

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PEARRIE ALLA KHAN,

Defendant-Appellant.

UNPUBLISHED

December 17, 1996

No. 180443

Recorder's Court

LC No. 93-09908

Before: Griffin, P.J., and T.G. Kavanagh* and D.B. Leiber**, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of criminal sexual conduct in the second degree, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant was sentenced to three years' probation. Defendant appeals as of right. We affirm.

On appeal, defendant claims that he was denied the effective assistance of counsel because his trial attorney elicited an opinion from the victim's aunt that the victim had told the truth. However, there was no evidentiary hearing on this issue below. Therefore, appellate review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), our Supreme Court adopted the federal standard for determining whether a defendant has been denied effective assistance of counsel as set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness *and* that there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Pickens*, *supra* at 312, citing *Strickland*, *supra* at 691-692; see *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996); *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Effective assistance of counsel is

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

** Circuit judge, sitting on the Court of Appeals by assignment.

presumed, and the defendant bears a heavy burden of proving otherwise. *Eloby, supra* at 476; see *Unites States v Cronic*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

We conclude that defendant has failed to meet his burden of establishing that defense counsel made a serious error that affected the result of trial. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 666, 687-688; 521 NW2d 557 (1994). Here, the adolescent victim gave clear, detailed testimony that, after defendant inquired about her physical development and sexual behavior, he touched her vagina and then rubbed her breast. The victim further testified that, during the incident, the victim's aunt (defendant's daughter) called on the telephone. The victim testified that she answered the telephone, told her aunt what had just occurred, and was advised to run next door. The victim's aunt acknowledged that, based on her telephone conversation with the victim, she advised the victim to run next door. Thereafter, defense counsel extracted the victim's aunt's opinion that she believed "some of" what the victim had told her on the phone.

After summarizing the trial testimony, the trial court concluded that "there is no doubt in this Court's mind about touching of the vaginal area and moving up to the breast." In reaching this finding, the trial court placed no emphasis on the victim's aunt's belief regarding the victim's veracity. Assuming, without deciding, that defense counsel's questions to the victim's aunt were both unreasonable and nonstrategic, we conclude under the circumstances of the present case that defendant has failed to sustain his burden of establishing that, absent the alleged error, the factfinder would have had a reasonable doubt respecting defendant's guilt. *Pickens, supra* at 312. Therefore, we hold that defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Richard Allen Griffin
/s/ Thomas Giles Kavanagh
/s/ Dennis B. Leiber