

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES EUGENE PORTER,

Defendant-Appellant.

UNPUBLISHED

January 29, 2008

No. 274574

Kent Circuit Court

LC No. 06-005240-FC

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(f), for which he was sentenced as a fourth habitual offender, MCL 769.12, to 10 to 50 years in prison. He appeals as of right. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he is entitled to a new trial due to ineffective assistance of counsel. Because defendant failed to raise this issue below in a motion for a new trial or an evidentiary hearing, our 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).]

While defendant challenges several aspects of trial counsel's performance, we find it necessary to address only counsel's failure to object or request a curative instruction with regard to the prosecutor's use of impeachment evidence as substantive evidence.

The victim and the defendant were the only persons present when the alleged offense occurred. According to the evidence, defendant partially strangled the victim, who passed out

and awoke to find her pants down around her ankles, but she could not say what had transpired during the interim. Conflicting testimony was presented concerning whether defendant and the victim engaged in consensual sexual relations shortly before the alleged assault. Defendant and the victim's friend both claimed that defendant and the victim engaged in consensual sexual intercourse on the porch outside defendant's house. The victim denied engaging in any consensual sexual activity with defendant. The prosecutor called Roderick Cross, who was expected to testify that defendant told him that he sexually assaulted the victim while she was unconscious inside defendant's house. However, Cross claimed that he could not recall his conversation with defendant, nor did he recall what he may have told Officer Smith. Smith then testified regarding the substance of Cross's statement. According to Smith, Cross reported that defendant told him that he strangled the victim until she became unconscious, and then had sexual intercourse with her.

Defendant's statements to Cross were not hearsay because they were defendant's own statements offered against him. MRE 801(d)(2)(A); *People v Kowalak (On Remand)*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996). Cross's out-of-court statement to Smith was hearsay, but was admissible to impeach Cross's testimony that he could not recall anything he might have said to Smith. MRE 613(b); *People v Jenkins*, 450 Mich 249, 256-258; 537 NW2d 828 (1995); *People v Coates*, 40 Mich App 212, 214; 198 NW2d 837 (1972). However, Smith's testimony was admissible only to prove that Cross made a prior inconsistent statement, not to prove the contents of the statement. *Jenkins, supra* at 256; *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002).

The prosecutor improperly used Cross's out-of-court statement as substantive evidence, arguing that it proved that defendant sexually assaulted the victim. There appears to have been no reasonable strategy for allowing this error to go unchallenged. Further, the error was prejudicial because Cross's out-of-court statement was the only evidence directly proving that defendant sexually assaulted the victim in the kitchen. According to the victim, no sexual activity occurred outside on the porch. Defendant strangled her in the kitchen until she passed out, and she awoke to find her pants around her ankles. There was objective evidence that the victim had been strangled, and it was reasonable to infer that this occurred as she had testified. Defendant would have little reason to try to strangle her, and the victim would have difficulty scratching him in the chest, if the two engaged in consensual "doggie-style" sex as he claimed. However, there was no evidence about what transpired in the kitchen after the victim passed out. While the victim did have injuries in the genital and anal areas, which would support a finding that sexual contact of some sort had occurred, both defendant and the victim's friend agreed that the victim engaged in consensual "doggie-style" sex on the porch, which was supported by the fact that the victim had knee injuries consistent with assuming the submissive posture on a hard surface. Further, a nurse examiner admitted that had she known that such a sexual act had taken place earlier, she would not be able to say that the injuries in the genital and anal areas were inconsistent with consensual sexual relations. The evidence of Cross's statement to Smith was the principal evidence that defendant did in fact sexually assault the victim in the kitchen after she passed out, yet it was not admissible as substantive evidence. Under the circumstances, including the fact that the trial court did not instruct the jury on the limited use of prior inconsistent statements for impeachment only, see CJI2d 4.5, we conclude that it is reasonably probable that the improper use of Cross's statement as substantive evidence tipped the balance in favor of conviction and, therefore, warrants a new trial.

In light of our decision, it is unnecessary to address defendant's remaining arguments on appeal.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Jane E. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood