STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 26, 2002
v	No. 230372 Kent Circuit Court
STANLEY WILLIAM HUFF, Defendant-Appellant.	LC No. 99-009473-FH

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of third-degree criminal sexual conduct, MCL 750.520d. He was sentenced to two concurrent terms of eleven to forty-five years. He appeals as of right, and we affirm.

Defendant's convictions stem from a sexual encounter that occurred at a motel where he resided. The victim alleged that she was in defendant's motel room because she was locked out of the room where she was staying and, while there, defendant forced her to engage in sexual intercourse. Defendant conceded that a sexual encounter had occurred, and that he had ejaculated, but denied that there was penetration. Defendant asserted that the sexual encounter was consensual, and that the victim was trying to trade sexual favors for crack cocaine.

Defendant first asserts that the trial court denied his constitutional right to due process by not permitting him to call witnesses in his favor. However, defendant did not attempt to call these witnesses, but rather, sought an adjournment hoping to be able to produce them. Thus, defendant asserts error in the trial court's refusal to grant an adjournment.

At some point during trial, defendant sought the prosecutor's assistance in locating certain witnesses. On the third and final day of trial, the prosecutor explained that police had been unsuccessful in locating Nicole Donovan. Defendant explained that he had reason to believe that the Donovan family had some knowledge regarding drugs or money being offered to the victim to frame defendant. A short time later, defendant rested but asked for an additional day. Defense counsel asserted that Theresa Hollis had made a false accusation of rape against defendant several years before and had later retracted under oath; that Hollis had told defendant that she would "see him go to jail;" that Morgan Donovan had "second and third-hand" "rumor knowledge" of the plot but was afraid to testify; that Morgan Donovan had sent a letter to defendant's mother indicating that he had personal knowledge of the plot but had been

threatened; and that Kristie Donovan had received a message from Hollis through her daughter, Nicole Donovan, asking if she would help set defendant up. Defendant argued that "given the seriousness of these facts, it's important to adjourn for long enough to check this out properly." The prosecutor responded that the case had been up for trial several times, that he was just informed of the Donovans the day before, that the testimony of Morgan and Kristie would be hearsay, that Theresa Hollis had been located and would be produced at defendant's request, and that defendant's allegations were pure speculation. The court denied the adjournment.

We review the grant or denial of an adjournment for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). Where an abuse of discretion is shown, a defendant is also required to show prejudice. *Id.* Defendant has shown neither. As the trial court noted, the testimony of Morgan and Kristie Donovan would have been hearsay. Regarding Nicole,[1] there is no reason to believe that she would have been located overnight, or that she would have given testimony to link Hollis with the victim in a plot to frame defendant. Defendant asserts that he should have been able to produce the witnesses for a separate record to find out if their testimony would in fact be hearsay. Given counsel's representations regarding the expected testimony, the court was not obliged to grant an adjournment to make such a record. As to the argument that the testimony would have been proper impeachment should Hollis have testified denying that she called seeking perjured testimony, we note that only the person who spoke with Hollis would have been able to impeach Hollis, and that, in any event, defendant did not pursue the prosecutor's offer to produce Hollis. The court did not abuse its discretion in concluding that defendant had had ample time to pursue the matter, and that defendant was offering hearsay and conjecture in support of the request for adjournment.

Defendant also argues that he should have been granted an adjournment to produce his mother as a witness. The court observed that the mother lived in Grand Rapids, was not present in court, and had apparently not called defense counsel. We further note that on the first day of trial, counsel stated that he would not be calling defendant's mother as a witness, but would make her available to the prosecutor for rebuttal. The court did not abuse its discretion in denying an adjournment. Further, defendant's mother was apparently present the following day, before closing argument, and defendant did not request that the proofs be reopened. Defendant argues that counsel was ineffective for failing to make such a request. Defendant has not, however, overcome the presumption that counsel's failure was based on trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant sought a new trial on the basis that the trial court erred in denying the adjournment, placing particular emphasis on his inability to produce his mother's testimony, but produced no affidavit or offer of proof regarding her testimony. On this record, no prejudice has been shown.

Defendant next argues that he was denied a fair trial because certain potentially exculpatory DNA tests were not conducted. Defendant conceded that he and the victim engaged in a sex act, and that he ejaculated. Defendant testified that he did so on the sheets and that he wiped himself off with a towel. The police seized the towel and the sheets, but no evidence was admitted about any DNA samples found on the items. Defendant's theory was that, if he had

[1] Defendant does not directly assert error with respect to Nicole, although there is a reference to "Ms. Donovan" which is unclear.

penetrated the victim, her DNA would also be found on his body, his pants and the sheets and towel.

In his argument on appeal, defendant states that he is appealing the trial court's decision not to compel the prosecution to deliver the DNA evidence to defense counsel. He argues that his trial counsel believed that such tests had been performed. However, there was evidence that although the tests were discussed, they were not performed. Defendant has not shown that evidence was withheld. Nor has defendant shown that the police were obliged to conduct the tests absent a defense request. *People v Vaughn*, 200 Mich App 611; 505 NW2d 41 (1993), rev'd on other grounds, 447 Mich 217 (1994). In *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997), this Court ruled that due process does not require the police to seek and find exculpatory evidence. Defendant does not argue that the prosecution prevented him from conducting tests on the evidence himself before trial.

We also reject defendant's argument that counsel was ineffective for failing to determine whether the tests were done and failing to request that any DNA test results on the sheets and towels be turned over to him. For a defendant to establish a claim that he was denied his constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Toma, supra.* Moreover, a defendant must overcome the strong presumption that his attorney's actions constituted sound trial strategy under the circumstances. *Toma, supra*, citing *People v Mitchell*, 454 Mich 156; 560 NW2d 600 (1997).

Because there is no evidence that the tests were performed but withheld, defendant has shown no prejudice from the alleged errors of counsel. Further, it appears that counsel's handling of the matter was trial strategy. Counsel's reference in closing argument to the fact that there was testimony that the tests were not performed, but that the officer who interviewed defendant clearly stated several times that the tests would be performed because they would show whether penetration occurred, and his reference to the DNA witness' testimony that the reliability of the results rests on the reliability of the data, which calls into question the procedures and conclusions of the police, amounts to sound trial strategy. Defense counsel's closing argument suggests that the police either refused to perform some tests because they believed the results would show defendant did not penetrate the victim, or that the police actually performed the tests and withheld the information. By handling the matter in this way, defense counsel interjected some doubt as to the strength of the prosecution's case, in that the prosecution either failed to consider, or ignored, potentially exculpatory evidence.

Defendant next argues that the trial court's submission to the jury of the charge of first-degree criminal sexual conduct, where no evidence was submitted on any physical injury suffered by the victim, amounts to error mandating reversal. In making this argument, defendant asks this Court to adopt the reasoning of *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975), an opinion that was explicitly overruled by *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998). Because defendant was not convicted of first-degree CSC, any error was harmless under *Graves.*

Finally, defendant argues that the prosecution presented insufficient evidence to support defendant's convictions of two counts of third-degree criminal sexual conduct. We disagree. The elements of third-degree criminal sexual conduct, as set forth in MCL 750.520d, require

penetration with another person and another factor, such as the other person being between the ages of thirteen and sixteen, force or coercion, a victim who is incapacitated, or an authority relationship between the victim and perpetrator. Here, the prosecutor asserted that defendant used force or coercion.

The evidence is sufficient to convict a defendant when a rational factfinder could determine that the prosecutor proved every element of the crimes charged beyond a reasonable doubt. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). "Force or coercion" as used in the statute requires that defendant used either physical force or did something to make the victim reasonably afraid of present or future danger. *People v Kline*, 197 Mich App 165, 166; 494 NW2d 756 (1992). Here, the prosecutor presented sufficient evidence that force was used, as the victim testified that defendant threw her onto the bed and covered her face before he removed her pants and penetrated her. From that testimony, a juror could find, beyond a reasonable doubt, that defendant used force immediately before penetrating the victim. Therefore, we reject defendant's argument.

Affirmed.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald S. Owens