

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY ANTHONY ORLANDO,

Defendant-Appellant.

UNPUBLISHED

March 21, 2000

No. 208842

Macomb Circuit Court

LC No. 96-000910 FC

Before: Murphy, P.J., and Hood and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(1)(a), for oral sexual penetration of a three-year old girl. He was sentenced to eight to twenty years' imprisonment, and appeals as of right. We affirm.

The victim was three years old when she resided with defendant, the live-in boyfriend of her mother. On occasion, the victim was left alone in the residence with defendant. At some point, the victim began to "act out," and she moved from her mother's home to that of her biological father. Approximately two years later, the victim was being cared for by a family friend when she discovered a pornographic magazine in the bathroom. The victim pointed to a picture in the magazine and made a comment about defendant. The victim later told her father and grandmother that defendant had inserted his penis into her mouth when she resided with him.

Defendant argues that his conviction must be reversed due to the ineffective assistance of counsel, and due to prosecutorial and police misconduct. We disagree. To justify a reversal based on ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and the resulting prejudice deprived him of a fair trial. *People v Murray*, 234 Mich App 46, 65; 593 NW2d 690 (1999). Effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The testimony of trial counsel is essential for supporting a claim of ineffective assistance of counsel. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). In the absence of such testimony, our review is limited to mistakes contained within the record. *Id.* We

will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's performance with the benefit of hindsight. *Id.*

Defendant first argues that trial counsel was ineffective for failing to object to Detective Linda DePrez's testimony that she interviewed defendant in the Macomb County Jail where he was held for child support arrearages. We disagree. While the information was elicited on direct-examination, defense counsel also questioned Detective DePrez regarding defendant's incarceration on four different occasions during cross-examination. Testimony regarding defendant's jail stay was also elicited by defense counsel on direct-examination of defendant. Additionally, in closing arguments, defense counsel commented on defendant's thirty-day jail sentence and its impact on his state of mind and health. Accordingly, defense counsel's failure to object to this testimony was trial strategy because it was elicited in order to demonstrate the conditions under which defendant gave statements to the police. *Rockey, supra; Effinger, supra.*

Defendant next argues that trial counsel was ineffective for failing to object to testimony by Detective DePrez that defendant had admitted to a prior drug and alcohol problem. While this testimony was not objected to by defense counsel, it appears that the failure to object was purposeful. During direct-examination, defendant testified that his drinking had caused problems, but he quit drinking seven years earlier. Accordingly, in the absence of a testimonial record to the contrary, we presume that the failure to object was purposeful trial strategy. *Rockey, supra; Effinger, supra.*

Defendant next argues that trial counsel was ineffective for eliciting Detective DePrez's belief that defendant was guilty. We disagree. Review of the testimony in context reveals that defense counsel asked whether Detective DePrez believed that defendant was guilty. Detective DePrez responded affirmatively based on defendant's admission to the crime. However, defense counsel proceeded to note that defendant's statement, that the incident was an accident, was minimized by Detective DePrez. Defense counsel went on to question Detective DePrez's failure to obtain a videotape or audiotape statement of defendant such that any admission of guilt would have been preserved for review by the jury. Defense counsel also questioned Detective DePrez's failure to question other children in the home and other children raised by defendant regarding his conduct toward them. Review of the testimony as a whole reveals that defense counsel intentionally elicited Detective DePrez's belief in an attempt to demonstrate that she failed to properly investigate the circumstances surrounding the crime based on her belief in defendant's guilt. Once again, defendant has failed to overcome the presumption of effective assistance and trial strategy. *Rockey, supra; Effinger, supra.*

Defendant next argues that defense counsel was ineffective for failing to timely object to testimony that defendant was regularly verbally abusive and vulgar. We disagree. Review of the trial transcript reveals that defendant called Geri Beth Williams to testify on his behalf. Defendant was the ex-fiance of Williams' mother, and Williams resided with defendant from the age of nine until the age of thirteen. During that time period, Williams testified that defendant did not sit around the house without his pants on. Furthermore, defense counsel inquired whether defendant ever touched or "struck" Williams in an inappropriate manner, which she denied. Additionally, defendant's son, Chad Orlando, testified on his behalf. Chad testified that he fought with his father, but the fights were arguments, not physical altercations. Chad also testified that he broke his arm while play wrestling with defendant. In

direct-examination of these witnesses, defendant introduced evidence regarding the circumstances surrounding his conduct during his residency with his various girlfriends. A material fact need not be an element of the crime or defense but must be in issue in the sense that it is within the range of matters in controversy. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996). Defendant introduced evidence of his conduct while residing with his various girlfriends, and the prosecutor merely sought additional development of an area introduced by defendant. Accordingly, the evidence was admissible, MRE 401; MRE 402, and defense counsel cannot be deemed ineffective for failing to timely raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant next argues that trial counsel was ineffective for failing to object to testimony regarding defendant's wish to not return to prison. We disagree. Review of the testimony reveals that defendant stated that he did not wish to go to prison for something that happened a long time ago. Defendant next told Detective James Carey that he had personal matters to attend to, and "he never wanted to go back again especially for something like this." It is unclear whether defendant's reference was to a prior prison term or his desire to not return to jail. While the lower court record indicates that defendant has prior offenses, there is no indication that he served prison time for those offenses. In any event, we cannot conclude, in the absence of testimony of trial counsel, that counsel was ineffective under the circumstances. The jury learned of defendant's jail stay due to a child support arrearage. It is entirely possible that defense counsel did not object to avoid highlighting the statement or did not wish to distinguish any prior incarceration from the child support arrearage. Accordingly, defendant's contention, that reversal is required due to ineffective assistance of counsel, is without merit.

Lastly, defendant argues that a new trial is required because of prosecutorial misconduct. This claim is not preserved for appeal because defendant failed to object at trial. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). Therefore, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in manifest injustice. *Id.* Our review of each of the alleged instances of prosecutorial misconduct reveals that the prosecutor's comments were proper or a curative instruction could have alleviated any prejudice to defendant. Accordingly, defendant's claim of error is without merit.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ E. Thomas Fitzgerald