

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS AARON HOLDEN,

Defendant-Appellant.

UNPUBLISHED

January 31, 2008

No. 274916

St. Joseph Circuit Court

LC No. 06-013592-FH

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced as an habitual offender, fourth offense, to a prison term of 3 to 30 years. He appeals as of right. We affirm.

Defendant was charged with three counts of second-degree criminal sexual conduct for alleged incidents involving the granddaughter of his girlfriend, with whom he shared an apartment. The prosecutor indicated in his opening statement that defendant had touched the child's buttocks with his penis, touched her breasts with his hand, and touched her vaginal area with his hand. At trial, however, the seven-year-old child could not recall defendant touching her with anything other than his hands. She also stated that defendant touched her "close to her chest" and pointed to her clavicle. Accordingly, the court directed a verdict with respect to the first two counts. With respect to the remaining count, the child testified that while she was in her grandmother's bed, pretending to be asleep, defendant touched her "private parts." She indicated non-verbally that her private parts meant "between [her] legs."

Defendant argues that trial counsel was ineffective because he failed to cross-examine the child. Had counsel done so, defendant argues, it is reasonably likely that the remaining count also would have been dismissed.

Because defendant did not move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and he must "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v*

Toma, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate that counsel's deficient performance "was so prejudicial to him that he was denied a fair trial." *Id.*

Defendant challenges trial counsel's decision not to cross-examine the witness, but decisions regarding whether to question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The witness was evidently distraught during her direct testimony. In closing arguments, both counsel described her as appearing "terrified." Therefore, questioning by defense counsel may have evoked sympathy for the witness and resentment for the defense. Counsel's statement to the jury, "In fact, you'll note I didn't even cross-examine her. She had—she had suffered enough at that point," indicates that counsel's decision to forego cross-examination was a matter of strategy. More importantly, the gaps and ambiguities in the witness's direct testimony provided a basis for defense counsel to obtain directed verdicts on two counts and to argue that the prosecution had failed to satisfy the burden of proof with respect to the remaining count. Had counsel cross-examined the witness, she may have clarified her testimony and thereby strengthened the prosecution's case. Counsel's decision was a matter of trial strategy. The fact that it was unsuccessful with respect to one of the three counts does not establish that counsel was ineffective. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

We affirm.

/s/ Richard A. Bandstra

/s/ Pat M. Donofrio

/s/ Deborah A. Servitto