

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERNICIOUS LEE CRAIG,

Defendant-Appellant.

UNPUBLISHED

March 5, 2009

No. 281383

Oakland Circuit Court

LC No. 2006-211804-FH

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction of two counts of second-degree criminal sexual conduct, MCL 750.520c. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent terms of six to 22½ years' imprisonment. We affirm.

On appeal, defendant has submitted a brief through appointed appellate counsel and has also submitted a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4.

I. Appellate Counsel's Brief

We begin with appointed counsel's argument that the trial court erred in refusing to admit into evidence a Care House report that was prepared after the victim's interview. The report identified other men as "offenders," and defendant claims that the evidence was admissible for the purpose of showing that the victim's age-inappropriate sexual knowledge came from a source other than defendant. We disagree.

Michigan's Rape Shield Law, MCL 750.520j, prohibits the use of a victim's sexual conduct except in reference to the victim's relationship with defendant or to show the source of semen, pregnancy, or disease. Defendant relies on *People v Morse*, 231 Mich App 424, 436; 586 NW2d 555 (1998), to support his position that evidence of a victim's prior sexual conduct may be admissible to show that age-inappropriate sexual knowledge was not learned from a defendant and to show that the victim may have had a motive in making false charges against the defendant. However, unlike the young child victims in *Morse*, the victim in this case was 15 or 16 years old when she first reported the assault. There was no intimation at trial that the victim had age-inappropriate sexual knowledge. In addition, defendant failed to show how the evidence

would have been relevant to show bias or how it was probative of the victim's ulterior motive for making the accusation. Finally, so much time took place between when the incident occurred and when it was reported that the "offenders" in the report could have referred to sexual conduct that took place at a time other than, including a time after, the incident. Defendant failed to establish how the Care House report's reference to other offenders was relevant to his case.

II. Defendant's Standard 4 Brief

Defendant first argues that the trial court erred when it denied his motion for a directed verdict. In the motion for a directed verdict, defense counsel asked the trial court to dismiss the charges based on the victim's inconsistent testimony. At the preliminary examination, the victim first testified that the incident occurred in 2002 and then changed her testimony to state it occurred in 2001 after the prosecutor revealed that defendant was not in the state in 2002. This abrupt change, defendant argued, called into question the victim's credibility.

When ruling on a motion for a directed verdict, the court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). Because the motion for directed verdict was based solely on the credibility of the victim's testimony, the motion was properly denied. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997); *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). The jury was entitled to decide whether to believe her testimony. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod on other grounds 457 Mich 885 (1998).

Defendant next argues that he was denied the effective assistance of counsel at trial because counsel failed to call two alibi witnesses who could have testified that defendant was living in Arkansas in 2001. Defendant failed to preserve the issue for appellate review because he did not move for a new trial or a *Ginther*¹ hearing in the lower court. When a defendant fails to preserve the issue of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Generally, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

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

Unlike the year 2002, for which defendant could present pay stubs and official records that he was living in Arkansas, defendant had no documentary proof of his whereabouts for 2001. Instead, he presented the testimony of his sister-in-law, who indicated that defendant was in Arkansas in both May and June of 2001.² She stated that she knew this because she visited Arkansas both those months to see her ill mother-in-law. Defendant argues that counsel was ineffective for failing to call two additional alibi witnesses who would have bolstered his sister-in-law's testimony and confirmed that defendant was in Arkansas. Notably, defendant fails to indicate what the witnesses would have said in their testimony, and, at any rate, counsel's failure to present the two cumulative witnesses did not deprive defendant of a substantial defense. Indeed, the sister-in-law provided alibi testimony as set forth above. Moreover, we note that defense counsel continually attacked the victim's allegations with evidence that she had changed her story, and the victim readily conceded that she had problems remembering the exact date that the offense occurred.

Additionally, although the witnesses initially appeared on defendant's witness list, defense counsel may have made a strategic decision in not calling them, including a decision based on his own assessment of their credibility. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Without a *Ginther* hearing or other reliable proffer, there is simply no way of knowing what testimony the witnesses would have provided or what counsel's motivation was in excluding them. There are no mistakes apparent on the record, and a reversal or remand is not warranted.

Defendant lastly argues that the prosecutor made improper arguments during the rebuttal portion of her closing argument. Because there was no contemporaneous objection and request for a curative instruction, this Court's review of defendant's claim of prosecutorial misconduct is limited to ascertaining whether there was plain error that affected defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Reversal is warranted only if plain error (1) affected the outcome of the proceedings and (2) resulted in the conviction of an innocent person or seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Defendant argued that the victim was lying. He pointed to the fact that the victim was inconsistent regarding the date when the offense occurred. The prosecutor urged the jury to believe the victim, regardless of the fact that she was confused about the dates. The prosecutor questioned why anyone would make such an accusation unless it was true. She pointed out the specificity of the victim's testimony. The prosecutor did nothing improper. She did not personally vouch for the credibility of the complaining witness. She simply argued that the victim was worthy of belief. It would have been improper for the prosecutor to vouch for the credibility of the victim's testimony if there had been some implication that the prosecutor had special knowledge that the victim was testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, the prosecutor was at liberty to argue from the facts of the case that the victim's

² The victim stated that she thought the offense occurred in the spring of 2001.

testimony was worthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007); *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). She did not improperly vouch for the victim's credibility and did not, contrary to defendant's argument, appeal "to the jury to consider matters and possibilities that were not in evidence and never would be in evidence."

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood