

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL LASHION DIXON,

Defendant-Appellant.

FOR PUBLICATION

August 24, 2004

9:05 a.m.

No. 246739

Oakland Circuit Court

LC No. 02-185376-FC

Official Reported Version

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

COOPER, J.

Defendant Darrell Lashion Dixon appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC),¹ first-degree home invasion,² and felonious assault.³ Defendant was sentenced to twenty-five to fifty years' imprisonment for each CSC conviction, ten to twenty years' imprisonment for his first-degree home invasion conviction, and two to four years' imprisonment for his felonious assault conviction. We reverse and remand for further proceedings consistent with this opinion.

I. Facts

Defendant's convictions arose from the alleged forcible rape of his ex-girlfriend. The complainant testified that on June 29, 2002, defendant entered her apartment, wearing a ski mask and gloves, by kicking in her door. Defendant threatened the complainant and her friend, Tyrone Mason, with a machete. After defendant coerced Mr. Mason into leaving, defendant twice sexually assaulted the complainant with her two-year-old son present.

II. Ineffective Assistance of Counsel

¹ MCL 750.520b.

² MCL 750.110a(2).

³ MCL 750.82.

Defendant raises several claims of ineffective assistance of counsel. Specifically, defendant alleges that defense counsel was ineffective for failing to meet with him prior to trial, to file a notice of intent to present evidence pursuant to the Michigan rape shield law, to lay the proper foundation for the admission of the complainant's 911 call, to present the defense of consent to the CSC charges, and to object at defendant's sentencing hearing to the scoring of offense variable (OV) 10. Absent a *Ginther*⁴ hearing, our review is limited to the existing record.⁵

Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise.⁶ To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.⁷ Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.⁸

Defendant first argues that defense counsel's failure to meet with him until immediately before the preliminary examination and her complete failure to meet with him between the preliminary examination and trial constituted a "complete denial of counsel" at a "critical stage" of the proceeding, and that he is entitled to a new trial without any showing of substantial prejudice.⁹ "The pre-trial period constitutes a 'critical period' because it encompasses counsel's constitutionally imposed duty to investigate the case."¹⁰ However, defendant concedes elsewhere in his brief that defense counsel did, in fact, meet with him before the preliminary examination.¹¹ The preliminary examination transcript reveals that defense counsel had been apprised of the relevant facts of the case, and that she asked the complainant questions designed to undermine her credibility and reveal her motivation for accusing defendant. Although defense counsel's errors at trial may have resulted from her lack of attention to defendant's case prior to trial, defendant has failed to provide any evidence in this regard. We, accordingly, decline to grant defendant a new trial on this basis alone.

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁵ *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

⁶ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

⁷ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

⁸ *Id.* at 600.

⁹ *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

¹⁰ *Mitchell v Mason*, 325 F3d 732, 743 (CA 6, 2003).

¹¹ See *Dick v Scroggy*, 882 F2d 192, 197 (CA 6, 1989), cited in *Mitchell*, *supra* at 744 (rejecting the defendant's ineffective assistance claim as counsel actually interviewed the defendant in a thirty to forty-five minute meeting).

Defendant next argues that defense counsel was ineffective for failing to lay a proper foundation for the admission of the complainant's recorded conversation with a 911 operator. The record reveals that defense counsel unsuccessfully attempted to lay the proper foundation. Defense counsel did elicit the substance of the conversation between the complainant and the 911 operator on cross-examination of the complainant. The complainant testified to waiting an hour and a half to call 911, claimed that she was not upset when she called and spoke to the operator in an extremely calm voice, and admitted to lying regarding the nature of her emergency.

Although the substance of the call reached the jury, defendant contends that hearing the complainant's calm voice during the call was necessary to undermine her credibility. We agree. Without any physical evidence this case amounted to a close credibility contest. Defense counsel's failure to have admitted evidence critical to the issue of the credibility of the complainant was likely outcome determinative.¹² Therefore, defendant is entitled to a new trial on this ground.

Defendant asserts that defense counsel was ineffective for failing to present the defense of consent to the first-degree CSC charges, and by failing to call defendant to testify that his sexual interaction with the complainant was consensual. However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy,"¹³ which we will not second-guess with the benefit of hindsight.¹⁴ Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.¹⁵ The record reveals that defense counsel raised the defense of consent through her cross-examination of the complainant, and sought to bolster that defense by attacking her credibility. Defense counsel bolstered this theory in closing argument. As the defense of consent was actually raised, defendant's contention is without merit.

Defendant also contends that defense counsel was ineffective for failing to file a notice of intent to introduce evidence of the complainant's past sexual conduct with defendant as required by the Michigan rape shield law.¹⁶ As a result of this error, the jury did not hear evidence regarding an incident of consensual intercourse between defendant and the complainant a week before the alleged sexual assault.

At trial, defense counsel conceded that she had not complied with the notice requirement set out in MCL 750.520j(2), but argued that the purpose of the notice requirement was fulfilled,

¹² The failure to introduce this evidence for the jury's consideration had the same impact regardless of whether it resulted from counsel's ineffectiveness or, as Judge Schuette's opinion concludes, from the trial court's error.

¹³ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

¹⁴ *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

¹⁵ *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

¹⁶ MCL 750.520j.

as the prosecution was made aware of the prior sexual relationship by the complainant's testimony at the preliminary examination. Defense counsel further argued that the evidence was admissible because it was relevant and supported defendant's theory that the intercourse was consensual in this instance.¹⁷

This Court has held that failure to comply with the notice requirement of MCL 750.520j does not necessarily preclude the admission of evidence of past sexual relations between a victim and a defendant.¹⁸ In *People v Lucas (On Remand)*, this Court found that the exclusion of evidence regarding past sexual activity between the defendant and the victim could violate a defendant's Sixth Amendment right of confrontation.¹⁹ Where no notice is filed, the trial court must determine whether the evidence is admissible on a case-by-case basis considering whether the defendant's timing of the offer to produce such evidence suggests an improper tactical purpose,²⁰ and whether the probative value of the evidence outweighs its prejudicial effect.²¹

The trial court failed to consider on the record the import of defense counsel's timing and to weigh the probative value of this evidence. It is clear from the record, however, that the trial court determined to exclude this evidence based on defense counsel's failure to file a notice of intent. Evidence of the recent consensual sexual activity between defendant and the complainant is highly probative and very likely outcome determinative. Defense counsel was constitutionally deficient for failing to file the required notice of intent to produce this evidence. The failure of defense counsel to meet with her client between the preliminary examination and trial in this capital case; the failure to lay a proper foundation for admission of the 911 tape, in addition to the failure to provide notice pursuant to MCL 750.520j(2), cumulatively and effectively deprived defendant of his Sixth Amendment right to counsel. Defendant is, therefore, entitled to a new trial.

Defendant also challenges the trial court's denial of his motion for a *Ginther* hearing on remand from this Court and raises several issues with regard to his sentence. It is axiomatic that when this case was remanded to the trial court, it was for the purpose of holding the *Ginther* hearing. However, as we have determined that defendant is entitled to a new trial, the issue is now moot.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper

¹⁷ See *People v Perkins*, 424 Mich 302, 307-308; 379 NW2d 390 (1986) (evidence of past sexual relationship between a defendant and a victim is probative).

¹⁸ *People v Lucas (On Remand)*, 193 Mich App 298, 303; 484 NW2d 685 (1992).

¹⁹ *Id.* at 302.

²⁰ *Id.* at 302-303.

²¹ *Perkins, supra* at 307-308.