

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS LEROY MILLER,

Defendant-Appellant.

UNPUBLISHED

May 29, 2008

No. 277607

Ingham Circuit Court

LC No. 06-000946-FH

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(h). He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In November or December of 2004, the sixteen-year-old victim awoke to find defendant, her stepfather, lying next to her in bed and fondling her breasts. Defendant fondled the victim in this manner on at least two more separate occasions. The victim's sister observed defendant walking up the stairs to the victim's bedroom at approximately 2:00 or 3:00 a.m. on at least five separate occasions. The sister would look into the victim's bedroom and see defendant lying next to the victim in her bed.

Upon finding out about defendant's behavior, the victim's mother confronted defendant, who confessed to getting into the victim's bed in the middle of the night, fondling her breasts and her "tummy," and masturbating in her bed. The mother immediately filed a police report and filed for divorce. A few weeks later, the mother, knowing that defendant would be calling to discuss the incidents, drove to the State Police post in order to have the conversation recorded. In this tape-recorded conversation, defendant admitted he had fondled the victim's breasts and that he wrongly placed the victim in an adult situation.

Defendant testified at trial that he had a close relationship with the victim, but that he never inappropriately touched the victim. However, on cross-examination, defendant confirmed that the tape-recorded conversation admitted into evidence contained audio of him admitting to inappropriately touching the victim.

Defendant raises two claims of ineffective assistance of counsel on appeal.

Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's factual findings for clear error and review its constitutional determination de novo. *Id.*

A finding is clearly erroneous when, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). Under de novo review, we give no deference to the trial court. *People v Howard*, 233 Mich App 52, 54; 595 NW2d 497 (1998); *Fletcher v Fletcher*, 200 Mich App 505, 512; 504 NW2d 684 (1993), rev'd in part on other grounds 447 Mich 871 (1994).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. *Strickland*, *supra*, 466 US at 687-688; *Toma*, *supra*, 462 Mich at 302. Second, the defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *Strickland*, *supra*, 466 US at 687, 694; *Toma*, *supra*, 462 Mich at 302-303.

Defendant first claims he was denied the effective assistance of counsel when, prior to trial, defense counsel failed to listen to the tape-recorded conversation between the mother and defendant. Defendant claims that had defense counsel listened to the tape-recorded conversation before trial, defense counsel would have known, and presented evidence, that defendant denied committing the crimes on the tape and that his vagueness on the tape was due to the fact that he was trying to save his marriage by appeasing his wife.

Having reviewed the record, we conclude that defense counsel listened to the tape-recorded conversation prior to trial. The record contains evidence wherein defense counsel reveals his knowledge of the contents and sequence of the tape-recorded conversation in its entirety. In addition, it is evident from the questions defense counsel asked defendant on direct examination regarding the taped conversation that he was trying to make the point that the mother had manipulated defendant in the conversation and that defendant only admitted to the accusations insofar as that he knew if he had touched the victim in such a manner, it would be illegal. Finally, in his closing argument, defense counsel argued that defendant did deny the crimes, specifically referencing the tape wherein defendant denied any wrongdoing.

The record does not support defendant's claim that defense counsel failed to listen to the tape-recorded conversation. The manner in which defense counsel questioned defendant and presented the evidence at trial are presumed to be matters of trial strategy that this Court will not second-guess upon appeal. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Next, defendant claims he was denied the effective assistance of counsel when defense counsel placed him on the witness stand without sufficiently preparing him to testify. Defendant claims he was allowed to nervously ramble during his answers, which made the jury more likely, in defendant's opinion, to find him guilty.

Defendant offers one rambling answer during direct examination to support his claim. Although long-winded, the answer offered no conclusive evidence that defense counsel insufficiently prepared defendant to testify. It is possible that defense counsel knew defendant had a tendency to be nervous and rambling in his testimony, but concluded that his testimony was more advantageous to the case than if he remained silent. Again, this Court will not second-guess matters of trial strategy on appeal. *Id.* Moreover, the nervousness of defendant is not proof of counsel's failure to prepare him to testify nor is it proof of his guilt.

The record is not only devoid of evidence that defense counsel insufficiently prepared defendant to testify, it contains evidence that defense counsel did in fact prepare defendant to testify. The consistencies present between defense counsel's opening statement and defendant's testimony point to the likelihood of prior preparation of the witness. In his opening statement, defense counsel stressed that the mother induced her daughter to press charges against defendant not because defendant was a sexual predator, but rather, because she was involved in a nasty divorce proceeding with defendant. Then, on direct examination of defendant, defense counsel asked defendant questions regarding his relationship with the mother and her motivation to fabricate the charges against him. Defendant offered coherent and relevant testimony in response to these questions.

In conclusion, the record does not indicate that defense counsel's preparatory efforts were deficient. Defendant's allegations are merely speculative, and do not show actual prejudice. *People v Fowlkes*, 130 Mich App 828, 836; 345 NW2d 629 (1983).

Affirmed.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering