STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2009
v	No. 276689 Wayne Circuit Court
WILLIAM EDWARD CHAPMAN, Defendant-Appellant.	LC No. 06-007491-01

Before: Wilder, P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Defendant appeals of right his convictions, following a jury trial, for three counts of third-degree criminal sexual conduct (with a 13- to 16-year-old victim), MCL 750.520d(1)(a), accosting a child for an immoral purpose, MCL 750.145a, furnishing liquor to a minor, MCL 436.1701(1), and two counts of distributing marijuana to a minor, MCL 333.7410(1). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 18 to 30 years' imprisonment for each of the three third-degree criminal sexual conduct convictions, four to eight years' imprisonment for the accosting a child for immoral purpose conviction, two to four years' imprisonment for the furnishing liquor to a minor conviction, 60 days in jail, with credit for time served, for the first distributing marijuana to a minor conviction, and four to eight years' imprisonment for the second distributing marijuana to a minor conviction. We affirm.

Defendant first met complainant at a grocery store between four and five years before trial. Defendant gave complainant whiskey when she was 16, and provided complainant and cocomplainant with marijuana and cigarettes while they were aged 15 or 16.

Defendant also had sex with complainant over ten times. According to cocomplainant, complainant was 15 when defendant had sex with complainant. In addition, cocomplainant testified that defendant also provided her with alcohol when she visited defendant's apartment, which she did over ten times. Defendant asked cocomplainant to have sex with him and complainant, but cocomplainant declined. At that time, cocomplainant was 15.

According to complainant, defendant instructed her to deny to the police that she knew him. But following complainant's hospitalization due to alcohol poisoning, cocomplainant told complainant's mother about her involvement with defendant.

Defendant first agues that there was insufficient evidence that complainant was aged 15 when he and complainant had sex. We disagree.

This Court reviews the record de novo when presented with a claim of insufficient evidence. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Reviewing the evidence in a light most favorable to the prosecution, this Court determines whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). This Court will not interfere with the fact-finder's role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact to decide what inferences can be fairly drawn from the evidence, and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Conflicts in the evidence are resolved in the prosecution's favor. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

To obtain a conviction for third-degree criminal sexual conduct, the prosecution is required to prove that the defendant engaged in sexual penetration with another person and that the victim was between 13 years and 16 years of age at the time. MCL 750.520d(1)(a). "Any penetration, no matter how slight, is sufficient to satisfy the 'penetration' element of third-degree CSC." *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). "Sexual penetration" is statutorily defined as "sexual intercourse . . . or any other intrusion, however slight, of any part of a person's body . . . ." MCL 750.520a(r).

While the complainant's testimony regarding whether she and defendant had sex before she was 16 is equivocal, there is other evidence to support defendant's conviction. The complainant's mother stated that the complainant's birthday was February 8, 1990; accordingly, complainant's 16th birthday occurred on February 8, 2006. Cocomplainant testified that between September 2005 and June 2006, she witnessed complainant and defendant engaging in sexual activity. Accordingly, a rational trier of fact could fairly infer that at least some of the sexual activity occurred between September 2005 and February 8, 2006, when complainant was still 15.

Further, a rational trier of fact could have given greater weight to cocomplainant's testimony regarding when the sex between defendant and the complainant took place, and less weight to the complainant's testimony that she did not know how old she was when she had sex with defendant. The complainant's mother testified that the complainant was not always able to make good decisions, and denied that her daughter was very smart or sophisticated. The complainant's mother also testified that the complainant had attended special education classes since she began attending school. The trier of fact was also able to observe the manner in which both the complainant and cocomplainant testified. From this evidence, a rational trier of fact could have decided that cocomplainant was a percipient and credible witness on the issue of complainant's age at the time defendant had sex with her. The trier of fact could have properly determined that cocomplainant's testimony, that complainant was 15 during a substantial portion of the time in which complainant and defendant had sex, was entitled to more weight than complainant's equivocal testimony that she could not remember having sex prior to her 16th birthday. Viewing the evidence in a light most favorable to the prosecution, and resolving the conflicts in the evidence in its favor, we conclude that there was sufficient evidence that the complainant was 15 when she and defendant had sex.

Defendant next argues that he is entitled to resentencing because the trial court's decision to assess ten points for offense variable (OV) 3 was unsupported by the record. Specifically, defendant contends that because the complainant's bodily injury, alcohol poisoning, did not arise from the sexual penetrations for which defendant was convicted, zero points should have been scored on OV 3. We disagree.

This issue involves the application of the statutory sentencing guidelines, specifically MCL 777.33. The rules of statutory construction apply to the statutory sentencing guidelines. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). In interpreting a statute, the fundamental task of a court is to discern and give effect to the Legislature's intent as provided in the plain language of the statute. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). Where the ordinary meaning of the statutory language is clear, further judicial construction is unnecessary and unwarranted. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). Further, if a defendant's offenses are subject only to concurrent sentences, only the guidelines range for the offense having the highest crime class need be calculated. MCL 771.14(2)(e)(ii); *People v Mack*, 265 Mich App 122, 126-127; 695 NW2d 342 (2005). Thus, the trial court was required to score only the most severe offense. *Mack*, *supra* at 127-129. In this case, the most severe offense is third-degree criminal sexual conduct.

MCL 777.33 provides, in pertinent part:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> d) Bodily injury requiring medical treatment occurred to a victim[:] 10 points

In *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008), our Supreme Court concluded that OV 9 cannot be scored using uncharged acts that did not occur during the same criminal transaction as the sentencing offenses. In so holding, the Supreme Court indicated "that, generally, . . . conduct 'relating to the offense' may be taken into consideration when scoring the offense variables." *Id*. at 349.

In the instant case, it is without dispute that the acts that resulted in the scoring of ten points for OV 3 (furnishing alcohol to a minor), were charged offenses, and that defendant was convicted of furnishing alcohol to a minor. Moreover, there was circumstantial evidence that defendant furnished alcohol to the victim contemporaneous to his having sexual intercourse with her, thus making the alcohol offenses events that occurred during the same criminal transaction as the sentencing offense. At a minimum, the alcohol offenses were related to the sexual penetration offenses. Therefore, the trial court was entitled to take the alcohol offenses into account when sentencing defendant.

Defendant next argues in his Standard 4 brief that he received ineffective assistance of trial counsel. Defendant claims ineffective assistance because counsel failed to seek a directed verdict on the basis that there was insufficient evidence to bind defendant over for trial on the two distributing marijuana to a minor charges. We disagree.

This Court's review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id*.

Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise. *LeBlanc*, *supra* at 578. To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The defendant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). "[D]efendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "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 Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

We first note that defendant formally waived his right to a preliminary examination on these charges. Because defendant waived the preliminary examination, defendant has effectively waived any claim of ineffective assistance of counsel at the preliminary examination stage. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Moreover, defendant also fails to note that his trial counsel did move for directed verdict on the charges of distributing marijuana to a minor, arguing that there was insufficient physical evidence that defendant provided the complainant and cocomplainant with marijuana. Defendant fails to overcome the strong presumption that the argument his trial counsel did present was trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Accordingly, defendant's argument that his trial counsel was constitutionally ineffective must fail.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck