

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON DALE PRESSLEY,

Defendant-Appellant.

UNPUBLISHED

February 2, 2010

No. 287915

Cass Circuit Court

LC No. 08-010070-FH

Before: Stephens, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of fourth-degree criminal sexual conduct, MCL 750.520e. He was sentenced to 30 months to 15 years' imprisonment. Defendant appeals as of right. We affirm.

On the evening of November 11, 2006, defendant arrived at a residence where the 14 year-old victim was socializing along with several others. Defendant touched the victim inappropriately several times throughout the evening. The incidents included kissing her on the forehead, touching her lower back and buttocks, lifting her shirt and kissing her abdomen twice, and lowering her jeans and underwear and kissing her vagina three times in succession. Defendant was initially charged with five counts of fourth-degree criminal sexual conduct, which was reduced to three counts at the preliminary examination.

Defendant first argues the jury instructions were insufficient because they did not inform the jury which of the various incidents of touching supported each individual count of criminal sexual conduct. He further argues that the trial court's general unanimity instruction was insufficient, and that the trial court should have issued a special instruction that the jury must unanimously agree that defendant committed the specific act supporting a count before finding him guilty of that count. The issues are waived where defense counsel was twice asked whether he had objections to the jury instructions at trial and twice indicated that he did not. Where a failure to object to jury instructions would not normally preclude review, failing to do so after the trial court specifically inquired about objections constitutes a waiver of the issue. *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000).

Defendant, however, also argues that his trial counsel was ineffective for several reasons, including with respect to the challenged instructions. Thus, we review the instructional issue in that context. "Whether a person has been denied effective assistance of counsel is a mixed

question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We generally review a trial court’s factual findings for clear error and its constitutional determinations de novo. *Id.* However, defendant did not raise this claim in a motion for new trial or an evidentiary hearing, and so our review is limited to mistakes apparent on the record. *People v Randolph*, 242 Mich App 417, 422; 619 NW2d 168 (2000), rev’d in part on other grounds 466 Mich 532 (2002). To prove ineffective assistance, a “defendant must show that his attorney’s conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived a fair trial.” *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). To prove the latter, defendant must show that the result of the proceeding would have been different but for defense counsel’s error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

The jury instructions provided by the trial court clearly indicated that the three counts of criminal sexual conduct arose from the three kisses to the victim’s vagina, and nothing else. As the three kisses were similar in kind, and occurred in quick succession, a special unanimity instruction was not necessary, and the trial court’s general unanimity instruction was sufficient. *People v Cooks*, 446 Mich 503, 524, 529; 521 NW2d 275 (1994). As the jury instructions were not improper, any objection by defense counsel would have been futile, and we therefore do not find that counsel was ineffective. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Next, defendant argues that counsel incorrectly assumed that the trial court ruled against admission of testimony concerning the victim’s past sexual activity, pursuant to the “Rape Shield Statute,” MCL 750.520j. Defendant suggests that the error resulted in trial counsel not questioning witnesses about the victim’s alleged history of falsely accusing other persons of improper sexual contact. This claim is without merit because although the trial court never actually ruled on the applicability of MCL 750.520j, it clearly instructed both counsel that all witnesses were prohibited from testifying to the victim’s past sexual activity without prior approval. In light of this instruction, we do not find that defense counsel’s challenged conduct fell below an objective standard of reasonableness. *Gonzalez, supra*. Moreover, defendant has not demonstrated that but for counsel’s conduct, the result of trial would have been different. *Frazier, supra*.

Defendant’s third and fourth claims can be addressed simultaneously. Defendant argues that trial counsel should have cross-examined the victim about her allegedly prior false accusations. He further contends that his trial counsel should have called two additional witnesses who had knowledge of those accusations. It is a well-established rule that “[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). “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 Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Accordingly, this Court finds no reason to second-guess trial counsel’s strategic decisions. Further, we note that while defendant has showed other paths his trial counsel could have taken, he has failed to articulate how failure to do so prejudiced him. *Gonzalez, supra* at 644.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly