prosecutor's conduct denied the defendant a fair trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Here, however, defendant did not challenge the prosecutor's comments at trial. "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *Id.* at 720. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.* at 721.

Defendant argues that the prosecutor's remarks during her closing and rebuttal arguments infringed on his right to remain silent, denigrated defense counsel, and crossed the line of proper advocacy. We disagree.

A prosecutor may not infringe "on a defendant's right not to testify," and a defendant has no burden to produce any evidence. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). However, once a defendant "advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *Id.* The prosecutor does not shift the burden of proof by commenting on the improbability of a defendant's theory. *Id.* A prosecutor may draw inferences from the testimony and may argue that a witness, including the defendant, is not worthy of belief. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985).

In this case, the prosecutor's statement that "one of the things that the defendant can't answer is why he's apologizing" on the recording, viewed in context, was intended as a comment on the weight of the recording evidence rather than a comment on defendant's failure to testify. To the extent that an improper inference could have been drawn, a cautionary instruction could have cured any prejudice, if requested. Indeed, the trial court later instructed the jury that the remarks of counsel were not evidence, that defendant had an "absolute right" not to testify, and that the jury could not consider defendant's failure to testify. These instructions were sufficient to protect defendant's substantial rights.

In the remaining challenged remarks, the prosecutor was responding to defense counsel's argument that the recording was not genuine by commenting on the weaknesses of the defense theory and by explaining that the evidence supported a finding that the recording was legitimate. In this context, the prosecutor properly could argue that the defense witnesses had a motive to protect defendant, their employer, and that the jury should not believe defense counsel's theory that the recording was not genuine. Also, the prosecutor's arguments were based on the evidence and inferences arising from the evidence and, accordingly, did not constitute an improper attack on defense counsel.

VI. Great Weight of the Evidence

Finally, defendant argues that the jury's verdict was against the great weight of the evidence because the defense witnesses were more credible than the victim. We disagree. We review the trial court's decision whether to grant a new trial on this ground for an abuse of discretion. *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003). Here, the trial court properly recognized that questions of credibility were for the jury to resolve and that the record presented no basis for it to substitute its judgment for that of the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). The trial court did not abuse its discretion when it denied defendant's motion for a new trial.

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly