

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS ROBERT SMITH,

Defendant-Appellant.

UNPUBLISHED

November 9, 2001

No. 220902

Otsego Circuit Court

LC No. 99-002393-FC

Before: K.F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first degree criminal sexual conduct (“CSC I”). MCL 750.520b. The trial court sentenced defendant to twenty to eighty years’ imprisonment as a fourth habitual offender. MCL 769.12. He appeals as of right. We affirm.

Defendant first argues that the prosecution failed to present sufficient evidence to support a conviction of CSC I. We disagree.

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citation omitted.) In reviewing the sufficiency of the evidence, this Court must view the evidence, in a light most favorable to the prosecutor, and determine whether a rational trier of fact could find that each essential element of the crime was proved beyond a reasonable doubt. *Id.*; *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). When doing so, this Court should not interfere with the jury’s role of weighing the evidence presented or determining the credibility of witnesses. *Id.* at 514; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Additionally, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In the case at bar, the victim provided direct testimony on each of the elements comprising CSC I. The testimony of an alleged CSC victim need not be corroborated by physical evidence. Indeed, the victim’s testimony alone will suffice. MCL 750.520h

Defendant further argues that the evidence was insufficient because the prosecutor did not connect an exact date with one of the instances comprising the offense.¹ Again, we disagree.

In *People v Naugle*, 152 Mich App 227, 233-234; 393 NW2d 592 (1986), this Court enunciated the test to determine to what extent specificity in terms of time will be required. To that end, the court stated that:

[C]ertain factors should be included in making such a determination, including but not limited to the following: (1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense.

Consideration of the afore-referenced factors indicates that in the case *sub judice*, a specific time is not essential. First, the nature of the crime charged is one of a repeated crime; i.e., defendant previously attempted similar conduct on the victim before. The victim also testified that as a result of the incident, she suffered mental anguish, accounting for her inability to pinpoint the exact date. Second, although the victim was unable to identify the exact date for the reasons stated, she nevertheless attempted to establish the date by recalling other landmark events surrounding the incident. To that end, the victim recalled that it occurred two to three weeks before the incident on March 16th. Third, the prosecutor attempted to elicit the date during direct examination by referencing its temporal proximity to the March 16 incident.

Our review of the record reveals that no prejudice inured to defendant by the prosecutor's failure to relate an exact date to the offense. Defendant did not attempt to establish an alibi. Rather, defendant argued that he did not engage in any sexual relations with the victim during the range of dates in question. Alternatively, defendant argued that when he did engage in anal sex with the victim, she consented to the contact. Therefore, defendant was not deprived of any meaningful defense resulting from the prosecution's failure to identify a specific date.

Defendant next argues that the prosecutor engaged in misconduct. However, defense counsel failed to object to any of the alleged misconduct at trial, therefore precluding review absent a miscarriage of justice.² *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995). However, upon review of the record, we also find that defendant's claims are factually unmeritorious.

Next, defendant argues that the trial court improperly scored OV 4 of the statutory sentencing guidelines. MCL 777.34. Defendant submits that there was no evidence that the victim required psychological counseling for the impact of the incident apart from her ordinary

¹ MCL 767.45(1)(b) provides that the prosecutor must give "[t]he time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense."

² We also note that defendant failed to appropriately brief this issue. Defendant may not simply assert positions and leave it to this Court to discover the rationale behind them. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

counseling needs. The scoring of OV 4 under the former judicial sentencing guidelines was based on the need for counseling due to the effects of the crime, rather than the actual treatment received. *People v Elliott*, 215 Mich App 259, 262-263; 544 NW2d 748 (1996). The victim testified that she sought counseling in response to the crimes at issue. Accordingly, we decline to find error in this regard.

Defendant also argues OV 13, was improperly scored because there was no proof that defendant was guilty of the crime for which he stood convicted. MCL 777.43. This argument is similarly without merit and is statutorily untenable because the variable specifically states, “[f]or determining the appropriate points under this variable, all crimes within a 5-year period, *including the sentencing offense*, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a) (emphasis added.)

Finally, defendant argues that he received ineffective assistance of counsel because defense counsel elicited his criminal history and failed to object to questions posed by the prosecutor concerning defendant’s assault upon the victim’s daughter wherein she sustained a black eye. Again, we disagree.

A claim of ineffective assistance of counsel is a constitutional issue. See *People v Rhinehart*, 149 Mich App 172, 174; 385 NW2d 640 (1986). This Court reviews constitutional issues de novo. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). Defendant did not properly preserve this issue for appellate review thereby confining this Court’s inquiry to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

We find that the issue pertaining to inquiries relative to defendant’s criminal history, to which defendant failed to object during trial, is unmeritorious. Indeed, the prosecutor merely responded to information that defendant raised himself. *Hedelsky, supra* at 384-385. Similarly, defendant opened the door to a line of questioning by the prosecutor relating to defendant’s assault upon the victim’s daughter. Moreover, we find that defendant failed to overcome the onerous presumption of effective assistance and that defense counsel’s alleged errors, if any, constituted nothing more than mere trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Accordingly, we affirm the trial court’s sentencing decision.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald