STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM BRANTLEY,

Defendant-Appellant.

UNPUBLISHED
May 2, 2000

No. 211410
Wayne Circuit Court
Criminal Division
LC No. 97-501359

Before: Cavanagh, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Defendant was sentenced to five to fifteen years' imprisonment for each count. We affirm.

Defendant argues that he was denied the effective assistance of counsel for several reasons. In order to preserve an ineffective assistance of counsel claim, a defendant must move for a new trial or an evidentiary hearing. However, ineffective assistance of counsel claims can be reviewed despite a defendant's failure to bring a motion in this regard. In that instance, review is limited to the facts in the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Defendant did not move for a new trial or a *Ginther* hearing. This Court's review will thus be limited to the facts in the record.

The right to counsel is fundamental because it is essential to a fair trial. *Gideon v Wainwright*, 372 US 335, 344; 83 S Ct 792; 9 L Ed 2d 799 (1963); *People v Pubrat*, 451 Mich 589, 593; 548 NW2d 595 (1996). The right to counsel is the right to effective assistance of counsel. *Pubrat, supra*, 451 Mich 594. Effective assistance of counsel is presumed. To overcome this presumption, this Court must determine whether counsel's performance was objectively unreasonable and whether defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant can rebut this presumption by proving that his attorney's representation was unreasonable under the prevailing professional norms and that the challenged strategy was not sound strategy. *Strickland v Washington*; 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant first argues that his counsel was ineffective for failing to present evidence of the victim's sexual conduct with others, which would have shown her motive for falsely accusing defendant and would have been admissible under the rape shield act. We disagree.

The rape shield act only allows admission of evidence of the victim's past sexual conduct with the actor or evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy or disease where the inflammatory or prejudicial value of the evidence does not outweigh its probative value. MCL 750.520j; MSA 28.788(10). The rape shield act was designed to exclude evidence of the victim's sexual conduct with persons other than the defendant. *People v Adair*, 452 Mich 473, 480; 550 NW2d 505 (1996), citing *People v Arenda*, 416 Mich 1, 10-11; 330 NW2d 814 (1982). However, in certain limited circumstances, evidence of sexual activity with others may be admissible for the narrow purpose of showing the complainant's bias or ulterior motive for making a false charge. *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984); *Parker v Byron Center Bd of Ed*, 229 Mich App 565, 576; 582 NW2d 859 (1998). In such cases, the defendant is required to file a written motion and an offer of proof. If the offer of proof shows sufficient relevancy, an in camera hearing may be granted to determine admissibility. MCL 750.520j; MSA 28.788(10); *People v Morse*, 231 Mich App 424, 436; 586 NW2d 555 (1998).

Here, defendant did not move to present evidence of sexual activity with others by the victim and did not make an offer of proof. Defendant argues that his counsel was ineffective for failing to do so. However, there is no evidence on the record that the victim had sexual experiences with others and, because defendant did not move for a *Ginther* hearing to determine why his counsel did not make a motion for admission of this evidence, there is no way for this Court to know whether defense counsel investigated the possibility of sexual activity with others and determined that there was no such activity.

Further, even in his brief on appeal, defendant does not detail how this information would be relevant. Although defendant argues that evidence of sexual activity with others is admissible to show bias or ulterior motive, defendant does not allege that the victim was biased against defendant or what her ulterior motive might have been. From the record, it is not apparent what her ulterior motive would be. In fact, the prosecution elicited testimony from the victim that prior to this abuse she had enjoyed visiting defendant and that her visits with defendant were her only opportunity to see her brother, with whom she was close. In addition, defendant's live-in girl friend testified that the victim told her that she wanted to live with defendant.

Defense counsel did cross-examine the victim regarding her testimony that she told schoolmates that she had lost her virginity to her short-term boyfriend, who was ten years old at the time of their relationship. Defendant has not shown that the victim had sexual experiences with others, that the sexual experiences with others would have been relevant and admissible had his counsel moved for their admission, or that his counsel failed to investigate this possibility. Because defendant bears the burden of proving that his counsel's representation was unreasonable under prevailing professional norms and defendant has not presented evidence that his attorney failed to investigate evidence, which may not have existed, and would probably not have been admissible, defendant has not rebutted the presumption of effective assistance of counsel. *Strickland, supra*, 466 US 687.

Defendant next argues that his counsel was ineffective for failing to object to hearsay evidence presented at trial. We disagree. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c). The victim's testimony that the girls were discussing "their first time" was not hearsay as it was not offered to prove the truth of the matter asserted, that the girls were not virgins. Rather, the victim was explaining an integral part of the events leading up to her disclosure of the abuse. Therefore, this testimony was not hearsay. See *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 205; 579 NW2d 82 (1998).

The victim's comment that the girls looked at her, and asked her who she had lost her virginity to, was not hearsay as it was a question and not an assertion. A statement is an oral or written assertion, or non-verbal conduct of a person, if it is intended by the person as an assertion. MRE 801(a). Here, the girls were asking about the victim's loss of virginity and were not asserting anything. Similarly, the victim's testimony that "one of the teachers had told my mother" was not hearsay as it was not an assertion. The teacher was not asserting that the victim was not a virgin and the testimony was not offered to prove that the victim was not a virgin, only that the victim had been discussing loss of virginity with her peers. Further, the victim did not testify as to what the teacher told her mother, only that the teacher had told her mother something which precipitated the victim's disclosure of the abuse and the victim testified that she had been talking to the girls about losing her virginity. This comment was not intended by the teacher to be an assertion and was not offered to prove the truth of the matter asserted; therefore, it was not hearsay. MRE 801(a).

The victim's mother's statement, that " . . . one of her teachers stopped in the hallway to tell me something about her and a girl were talking about how they had lost their virginity . . . ," was not hearsay as it was not offered to prove the truth of the matter asserted. MRE 801(c). The mother's testimony was intended as an explanation of why she asked the victim about sex and not to prove that the victim actually had a conversation with a girl about virginity. Further, even if this statement was hearsay, its admission was not error requiring reversal, as it came secondary to the victim's testimony that she was talking to girls about her first time and thus its admission did not result in a miscarriage of justice. MCL 769.26; MSA 28.1096.

Additionally, even if these statements were hearsay, defense counsel's failure to object to these minor statements certainly did not affect the outcome of the trial. These statements were relevant because they explained the chain of events leading up to the victim's disclosure of the abuse and not because the statements tended to make it more or less probable that defendant committed the charges. MRE 401. Therefore, defense counsel was not ineffective for failing to object to the admission of these statements. *Mitchell, supra*, 454 Mich 164.

Next, defendant argues that his trial counsel was ineffective for failing to adequately cross-examine the victim regarding inconsistencies in her testimony and details of the sexual assaults. We disagree.

This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice*, 235 Mich App

429, 435; 597 NW2d 843 (1999). Decisions regarding what evidence to present and whether to question a witness are presumed to be matters of trial strategy. *Rockey, supra,* 237 Mich App 76. It is entirely possible that defense counsel believed that he would alienate the jury by harshly cross-examining the victim regarding the times and dates of the abuse and the specific details, especially because defendant is the victim's father and the jury may have considered any rough treatment of the victim as evidence that defendant did not care about his daughter. Defense counsel established through defendant's testimony that defendant was a loving father and that he did not have sex with his daughter or French kiss her. Defense counsel's choice to avoid questioning the victim regarding dates and times of abuse and the details was trial strategy that this Court will not second-guess. *Rice, supra,* 235 Mich App 435.

Defendant next argues that defense counsel was ineffective for failing to call three witnesses. Again, we disagree.

Decisions as to whether to call a witness are presumed to be trial strategy. *Mitchell, supra,* 454 Mich 163. The failure to call a witness is only ineffective assistance of counsel where it deprives defendant of a defense which would change the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). There is nothing on the record that would lead this writer to believe that the witnesses could have testified in such a way that would have affected the outcome of the trial. The victim testified that the first person she told about the abuse was her friend; any testimony by the friend would have been inadmissible as hearsay. It is unclear what information the victim's boyfriend could have provided that would have affected the outcome of the trial; defendant does not provide any indication as to what the boyfriend would have testified to or how his testimony would have been relevant. Lastly, presumably the school teacher could only testify that she found out that the victim had told others that she was not a virgin and that she informed the victim's mother. This testimony would not have affected the outcome of the trial.

Defense counsel's performance did not fall below an objective standard of reasonableness or prejudice defendant so as to affect the outcome of the trial. Defendant has failed to meet his burden to rebut the presumption that defense counsel was effective.

Defendant also argues that the evidence presented was insufficient to sustain his first-degree criminal sexual conduct convictions. We disagree.

In reviewing sufficiency of the evidence claims, this Court must determine if there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. In doing so, this Court must view the evidence in a light most favorable to the prosecution. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). "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 *People v Smith,* 205 Mich App 69, 71; 517 NW2d 255 (1994), the defendant was charged with four counts of first-degree criminal sexual conduct in violation of MCL 750.520b(1)(a);

MSA 28.788(2)(1)(a). This Court found sufficient evidence to convict where the victim, who was under thirteen, testified that the defendant had performed fellatio on him on at least five different occasions. In making this determination, the Court indicated that it did not matter that there was conflicting evidence because there was evidence that the jury could choose to believe that would justify conviction. *Smith, supra,* 205 Mich App 71.

Here, the victim testified that, when she was ten years old continuing until she was eleven years old, defendant placed his penis inside her vagina on about fourteen to fifteen occasions. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence on which to convict defendant as there was testimony that he sexually penetrated the victim, a person under thirteen, on more than four occasions.

Defendant's argument that the trial court's comments during sentencing showed that the evidence was insufficient is unpersuasive. If after reviewing the evidence, reasonable people could differ, the question is properly left to the trier of fact. *Mull v Equitable Life Assurance Society of the United States*, 196 Mich App 411, 421; 493 NW2d 447 (1992). Here, the jury was the trier of fact. The trial court recognized this in stating the following: "They [the jury] chose to credit [the victim], who had been impeached, I thought, on a number of different areas, but the jury has in fact spoken, and that is something that we all have to live with an [sic] abide by." Here, reasonable minds could have differed and the trier of fact determined that defendant was guilty.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Brian K. Zahra