

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY MUSGROVE,

Defendant-Appellant.

UNPUBLISHED
October 28, 1997

No. 195464
Livingston Circuit Court
LC No. 95-009057-FH

Before: Young, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). He was sentenced as a fourth habitual offender to twenty to sixty years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that he was denied effective assistance of counsel because his trial counsel failed to fully investigate and prepare for trial, failed to develop a close working relationship with defendant, and failed to present a defense. Defendant presented these arguments in an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1976). This Court must review the facts contained on the record and decide whether counsel's performance was deficient measured against prevailing professional norms and whether there is a reasonable probability that, but for counsel's performance, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

Defendant's argument that his trial counsel was ineffective for failing to fully investigate is based on his claims that counsel should have called certain witnesses for the defense. However, the decision whether to call or question witnesses is presumed to be a matter of trial strategy, *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997), and this Court will not find assistance of counsel to be ineffective based merely on failed attempts at reasonable trial strategies, *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Viewing the evidence presented at the *Ginther* hearing, there is nothing to indicate that trial counsel's decision was unreasonable. Trial counsel set forth reasonable explanations as to why defendant's requested witnesses would do more harm than good and defendant offers no valid rebuttal to his counsel's theory. Further, defendant testified at the hearing that he agreed with his counsel's strategy at the time of trial. Because this Court will not view trial counsel's effectiveness with the benefit of hindsight, defendant has failed to rebut the presumption that counsel acted upon a sound trial strategy. *Stanaway, supra*, at 687.

Defendant also asserts that his trial counsel was ineffective for failing to establish a close working relationship; defendant's argument is again based largely on counsel's failure to concur with defendant's desire to call certain witnesses, as well as on the allegedly inadequate amount of time counsel spent preparing for trial. The testimony at the hearing varied as to how much time defendant and his counsel spent discussing the case.

However, defense counsel testified to several detailed discussions with defendant and testified to the advice he offered to defendant in response to several of defendant's questions and ideas about the case. Further, defendant himself testified to several conversations with his counsel and appeared to understand and, at least at the time of trial, agree with counsel's trial strategies. While such trial strategies may not have resulted in acquittal for defendant, there is nothing in the record to indicate that the strategies were unreasonable or that a change in strategy would have been outcome determinative. Therefore, we conclude that defendant has failed to establish that he was denied the effective assistance of counsel at trial.

Next, defendant argues that the evidence presented was insufficient to support the jury's verdict and that the verdict was against the great weight of the evidence. Again, we disagree. At the close of the prosecution's case, defendant moved for a directed verdict. The trial court denied defendant's motion, apparently finding that any other result would require weighing the credibility of the witnesses, an improper consideration under a sufficiency of the evidence analysis. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). This Court tests the validity of the motion by the same standard as the trial court; we must view the evidence in the light most favorable to the prosecution and decide whether the evidence is sufficient to justify a reasonable trier of fact in finding that the elements were proved beyond a reasonable doubt. *Id.* at 515; *People v Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997).

Defendant's conviction required a showing that he engaged in sexual penetration with another person and that the other person was between the ages of thirteen and sixteen. MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). "Sexual penetration" is defined as any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body. MCL 750.520a; MSA 28.788(1).

Defendant's argument that the evidence was insufficient to support his conviction was based on his theory that the only evidence presented was the victim's testimony and that the victim was not credible. As stated above, however, a review of the sufficiency of the evidence precludes this Court from weighing the evidence or making determinations as to witnesses' credibility. *Wolfe, supra*, at 514-515. In this case, the victim testified to the essential elements of the crime: she stated that she was fifteen years old and that defendant had penetrated her vagina with his fingers. Further corroboration was not required. MCL 750.520h; MSA 28.788(8). Therefore, the evidence presented was sufficient to support the jury's verdict that defendant was guilty of the crime charged.

Next, the trial court also denied defendant's motion for a new trial, finding that the guilty verdict was not against the great weight of the evidence. In determining whether a verdict is against the great weight of the evidence, the trial court cannot substitute its judgment for that of

the factfinder. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 210; 457 NW2d 42 (1990). On appeal, this Court reviews the trial court's grant or denial of the motion for a new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 476-477; 511 NW2d 654 (1993). The test is whether the verdict is against the overwhelming weight of the evidence, *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990). This Court should give deference to the trial court's ability to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice. *Id.*

In the instant case, the trial court, in denying defendant's motion, noted that the case was decided as a matter of credibility, the jury believed the victim, and defendant chose not to testify. Again, defendant's argument on appeal rests primarily on the victim's lack of credibility. It is not for this Court to resolve questions of credibility anew. *In re Robinson*, 180 Mich App 454, 463-464; 447 NW2d 765 (1989). Further, in looking at the weight of evidence in this case, the only evidence presented was the victim's testimony which, as stated above, supported the jury's verdict. Therefore, it cannot be said that the verdict was against the overwhelming weight of the evidence and the trial court did not abuse its discretion in denying defendant's new trial motion.

Next, defendant argues that the trial court erred in denying his motion in limine to suppress two previous convictions. Because defendant did not testify, and did not indicate any intention to testify nor the nature of such testimony, this issue is unpreserved for review by this Court. *People v Finley*, 431 Mich 506, 509, 521, 526; 431 NW2d 19 (1988); *People v Gaines*, 198 Mich App 130, 131; 497 NW2d 210 (1993).

Defendant next argues that he was denied a fair trial as the result of repeated instances of prosecutorial misconduct. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Misconduct must be determined on a case by case basis, reviewing the prosecutor's comments in their context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

First, defendant argues that the prosecutor intended to prejudice the jury by eliciting from the witness that defendant fathered a child out of wedlock. However, the redirect examination to which defendant refers was in response to issues raised by defendant during cross-examination, regarding the victim's relationship with defendant's girlfriend. Although the prosecutor's questions may have been of minimal relevance, they did not constitute error requiring reversal where they were made in response to issues initially raised by defense counsel. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Further, the prosecutor quickly dropped such line of questioning. Defendant was not denied a fair trial, in our judgment, as a result of the brief remarks.

Next, defendant argues that the prosecutor erred in closing argument by referring to the victim's and defendant's ages and experiences with the opposite sex. Defendant objected at trial that the statements constituted improper references to "sexual matters." The trial court instructed the prosecutor on the proper scope of his statements and the prosecutor agreed to change his language. The prosecutor then continued his closing argument, arguing that defendant, by virtue of his age and experience, would have likely been aware of the effects of alcohol or marijuana on the victim. A prosecutor is free to argue the evidence and all reasonable inferences arising from it to the jury. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Viewing the prosecutor's comments in

context, it appears that the prosecutor was arguing that defendant had knowledge of the victim's physical and mental reactions to alcohol and marijuana, not an unreasonable inference from the evidence presented that defendant had on several previous occasions, as well as the night of this alleged incident, provided the victim with these drugs. Viewing these comments in context, we conclude that defendant was not denied a fair trial on the basis of the prosecutor's remarks.

Defendant's remaining allegations of prosecutorial misconduct are unpreserved and are reviewed by this Court only for a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Upon review of the alleged errors in context, we find no errors which could not have been cured by an objection and timely instruction below or which would result in a miscarriage of justice for failure to review.

Finally, defendant argues that the trial court abused its discretion in imposing his sentence. We again disagree. First, defendant argues that the trial court erred in its scoring for offense variable 13. The Supreme Court recently held that scoring calculations do not involve questions of law and are undertaken in the discretion of the trial court. *People v Mitchell*, 454 Mich 145, 176-178; 560 NW2d 600 (1997). Relief for such challenges is unavailable on appeal. *Id.*

Next, defendant challenges the proportionality of his sentence under *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990), which requires that a sentence be proportionate to the seriousness of the crime and the defendant's prior record. This Court reviews the trial court's imposition of sentence for an abuse of discretion. *People v Coles*, 417 Mich 523, 530; 339 NW2d 440 (1983), overruled in part on other grounds. *Milbourn*, *supra*. Defendant argues that, although sentencing guidelines do not apply to habitual offenders, they should be considered in determining the proportionality of his sentence. However, any reference to the guidelines within this Court's review of proportionality is improper. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). We do not find any abuse of discretion on the trial court's part in its sentence determination.¹

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Stephen J. Markman

/s/ Michael R. Smolenski

¹ Defendant also argues that the trial court "unduly emphasized the aspect of punishment." A review of the trial court's statements immediately preceding sentencing indicates that the court did, in fact, intend severe punishment; however, the court also set forth its consideration of rehabilitation, deterrence, protection for the public, harm to the victim, defendant's other bad acts toward the victim, and defendant's criminal history. The trial court's considerations were proper and there is nothing to indicate that defendant's sentence, as a fourth habitual offender, was disproportionate to the seriousness of the crime and defendant's prior record.