STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 22, 2002
v	No. 225055 Oakland Circuit Court
GEORGE TILLERY, JR., Defendant-Appellant.	LC Nos. 98-162522-FC; 98-162524-FC; 98-162526-FC

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b)(iii), and one count of second-degree CSC, MCL 750.520c(1)(b)(iii). He was sentenced to concurrent prison terms of twenty-five to fifty years for each of the first-degree CSC convictions and ten to fifteen years for the second-degree CSC conviction. He appeals by delayed leave granted. We affirm.

I.

Defendant contends that his convictions were not supported by sufficient evidence. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). In order to convict defendant of first-degree CSC under MCL 750.520b(1)(b)(iii), the jury had to find that defendant was in a position of authority over the complainant, and that he used that authority to coerce her submission to sexual penetration. Conviction of second-degree CSC under MCL 750.520c(1)(b)(iii) requires the same findings, except it applies to sexual contact as opposed to penetration.

A.

Defendant first claims that there was insufficient evidence to establish that he was in a position of authority over complainant. We disagree. The "position of authority" element for first- and second-degree CSC can be established with evidence that the defendant won the complainant's trust and her parent's trust, and created the opportunity to exploit her while in a vulnerable situation. *People v Knapp*, 244 Mich App 361, 370-373; 624 NW2d 227 (2001); *People v Reid*, 233 Mich App 457, 470-473; 592 NW2d 767 (1999). In the instant case, the

evidence established that defendant had such a position of authority over the complainant. The complainant's mother came to regard defendant as a close family friend, a father figure to her children, and a possible godparent for the complainant. The fact that he was never formally named godfather is immaterial because no formal relationship is necessary to establish authority. *Reid, supra* at 472. The complainant's mother delegated some degree of parental authority to defendant. She testified that she trusted him to supervise her children overnight on weekends, and that he agreed to comply with her rules about what the children could and could not do. The complainant testified that she spent the weekend at defendant's house with the understanding that he was in charge, and that she was obligated to listen to him. This evidence established that the complainant's mother had entrusted the complainant to defendant's care. See *id.* Thus, a reasonable trier of fact could find from this testimony that defendant was in a position of authority over the complainant.

The evidence also established that defendant used that position of authority to coerce the complainant to submit. The assaults only occurred in the middle of the night during the weekend visits when the complainant was entrusted to defendant's care and supervision. The complainant was in an extremely isolated and vulnerable position during these weekend visits. As a thirteen-year-old overnight visitor, she could not simply leave the house. The only other adult present was defendant's girlfriend. The complainant was asleep in the living room of defendant's house, where he had ready access to her. Defendant thus used his authority to place the complainant in an extremely vulnerable situation, and then sexually assaulted her while she was in that situation of extreme vulnerability. See *id.* (coercion found where the complainant was alone with defendant and isolated from others while subject to the general control of defendant). Accordingly, when viewed in a light most favorable to the prosecution, a rational trier of fact could find from this evidence that defendant used his authority to coerce the complainant's submission to sexual intercourse and contact.

B.

Defendant further argues that the evidence was insufficient to find him guilty beyond a reasonable doubt because there was no corroborative eyewitness to the alleged assaults, the physical evidence was weak and inconclusive, and the complainant's testimony was inconsistent and not credible. However, a jury may convict a defendant solely on the basis of the complainant's eyewitness testimony, without corroborative physical evidence. *People v Newby*, 66 Mich App 400, 405; 239 NW2d 387 (1976). Defendant's claim that the complainant was not credible does not undermine the sufficiency of the evidence. "It is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Here, the jury found that the complainant was credible despite minor inconsistencies in the testimony and despite her belated revelation that more than one assault occurred. We will not disturb the jury's determination regarding credibility.

We also find no merit to defendant's claims that the prosecution shifted the burden of proof to him, or that it failed to negate a reasonable theory of innocence. Defendant's claims of insufficient evidence must therefore fail.

II.

Defendant next argues that his dual convictions of first- and second-degree CSC violate the constitutional protections against double jeopardy. Because defendant did not raise this issue before the trial court, it is not preserved. Consequently, reversal is warranted only upon a showing of plain error affecting defendant's rights, which generally requires a showing of prejudice. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Here, there was no double jeopardy violation. Where the defendant commits two distinct acts during the same episode of criminal behavior, the Double Jeopardy Clauses do not prohibit multiple punishments for the separate acts. *People v Lugo*, 214 Mich App 699, 708-709; 542 NW2d 921 (1995) (dual convictions of felonious assault and assault with intent to do great bodily harm were permissible, although they both arose from the same altercation between the defendant and a police officer). In *Lugo,* this Court explained that there was no double jeopardy violation because each conviction was predicated on a separate and distinct act occurring during the altercation: the defendant first assaulted the officer with a broom, and then with a gun. *Id.* at 709. Similarly, in *People v Rogers*, 142 Mich App 88; 368 NW2d 900 (1985), this Court upheld the defendant's convictions of three counts of first-degree CSC because each was based on a distinct act of penetration that the defendant either committed or aided and abetted. *Id.* at 89, 92.

Here, the complainant testified that defendant committed two separate acts while sexually assaulting her: he fondled her breasts and he vaginally penetrated her. This evidence supported separate convictions for first- and second-degree CSC. Accordingly, there was no double jeopardy violation.

III.

Defendant contends that the trial court lacked the authority to try LC No. 98-162526-FC, but he did not object in the trial court. This issue is therefore not preserved for appellate review. This Court reviews such issues for plain error affecting defendant's substantial rights. *Carines, supra*. Here, although the chief judge was delayed in signing the final reassignment order, the cases had already been consolidated and the reassignment was in progress at the time of trial. Defendant has not shown that his substantial rights were affected by the delay in signing the reassignment order. Accordingly, appellate relief is not warranted.

IV.

Next, defendant argues that the trial court erred in admitting the complainant's testimony that defendant told her, during the assault, that she was "not the only one." A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

Defendant claims that the statement was inadmissible because it was not relevant to any issue in the case and was unduly inflammatory. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *Aldrich, supra* at 114. Generally, all relevant evidence is admissible, unless otherwise provided

by law, and evidence that is not relevant is not admissible. *Id.*; MRE 402. Still, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

In this case, the statement was properly admitted because it was part of the res gestae of the offense. *People v Sheehy*, 31 Mich App 628, 629-630; 188 NW2d 231 (1971), quoting *People v Savage* (1923), 225 Mich 84, 86[; 195 NW 669]. Second, the statement was relevant and probative to show how defendant approached the complainant, and how he conducted himself while he coerced her to submit to his sexual advances. The statement was not unduly inflammatory. The complainant testified about this statement in conjunction with her testimony that defendant sexually assaulted her. Having heard that defendant sexually assaulted the complainant, the jury was not likely to be significantly more outraged by defendant's alleged statement. Thus, the trial court did not abuse its discretion in admitting the statement.

V.

Defendant claims that the trial court erred when it instructed the jury on the position of authority element of CSC. The trial court instructed the jury that it must find that

> at the time of the alleged act the defendant was in a position of authority over Natasha Shaw, that is, he was in a position of caretaker, and used this authority to coerce Natasha Shaw to submit to the sexual acts alleged.

The phrase "in a position of caretaker" is not part of the standard criminal jury instruction, CJI2d 20.4. Defendant claims that this addition by the trial court "misdirected" the jury and prejudiced him.

This Court reviews jury instructions as a whole to determine if the trial court made an error requiring reversal. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001), lv gtd 466 Mich 889 (2002). Even if they are not perfect, jury instructions are not erroneous if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Id.* Here, however, defendant did not object to the trial court's instructions as given. Therefore, we review this issue for plain error. *Carines, supra*.

Although we agree that inclusion of the phrase "in a position of caretaker" did not mirror the standard jury instructions, it fairly presented the issues on the position of authority element under the facts and circumstances of this case and sufficiently protected defendant's rights. As such, the instructions as given did not affect defendant's substantial rights or prejudice him.

VI.

Last, defendant claims that he was denied the effective assistance of counsel. Because there was no *Ginther*[1] hearing, our review of this issue is limited to mistakes apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). To establish

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

ineffective assistance of counsel, a defendant must show (1) that counsel's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600, 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

Defendant has failed to establish that he was denied the effective assistance of counsel. Although he claims that defense counsel failed to investigate a "substantial defense," he does not explain what substantial defense counsel could have developed with more in-depth investigation. Therefore, defendant has failed to show that his counsel's performance was objectively unreasonable, or that a different outcome would have resulted.

Defendant's claim that he was denied the effective assistance of counsel when his trial counsel failed to call certain witnesses is also without merit. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy," which this Court will not second-guess with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Failure to call witnesses constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). First, at trial, defendant stated on the record that he freely and voluntarily decided to waive his right to testify and to call his wife to testify. The decision was thus his own, not his attorney's. With regard to defendant's other prospective witnesses, the record does not support defendant's speculation that they would have given favorable or admissible testimony. Therefore, defendant was not deprived of a substantial defense. Accordingly, defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra