

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID RUSSELL SCHULZ,

Defendant-Appellant.

UNPUBLISHED

October 7, 1997

No. 196092

Macomb Circuit Court

LC No. 95-001726-FC

Before: Markman, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b) (force or coercion). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12(1)(a); MSA 28.1084(1)(a), to five to fifteen years in prison for each count. Defendant now appeals as of right. We affirm.

Defendant first argues the evidence presented at trial was insufficient to sustain a conviction for third-degree criminal sexual conduct. In addressing a challenge to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational jury could find that the elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). The only issue at trial was whether the sexual relations between defendant and the complainant were consensual. Defendant testified that he and the complainant had consensual sex. The complainant testified that she did not want to have sexual relations with defendant and he threatened to harm her if she did not comply with his demands. Defendant contends the complainant's testimony was not corroborated and not credible. However, defendant fails to recognize that the prosecution is not required to offer corroborating evidence of the complainant's version of the events to sustain a conviction. MCL 750.520h; MSA 28.788(8). Moreover, this Court generally refuses to reverse a conviction based on the credibility of a witness, and we decline to do so here. *People v Hughes*, 217 Mich App 242, 248; 550 NW2d 871 (1996).

Defendant next argues the jury's verdict was against the great weight of the evidence; therefore, the trial court erred by denying his motion for a new trial. We disagree. The trial court did not abuse its

discretion in denying defendant's motion, because the jury's verdict was not manifestly against the clear weight of the evidence. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993); *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). It was reasonable for the jury to accept the complainant's testimony rather than defendant's.

Finally, defendant argues he was denied the effective assistance of counsel. This Court's review of this issue is limited to the record because a *Ginther*¹ hearing was not held. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Defendant's claim is without merit. He has not met his burden of establishing that counsel's performance was deficient and that the representation was prejudicial to him to the extent that, absent counsel's alleged errors, he probably would have been acquitted. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant first contends counsel was ineffective because he failed to file a motion to suppress the statements defendant made to police at the time of his arrest. Defendant argues his statements should have been suppressed because they were the product of an invalid search warrant. Contrary to defendant's assertion, the record reflects that the search warrant was based upon probable cause. Moreover, defendant's statements were taken after he had been advised of and voluntarily waived his *Miranda*² rights. Accordingly, counsel's motion to suppress would have been futile, and his failure to make the motion does not render his assistance ineffective. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant next argues counsel's failure to conduct a pretrial investigation and subpoena certain character witnesses to defend his position at trial was erroneous. The decision whether to call a witness is a matter of sound trial strategy, which this Court will not second guess. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). In order to overcome the presumption of sound trial strategy, defendant must show that counsel's failure to call character witnesses deprived him of a substantial defense that would have affected the outcome of the proceedings. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Nothing in the record suggests that if character witnesses had been presented, the jury would have acquitted defendant.

Finally, defendant argues that counsel's failure to object to the prosecutor's elicitation of and reference to hearsay denied him a fair trial. Defendant's argument is without merit. Counsel did object when the treating physician testified that the complainant told him she had been sexually assaulted. Moreover, the challenged references by the prosecutor were all proper comments on the evidence in the case; therefore, counsel's failure to object did not result in any prejudice to defendant.

Affirmed.

/s/ Stephen J. Markman

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).