STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL WARREN PERKINS,

Defendant-Appellant.

UNPUBLISHED
December 11, 1998

No. 203178
Cass Circuit Court
LC No. 96-008807 FH

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Defendant Darrell Warren Perkins was convicted in a jury trial of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), for which he was sentenced to ten to fifteen years' imprisonment. He now appeals as of right. We affirm.

I

This conviction arose from an incident that occurred when the victim was ten-years old. She testified that defendant took her fishing with his stepson and another boy. While the boys were fishing, defendant took the victim into woods nearby, where he grabbed her, pulled her pants down, and put his penis between her legs. Defendant then masturbated in front of the victim until "white stuff was squirting out." The victim did not report the incident for over a month. During that time, she continued to come to defendant's house to play with defendant's stepdaughter. When she reported the incident, she told her parents and police that defendant had penetrated her. However, after a doctor had examined the victim's vagina, found no evidence of bleeding or scar tissue, and caused her pain when the doctor put his finger "superficially inside" her vagina, she said that defendant touched her. Shawn Loughrige, a state police officer, testified that when he asked defendant for the truth as to what had happened, defendant replied that if he told Loughrige the truth, he would go to prison.

At trial, defendant denied that the incident occurred. He also denied admitting guilt to Loughrige, claiming that he told Loughrige that if he said that the allegations were true, he would go to prison.

II

In his first argument, defendant claims the trial court committed error necessitating reversal in allowing cross-examination of himself and his wife as to their sexual practices and marital problems. Defendant failed to properly object to the testimony about which he now complains,[1] thus waiving appellate review in the absence of manifest injustice. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995). After a careful review of the record, we find no manifest injustice in the admission of the now-challenged testimony.

III

In his second argument, defendant claims he was denied effective assistance of counsel. We disagree.

To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Because no *Ginther* hearing was held, this Court's review is limited to errors apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Defendant claims that his counsel was ineffective because he asked defendant whether he had molested any other children at the complex where he and the victim lived. Read in context, we find this question to be a valid attempt to demonstrate that the acts alleged by the victim were false because they were out of character with his previous behavior. Defendant has failed to overcome the presumption that counsel's action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant also claims that counsel was ineffective because he failed to cross-examine the victim about whether she saw a tattoo on defendant's penis. The record contains no evidence that such a tattoo exists.[2] Further, defendant again has not overcome the presumption that counsel's decision to refrain from questioning the young victim on this matter was a matter of trial strategy.

Finally, defendant claims defense counsel was unprepared for a *Walker* hearing regarding the admissibility of a post-polygraph statement to police.. Even if we were to assume that counsel's conduct fell below an objective standard of reasonableness, there is nothing in the record to indicate that, but for counsel's alleged lack of preparation, the outcome of the proceeding would likely have been different. *Stanaway, supra.*

IV

Defendant next claims the trial court abused its discretion in admitting a post-polygraph statement to police. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Defendant claims the probative value of the statement – that if he told police the truth he would go to prison – was outweighed by its prejudicial effect because it was obvious to the jury that it was made in the course of a polygraph examination. We disagree. The court carefully limited the scope of the testimony to statements made after the polygraph, and we find no support for defendant's claim that challenged testimony suggested that he had submitted to a polygraph examination. The trial court did not abuse its discretion in admitting defendant's statement.

V

In his final argument, defendant challenges the sufficiency of the evidence. We review this issue de novo. *People v Medlyn*, 215 Mich App 338, 341; 544 NW2d 759 (1996). In doing so, we view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. Id.

In the present case, the victim testified that defendant grabbed her, pulled her pants down, put his penis between her legs, and then masturbated to ejaculation in front of her. Defendant denied the victim's account. On appeal, defendant's entire argument questions whether the victim's story is worthy of belief. This argument must fail, because the determination of witness credibility is the function of the jury and not of this Court. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Richard A. Bandstra

[1] In two of the four instances complained of, defendant's objection at trial was that the evidence was irrelevant and beyond the scope of cross-examination. He now argues that this evidence was an improper attempt to show that defendant's marital problems may have been a motive for molesting the victim. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). In one of the remaining instances, defendant failed to object at all and thus did not preserve the issue. See *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). In the final instance, defendant did not object to the question until after it had been answered; the objection was untimely. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997).

[2] In support of his claim, defendant has attached an affidavit to his brief asserting that he has such a tattoo and that he told his attorney about it. We cannot consider this affidavit, as it is not part of the lower court record. *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992).