

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE CARL TONEY,

Defendant-Appellant.

UNPUBLISHED

October 23, 2008

No. 274752

Wayne Circuit Court

LC No. 06-005298-01

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of criminal sexual conduct in the first degree (CSC I), the victim being under 13 years of age, MCL 750.520b(1)(a), and two counts of criminal sexual conduct in the second degree (CSC II), the victim being under 13 years of age, MCL 750.520c(1)(a). The trial court sentenced defendant to serve concurrent terms of imprisonment of ten to 25 years for CSC I, and six to 15 years for each CSC II conviction. Defendant appeals as of right. We affirm.

I. Facts

The complaining witness, who was 11 years old at the time of trial, testified that, on one occasion in March 2006, defendant touched her on her “boobs” and “private spot,” elaborating that by private spot she meant “vagina.” The witness elaborated that defendant put his hand “down” her shirt and touched her “boobs,” and persisted over her protestations. She further elaborated that defendant put his hand inside her panties and touched the “inside” of her “private spot,” causing her discomfort. Complainant stated that defendant asked if she could keep a secret, and proposed that the matter be kept between them.

Complainant further testified that several days later defendant kissed her on her lips, and grabbed her hand and put it on his “P-e-n-i-s,” spelling the word because she was too inhibited to say it. The witness elaborated that this took place over defendant’s clothing, and answered in the affirmative when asked if she felt something where he had placed her hand.

Defendant’s sole issue on appeal is that trial counsel was ineffective, citing the failure to object to certain aspects of the jury instructions given in connection with the charges of CSC II, and to the court’s answer to a question from the jury in connection with the charge of CSC I.

II. Assistance of Counsel

To prove ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to result in deprivation of a fair trial. *Strickland v Washington*, 466 US 668, 687-688, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must further show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

A. Questions from the Jury

The trial court instructed the jury on the penetration element of CSC I as follows: "First, that the defendant engaged in a sexual act that involved entry into the . . . [victim's] genital opening by the defendant's finger. Any entry no matter how slight is enough. It does not matter whether the sexual act was completed." During its subsequent deliberations, the jury asked the court, "What is penetration?" and also, "Did she say he penetrated her vagina?" The court reminded the jury that the instructions spoke of "entry," and that whether it took place was a question of fact for the jury to decide.

Defendant points out that the prosecuting attorney had used the term "penetration" in closing argument, which mirrors the statutory language, see MCL 750.520b(1), but that the jury instruction instead used the term "entry," and posits that the jurors were confused by the use of those different words. Defendant characterized the trial court's answer to the jury's questions as an abdication of the duty to instruct the jury, leaving it for the jury to decide for itself what constituted "penetration." However, in answering the questions, the trial court made it clear that the instruction on "entry" covered the definition of "penetration." And the court properly left for the jury to decide whether complainant's testimony indicated that "entry," as defined, took place.

For these reasons, defendant fails to show that the trial court erred in declining to take issue with the trial court's answers to the jury's questions. "Counsel is not obligated to make futile objections." *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

B. Instructions

On the conduct constituting CSC II, the trial court instructed the jury as follows: "First, that the defendant intentionally touched [the victim] or the clothing covering that area. Defendant argues that the trial court failed to indicate that the touching at issue had to involve complainant's intimate sexual anatomy, and that the court wholly failed to instruct the jury in connection with the prosecution's theory that defendant had forced complainant to touch the clothing covering his genitals. Defendant has indeed brought errors to light.

The court merely implied that, for the charge alleging that defendant touched complainant, through use of the words “touched” and “the clothing covering that area,” that complainant’s intimate anatomy was at issue, not just any touch. See MCL 750.520a(q) (specifying “the victim’s or actor’s intimate parts or . . . the clothing covering the immediate area of the victim’s or actor’s intimate parts”). For purposes of the charge in connection with allegations that defendant had inappropriately touched complainant’s breasts, we surmise that the jury filled in that blank, given that such contact as a pat on the head, or upon a hat covering the head, obviously would not constitute a sex crime, and the evidence in this case related only to sexual touching.

Moreover, the deficiency in the instructions was less likely to cause the jury to find defendant guilty on the basis of benign touching than to hesitate to find him guilty even taking complainant’s testimony at face value, given that this charge concerned contact with breasts, not genitals. Because there may have been some strategic advantage in leaving the jurors confused in this regard, no claim of ineffective assistance can follow from the lack of an objection. See *People v Toma*, 462 Mich 281, 308; 613 NW2d 694 (2000) (where a defendant insisted on testifying, counsel’s failure to ensure that the jury fully understood the defendant’s account of events did not constitute ineffective assistance, because that account was “so unbelievable that defendant was arguably better off letting the jury speculate about what he was really trying to say”).

Similarly, if the court’s failure to instruct the jury in connection with the charge predicated on defendant’s having forced complainant to put her hand on his genitals through his pants had mislead the jury, the result should have been a verdict of not guilty. Because the instructions, as given, failed to specify that elements of the crime could be met from causing the victim to touch defendant in a sexual manner, any failure of the jury to reason out that this was nonetheless the case was more likely to lead to a verdict of not guilty than guilty in connection with the incident involving defendant’s pants. Defense counsel thus had a strategic basis for refraining from asking that the court elaborate.

Again, defendant’s whole appeal is based on allegations of ineffective assistance of counsel. Defendant does not otherwise raise arguments concerning the omissions of key information from the jury instructions, or over the jury having found him guilty of two counts of CSC II despite gaps in the instructions. Because fails to show any errors on the part of defense counsel, we affirm defendant’s convictions and sentences.

Affirmed.

/s/ Deborah A. Servitto

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood