

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of HERMAN RAMIK KERSEY,
Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

HERMAN RAMIK KERSEY,

Respondent-Appellant.

UNPUBLISHED

January 12, 2012

No. 301106

Wayne Circuit Court

Family Division

LC No. 07-470263

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Following a bench trial, respondent appeals as of right from the order adjudicating him responsible for committing third degree criminal sexual conduct, MCL 750.520d(1)(a) (victim at least 13 but under 16 years old). Because respondent was not denied the effective assistance of counsel and sufficient evidence supported finding him responsible for the charged crime, we affirm.

On August 16, 2009, 15-year-old K.W. was visiting her mother's home for the summer when she and several female friends encountered several teenage males walking in the neighborhood. K.W. spoke to one of the males, whom she identifies as "Eric" for a few minutes, then followed him to a house where she remained on the front porch, but continued to talk to him through a screen door. K. W. was then pushed into the home from behind. According to K.W., both Eric and respondent kissed her while she was in the home, and both forcibly shoved their penises into her mouth.

Respondent first argues on appeal that he was denied the effective assistance of counsel at trial. Because no *Ginther*¹ hearing was held, this Court's review is limited to those mistakes

¹ *People v Ginther*, 390 Mich 436, 443; 212 Nw2d 922 (1973).

apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). The determination whether respondent was deprived of the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of respondent's constitutional right to effective assistance of counsel. *Id.* To establish ineffective assistance of counsel, respondent must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Respondent first argues that his counsel was ineffective for failing to investigate and present his alibi defense, including respondent's testimony and testimony from "Von." We disagree.

Respondent was entitled to have his counsel prepare, investigate, and present all substantial defenses. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). A substantial defense is one that could have made a difference in the outcome of the trial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Failure to call a witness can constitute ineffective assistance of counsel, but generally only where it deprived respondent of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). To establish that he was deprived of a substantial alibi defense, respondent must thus show that his proposed alibi witnesses would have supported his defense. *Kelly*, 186 Mich App at 527. Here, respondent has failed to do so.

Respondent has not established that there were any alibi witnesses who would have supported his defense. A police detective testified that respondent said that he was at the mall until 6:00 p.m. on the day that the incident occurred and that respondent did not provide any other information related to his trip to the mall. There is no indication that respondent identified anyone who may have been with him at the mall or anyone who may have seen him there. Respondent did not state that Von was with him at the mall, nor is there any indication how Von would have testified at trial. Because respondent has not named any other alibi witnesses or indicated their expected testimony, he has not established that he was denied a substantial alibi defense.

Respondent also argues that trial counsel was ineffective for failing to inform respondent of his right to testify on his own behalf. Again, we disagree.

There is nothing on the record regarding respondent's waiver of his right to testify. The trial court has no duty to advise defendant of his right to testify or obtain an on-the-record waiver of that right. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991). And, here trial counsel did not make any statements on the record regarding respondent's waiver of his right to testify; counsel simply did not call respondent as a witness. However, we note that defendant's argument on this issue is essentially that he was deprived of the right to present his alibi defense in his own words. Because a detective testified that respondent had unequivocally stated that he had no information about the incident because he was at the mall on that date and at the time of the incident, respondent's testimony was not necessary to establish an alibi.

Respondent's alibi defense was conveyed to the trial court. Respondent has failed to establish ineffective assistance of counsel on the record before this Court.

Finally, respondent argues that the evidence presented was insufficient to establish that he was responsible for committing the offense. We disagree.

Respondent's challenge to the sufficiency of the evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). This Court must review the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007).

Respondent's sole argument with respect to the sufficiency of the evidence turns on his identity as the perpetrator. According to respondent, there was little investigation to establish his identity as the perpetrator and the witness testimony was inconsistent and hazy, at best.

Identity is an essential element of every criminal offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). The positive identification of a defendant by witnesses may be sufficient to support the defendant's conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Moreover, the credibility of a witness giving identification testimony is a question for the trier of fact that this Court does not resolve anew. *Id.*

Although admittedly the police did not investigate respondent's alibi or find other witnesses who could have testified that respondent was present on the day in question, the prosecution did present the testimony of K.W. and her friend, who had both met respondent before that day and knew him by name. There was no doubt in K.W.'s mind that respondent forced his penis into her mouth. Further, K.W.'s friend, who had previously met respondent, testified that she saw respondent downstairs in the house with K.W. and upstairs sitting on top of K.W. Viewing the evidence in a light most favorable to the prosecution, there was ample evidence to establish that respondent committed sexual penetration with a person at least 13 but less than 16 years old.

Affirmed.

/s/ Christopher M. Murray

/s/ Michael J. Talbot

/s/ Deborah A. Servitto