STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 2, 2002
V	No. 232253 Wayne Circuit Court
JAMES COCKERHAM, Defendant-Appellant.	LC No. 00-000825

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of third-degree criminal sexual conduct (CSC III), MCL 750.110d(1)(b), for which he was sentenced to 6 to 15 years' imprisonment. Defendant appeals as of right. We affirm.

I. Facts

This case arises from an incident occurring on the evening of July 26, 1999. The victim was at a friend's house when defendant arrived. Shortly after he arrived, defendant invited the victim to ride to the store with him. When she declined, defendant picked up a steak knife, held it by his side, and asked her if she thought he was playing with her. Defendant, the victim and others present laughed this off as a joke, and defendant put down the steak knife but continued to insist that the victim go with him. Eventually the victim agreed to go with defendant.

The victim testified that after they left the house in defendant's vehicle, defendant did not drive toward the store. When she asked defendant why they were not heading in the right direction, defendant told her that he had previously been involved in robberies and murders and that he was going to make a prostitute of her. Defendant also claimed to have a gun.

The two continued to drive around, and then picked up two friends and drove around with them for a while. The victim testified that after they dropped off the two friends, defendant threatened that if she did not have sex with him, he would make a prostitute of her. When she resisted his advances, defendant held the lighted end of a cigarette near her nose and told her he was losing patience. The victim testified that defendant ordered her to get into the back seat and take her clothes off, and then he forced her to have sex.

Defendant admitted that they went for the drive together, picked up and dropped off the two friends, and then had sex. However, he maintains that he did not have, or imply or say that he had, a gun. Defendant also maintains that the victim consented to have sex with him after he promised her crack cocaine, but then decided to file the rape charge when he backed out of his side of the deal.

II. Analysis

A. Insufficiency of the Evidence

Defendant argues first that there was insufficient evidence for the judge to find him guilty. We disagree. Claims that a verdict was not based on sufficient evidence are reviewed de novo. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). The Court must determine whether the evidence presented, viewed in the light most favorable to the prosecution, could persuade a rational factfinder that the essential elements of the charged offense were proven beyond a reasonable doubt. *Wolfe, supra* at 515; *Aldrich, supra* at 122.

In a bench trial, the judge, acting as factfinder, observes the witnesses and determines the weight and credibility to be given to their testimony. *People v Garcia*, 398 Mich 250, 263-264; 247 NW2d 547 (1976). This Court's review should not disturb that determination. *Wolfe, supra* at 514-515. The testimony of a single witness is sufficient to support a conviction if it is believed by the factfinder. *People v Taylor*, 18 Mich App 381, 384-385; 171 NW2d 219 (1969).

The elements of CSC III in this case were sexual penetration of the victim using force or coercion. MCL 750.520d(1)(b). "Force or coercion" means the defendant either used physical force to accomplish the penetration or did something to make the victim "reasonably afraid of present or future danger." CJI2d 20.15.

Here, the judge determined that the victim's testimony was credible and defendant's testimony was not. The victim's testimony, as recounted by the judge, was that she was penetrated against her will and that defendant told her he had a gun and made various other threats. This testimony, viewed in the light most favorable to the prosecution, was sufficient to establish the elements of CSC III. MCL 750.520d(1)(b); CJI2d 20.12, 20.15; *Taylor, supra* at 384-385; *Wolfe, supra* at 514-515.

B. Effective Assistance of Counsel

Defendant next argues that he was deprived of effective assistance of counsel when his attorney (1) failed to contact and subpoena witnesses and (2) failed to move for a directed verdict of acquittal. Whether an attorney failed to provide effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, but questions of constitutional law are reviewed de novo. *Id.* When, as here, no testimonial record on counsel's performance has been created in the trial court, a defendant must show on the existing record plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999. An error affected substantial rights if it could have been outcome determinative. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). However, even if the defendant shows

outcome-determinative plain error, we will reverse only if the defendant was actually not guilty or the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines, supra* at 774.

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, Ams VI, XIV; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039, 2044; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To prevail on a claim that counsel was ineffective, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; ___ NW2d ___ (2001). There is a strong presumption that counsel's assistance was sound trial strategy. *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). In general, this Court will not second-guess trial counsel's judgment on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

A failure to produce witnesses constitutes ineffective assistance of counsel only if it deprives a defendant of a substantial, or outcome-determinative defense. *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 581 NW2d 1 (1997), cert den sub nom *Michigan v Bass*, 525 US 921; 119 S Ct 275; 142 L Ed 2d 227 (1998). The choice of witnesses is presumed to be part of sound trial strategy, and to overcome that presumption, a defendant must show that counsel failed to properly prepare for trial and therefore was ignorant of the substantial nature of the omitted testimony. *Id.* Defendant does not identify the witnesses counsel failed to contact and subpoena, and therefore fails to show either that their testimony would have been outcome-determinative or that counsel was not aware of them due to a failure to properly prepare for trial. *Id.*

A directed verdict should be granted if the evidence is insufficient to support conviction. MCR 6.419; *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). In this case, as noted, the victim's testimony alone was sufficient to convince a rational factfinder, beyond a reasonable doubt, that defendant had committed the charged offense. *Taylor, supra* at 384-385; *Wolfe, supra* at 514-515. Further, defendant presented no defense other than his own testimony, which the judge discounted in its entirety. Therefore, it would have been futile for defendant's counsel to move for a directed verdict. Counsel cannot be considered ineffective for failure to advocate a futile or meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

C. Res Gestae Witness

Finally, defendant argues that the prosecution failed to produce a res gestae witness and that his counsel was ineffective for failing to object to the witness' absence. This issue was not raised in the trial court, so defendant must meet the standard for unpreserved error. *Carines, supra* at 774. Defendant claimed that the doctor who administered the rape kit to the victim was a res gestae witness who should have been called by the prosecution. "*Res gestae* are the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character . . . . And as long as the transaction continues, so long

do acts and deeds emanating from it become part of it . . . ." *People v Kayne*, 268 Mich 186, 191-192; 255 NW 758 (1934). "A res gestae witness is a person who witnesses 'some event in the continuum of a criminal transaction' and whose testimony will 'aid in developing a full disclosure of the facts.'" *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989). It is clear that the doctor was not a res gestae witness because his knowledge of the crime occurred as the result of his examination of the victim, and not because he witnessed some event in the continuum of the criminal transaction. See *Kayne, supra* at 190-192; *Calhoun*, *supra* at 520-521; *People v Reynolds*, 93 Mich App 516, 521; 286 NW2d 898 (1980). However, because the prosecution did include the doctor on its witness list, it had an obligation to produce the doctor at trial. *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991). Defendant fails to show how the doctor's absence changed the outcome of the trial or otherwise justifies reversal. The victim's medical records were admitted as evidence, and the doctor's testimony would have been cumulative. As such, defendant fails to rebut the presumption that his trial counsel's failure to object to the doctor's absence was sound trial strategy. *Stanaway, supra* at 687; *Rice (On Remand)*, *supra* at 445.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder