

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

LEO MICHAEL DYJAK,

Defendant-Appellant.

UNPUBLISHED

June 14, 2011

No. 296571

Midland Circuit Court

LC No. 09-004230-FH

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b) (sexual penetration involving force or coercion), and fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(b) (sexual contact involving force or coercion), arising from the sexual assault of his ex-girlfriend. The trial court sentenced defendant to concurrent terms of two to 15 years in prison for the CSC III conviction and to one year in jail for the CSC IV conviction. We affirm.

Defendant and the victim met online in July 2008 and began dating approximately two months later. By November 2008 defendant had moved into the victim's home. In September 2009, the victim told defendant that she wanted to end the relationship, and gave him one month to move out of her home. Defendant became very upset, and the couple argued.

A few days later, when the victim returned home from work, defendant again confronted her about her decision to end their relationship. After an apparently heated conversation, the victim went into the bedroom she shared with defendant, intending to go to sleep. Defendant followed the victim into the bedroom, got on top of her and held her down with his weight. Although the victim raised her voice and repeatedly told him "no" and "stop," defendant removed her underwear and placed his mouth on her vagina. When defendant finished, he rolled off the victim and fell asleep.

A few days after this incident, defendant again confronted the victim when she returned home from work, insisting that they discuss their relationship and her desire to end it. Defendant restrained the victim. Despite the victim's tears and her repeatedly telling defendant "no," defendant fondled the victim and inserted his fingers into her vagina. The victim tried to push defendant off her, but she could not do so. She tried to scratch defendant and told him to stop, but defendant continued to perform sexual acts on her. As the victim yelled and cried, defendant

pulled up her nightgown, again grabbed her breasts and kissed her neck. He then began to have vaginal intercourse with her. After defendant fell asleep, the victim tried to leave the bedroom, but defendant held her close to him, thereby preventing her from leaving.

The next morning, the victim got up, took a shower, and left the house. She went to a girlfriend's house, where she called the police and reported the sexual assault. Defendant acknowledged that he and the victim had engaged in cunnilingus and sexual intercourse, but he maintained that the activity was consensual.

Defendant claims that the prosecution presented insufficient evidence to support his convictions for CSC III and CSC IV. We disagree. We review claims of insufficient evidence in a criminal trial de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

When reviewing a claim of insufficient evidence, we must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the essential elements of the crime were established. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We are "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

A person is guilty of CSC III if he uses force or coercion to engage in sexual penetration with the victim. MCL 750.520d(1)(b). "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). Force or coercion includes circumstances where "the actor overcomes the victim through the actual application of physical force or physical violence." MCL 750.520b(1)(f)(i); MCL 750.520d(1)(b). In this case, the victim's testimony was sufficient to permit a reasonable juror to conclude that on one occasion, defendant used force to sexually penetrate the victim against her will by restraining her with his body as he placed his finger and penis inside her vagina. MCL 750.520h. Accordingly, the prosecution presented sufficient evidence to establish that defendant committed CSC III.

"A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and . . . [f]orce or coercion is used to accomplish the sexual contact." MCL 750.520e(1)(b). "Sexual contact" includes the intentional touching of the victim's genitals, groin, inner thigh, buttock, or breast, or the intentional touching of the clothing covering the immediate area of the victim's genitals, groin, inner thigh, buttock, or breast, if the intentional touching can reasonably be construed as being done for the purpose of sexual arousal or gratification, for a sexual purpose, or in a sexual manner for revenge, to inflict humiliation, or out of anger. MCL 750.520a(e), (q). Force or coercion includes circumstances where "the actor overcomes the victim through the actual application of physical force or physical violence." MCL 750.520e(1)(b)(i).

The victim's testimony established that on one occasion defendant forcibly held her down, removed her underwear, and placed his mouth on her vagina against her will, apparently

in an attempt to perform cunnilingus on her. A reasonable juror could easily conclude that defendant intentionally and purposefully placed his mouth against the victim's vagina for a sexual purpose or to punish or humiliate the victim for wanting to break up with him. This evidence was sufficient to permit a reasonable juror to conclude that defendant committed CSC IV.

Defendant raises several speculative questions, apparently in an attempt to establish that the victim's testimony was not believable. However, questions of credibility are the province of the jury, not of this Court, *Avant*, 235 Mich App at 506, and defendant cannot establish that the testimony presented at trial was insufficient to convict by raising peripheral issues that neither party chose to address or by identifying potential discrepancies in the testimony presented at trial. The evidence, taken in a light most favorable to the prosecution, was sufficient to permit a rational juror to find beyond a reasonable doubt that the essential elements of the crimes were established, and defendant's argument to the contrary lacks merit. *Wolfe*, 440 Mich at 515.

In his discussion of his claim of insufficient evidence, defendant accuses the prosecution of tampering with the jury. However, because defendant failed to raise this issue in his statement of the questions presented, it is not properly before this Court. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Further, defendant has failed to establish any factual basis for his claims or provide any citation to authority in support of his position. For these reasons, we decline to address this issue further. See *People v Kelly*, 231 Mich App 627, 640–641; 588 NW2d 480 (1998)..

Next, defendant claims that his trial counsel was ineffective. We disagree. Because defendant failed to move for a *Ginther*¹ hearing, our review is limited to mistakes apparent on the record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998).

“To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense.” *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). To demonstrate that counsel's performance was deficient, a defendant must establish that his attorney's representation “fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy.” *Id.* “A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments.” *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004).

To establish that counsel's deficient performance prejudiced the defense, the defendant must show that his attorney's representation “was so prejudicial to him that he was denied a fair trial.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In other words, the defendant must show that because of counsel's deficient performance, the resulting proceedings “were fundamentally unfair or unreliable.” *People v Rodgers*, 248 Mich App 702, 714; 645

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

NW2d 294 (2001). This requires the defendant to demonstrate a reasonable probability that, but for his counsel's unprofessional errors, the outcome of the proceeding would have been different. *Toma*, 462 Mich at 302-303. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Rodgers*, 248 Mich App at 714. In reviewing a claim of ineffective assistance of counsel, "[t]his 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 Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant claims that trial counsel was ineffective for failing to properly develop certain evidence by asking questions that would presumably be favorable to defendant at trial. Yet defendant fails to explain why trial counsel's failure to address these issues constituted deficient performance. Defendant does not show why such questions would be important, discuss what evidence he hoped would be established through these questions, or indicate whether this evidence would be exculpatory or would otherwise help his defense. In the absence of such explanations, defendant fails to rebut the presumption that trial counsel's failure to address these apparently peripheral and irrelevant issues constituted sound trial strategy. Further, defendant fails to explain how trial counsel's failure to raise any of these issues prejudiced his defense. Also, nothing in the trial court record indicates how the failure of trial counsel to address these issues prevented defendant from receiving a fair trial. Defendant's claim of error lacks merit.

Defendant mentions additional instances of alleged inaction by trial counsel that he claims constituted ineffective assistance. In particular, he claims that trial counsel should have had him testify at trial, that counsel failed to clarify exactly which sexual acts occurred on each occasion, and that counsel failed to challenge numerous errors in his presentence investigation report. However, because defendant fails to develop these arguments, provide any citation to authority, or reference relevant portions of the trial court record that support his position, we need not consider these issues further. *Kelly*, 231 Mich App at 640-641.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens