

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDRIC LAMONT CARTER,

Defendant-Appellant.

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UNPUBLISHED

February 18, 1997

No. 188175

Kent Circuit Court

LC No. 94-002726-FC

Before: Sawyer, P.J., and Neff and A. L. Garbrecht,\* JJ.

PER CURIAM.

Defendant appeals as of right his conviction of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Determined to be both an habitual offender (second), MCL 769.10; MSA 28.1082, and a second time sexual offender, MCL 750.520f; MSA 28.788(6), defendant was sentenced to twenty-five to forty-five years' imprisonment. We affirm.

The complainant alleged that defendant had engaged in sexual contact and penetration with her when she was six years old. Defendant claimed a defense of alibi, stating that he was in Chicago when the incident was alleged to have occurred.

I

Defendant first contends that the evidence presented at trial was insufficient to support his conviction for first-degree CSC. Defendant does not dispute that the complainant may have been a victim of first-degree CSC, but argues that the evidence was insufficient to prove beyond a reasonable doubt that defendant committed the crime.

In reviewing the sufficiency of the evidence in a criminal case, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). The question is not whether

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

there was conflicting evidence, but whether there was evidence which the

jury could choose to believe which would justify convicting the defendant. *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994), aff'd sub nom *People v Peterson*, 450 Mich 349 (1995). This Court must not interfere with the jury's role of determining the weight and credibility to be given the testimony of witnesses. *Wolfe, supra* at 514.

First-degree criminal sexual conduct is defined by statute as follows:

(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age. [MCL 750.520b(1)(a); MSA 28.788(2)(1)(a).]

In this case, the prosecutor presented sufficient evidence which, if believed by the jury, would justify defendant's conviction. The complainant, who was nine years old at the time of trial, testified that at some time while she was living at 893 Division Avenue in Grand Rapids, defendant placed her on the couch, removed her clothing and penetrated her vagina with his penis. The complainant's mother testified that she and the complainant lived at the Division Avenue address from 1991 to 1993 and that defendant often spent the night with them. Although there was conflicting testimony as to when this incident occurred and whether defendant was in Grand Rapids or Chicago at the time, several witnesses testified that defendant was in Grand Rapids during December 1991. The complainant's mother testified that defendant spent the night at her house on Division Avenue several times during December 1991 and that the complainant was present. There was also medical testimony that a tear in the complainant's hymen was consistent with and suggestive of sexual abuse.

Viewed in the light most favorable to the prosecution and leaving the determination of the credibility of witnesses to the jury, the evidence was sufficient to permit a rational trier of fact to find that the essential elements of first-degree CSC were proven beyond a reasonable doubt.

## II

Next, defendant contends that he was denied effective assistance of counsel because his trial counsel failed to object when a witness, during cross-examination by the prosecutor, made reference to defendant's prior incarceration.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In determining whether an error was prejudicial, the defendant must overcome the presumption that, under the circumstances, the challenged action could be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The defendant must further show a reasonable probability that, but for the error, the result of the

proceedings would have been different. *Id.* This Court will neither substitute its judgment for that of counsel regarding matters of trial strategy, nor assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Failure of a defendant's trial counsel to object to brief improper questioning by the prosecutor is not necessarily ineffective assistance. *People v Lawless*, 136 Mich App 628, 635; 357 NW2d 724 (1984). Defense counsel could properly refrain from objecting where an objection would emphasize the testimony in the minds of the jurors and where no further reference to the testimony was made by the prosecutor. *Id.* In this case, the witness' reference to defendant's prior incarceration was brief and the prosecutor made no further reference to the testimony. Because this one witness' testimony was the only reference made at trial to defendant's prior incarceration, an objection could have emphasized the testimony in the minds of the jurors. Defendant has not overcome the presumption that, under the circumstances, the challenged action could be considered sound trial strategy, and his claim of ineffective assistance of counsel must fail.

### III

Finally, defendant contends that his sentence is excessive and not proportionate to his conviction for the crime of first-degree CSC. We disagree.

The sentencing guidelines do not apply to habitual offenders like defendant, and it is inappropriate to use them when reviewing defendant's sentence. *People v Gatewood*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Nonetheless, the principle of proportionality announced in *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990) applies.

The maximum sentence for a conviction of first-degree CSC is life imprisonment. MCL 750.520b(2); MSA 28.788(2)(2). Defendant was also determined to be an habitual offender (second), MCL 769.10; MSA 28.1082, and a second time sexual offender, MCL 750.520f; MSA 28.788(6). Considering the seriousness of the instant offense, including defendant's threats to harm his young victim, and defendant's prior record, we conclude that defendant's sentence does not violate the doctrine of proportionality.

Affirmed.

/s/ David H. Sawyer

/s/ Janet T. Neff

/s/ Allen L. Garbrecht