STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ROBERT DESHAWN AMERSON, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

ROBERT DESHAWN AMERSON,

Respondent-Appellant.

UNPUBLISHED
July 21, 2011

No. 298526
Calhoun Circuit Court
Family Division
LC No. 2010-3003215-DL

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, respondent Robert DeShawn Amerson, a minor, was convicted of assault with intent to commit criminal sexual conduct (CSC) involving sexual penetration, MCL 750.520g(1), and fourth-degree CSC involving force or coercion, MCL 750.520e(1)(b). The trial court sentenced respondent to 48 months' probation, successful completion of the K-PEP program, and commitment to the county jail until release to K-PEP in May 2011. Respondent now appeals as of right. We affirm.

I. FACTUAL BACKGROUND

Respondent's convictions arose out of his assault on a 16-year-old female victim. The victim testified that she and respondent lived near each other in the same apartment complex and rode the school bus together. She remembered calling and texting him a few times. On February 11, 2009, the victim walked from the bus stop to the complex with respondent. She was talking to her friend, Malcolm Fairley, on her cell phone. She stopped, played in a puddle, and continued talking. Respondent went into his apartment and then returned. When the victim's cell phone battery died, she went inside her apartment, got the house phone, and called Fairley. While they were talking, she went back outside. She walked past respondent and stood on a landing or balcony attached to the apartment building. Fairley placed the victim on hold, and she leaned over the railing, looking out. As she was leaning, she felt something on her pants. She ignored it at first, but then reached back and realized it was respondent's penis. She jumped and

said, "Eww." Respondent then put his hand down the victim's loose-fitting pants and touched the outer part of her vagina with his finger.

While this was occurring, the victim's friend, Ericka Huntoon, "beeped in" on her phone. Huntoon started telling her a story. Respondent told the victim to sit on the stairs, but she ignored him. When he said it again, the victim said, "No, and if I—and if I don't?" Respondent replied that he would throw her over the balcony. She walked to the corner of the balcony and squatted down. Respondent tried to pick her up, but was unsuccessful. The victim then moved to the stairway and sat down. Huntoon had hung up the phone by that time, and Fairley still had the victim on hold. Respondent came up to the victim on the stairway and said, "Suck my penis." She laughed because she was still in shock that he was acting that way toward her. When respondent repeated his statement, she pushed him away and said, "No." Respondent then straddled her and told her to "lick his penis." His penis was exposed, about six inches from her face. The victim had her head turned away, but respondent put his hand on her head and tried to force her to look at his penis. She again pushed him and said, "No." She said "no" loudly, hoping that a neighbor would hear and help. Respondent eventually stepped back and said, "Well, I better stop because if I keep doing this, then all you're going to do is call the police."

At this point, Fairley had removed the victim from hold and was speaking to her again. The victim wanted Fairley to call her old boyfriend Kimi to help her, so she said "monkey" into the phone. She and Fairley had always told each other that Kimi looked like a monkey, and she hoped that Fairley would realize she needed Kimi. The victim did not tell Fairley or Huntoon what respondent was saying or doing, even though they were on the phone with her during the assault, because she was scared of what respondent might do, particularly because she believed he may have a gun with him, and she did not want him to know that she was scared.

After respondent made his comment about the victim calling the police, she told him she had to go inside. She went inside her apartment and started crying. According to the victim, she was on the phone with Fairley at that time. She told him that she would call him back. She then called Kimi and told him that she had been raped by respondent. She did not know there was a difference between rape and sexual assault. When the victim's mother arrived home, the victim quickly told her what had happened.

Fairley testified that he had spoken to the victim over the phone after they got out of school on the day of the assault. She sounded normal until later in their conversation when she yelled, "Monkey." Fairley thought that she was jokingly referring to him and hung up the phone. He did not indicate whether they then resumed their conversation. Huntoon testified that she also spoke to the victim over the phone on the afternoon of the assault. While they were on the phone, she heard a boy say, "Suck my, before I push you over the balcony." Later that day, the victim called Huntoon. The victim was crying and said that a boy had tried to rape her. The victim's mother testified that when she arrived home from work on the day of the assault, the victim looked nervous and scared. The victim was talking on the phone to Kimi. When asked what was wrong, she said, "Mom, I got raped." The victim's mother then called the police.

Deputy Sharon Beltz testified that on the evening of the assault, she interviewed the victim, who was not crying, but appeared "pretty upset." Thereafter, while she was sitting in her patrol car, the deputy saw a young man peek around the corner of one of the apartment buildings

several times. She then got out of her car and said, "Hey, Rob." The young man, later identified as respondent, replied, "What" or "Yeah." Deputy Beltz followed him upstairs to his apartment. When she arrived at the apartment, respondent said, "I'm not going to jail. I'm not going." Respondent was subsequently taken into custody. Thereafter, he was convicted and sentenced as described above.

II. SUFFICIENCY OF THE EVIDENCE

Respondent argues that there was insufficient evidence to find him guilty of assault with intent to commit sexual penetration beyond a reasonable doubt. We disagree.

We review sufficiency of the evidence claims de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, would warrant a reasonable juror in finding that all the elements of the charged crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). In doing so, we must not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

The "elements of assault with intent to commit CSC involving penetration are simply (1) an assault, and (2) an intent to commit CSC involving sexual penetration. Nothing in MCL 750.520g(1) requires the existence of an aggravating circumstance or that the assault is made with an improper sexual purpose or intent." *People v Nickens*, 470 Mich 622, 627; 685 NW2d 657 (2004). "An assault is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *Id*. at 628. "Sexual penetration" is defined as "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).

Respondent's only argument in regard to this issue is that the prosecution failed to present sufficient evidence that he intended a sexual penetration. We disagree. As indicated, the victim testified that while she was standing on the apartment complex balcony, she felt respondent's penis against her pants. Respondent then put his hand down her pants and touched the outer part of her vagina with his finger. He told her to sit on the stairs and that if she refused, he would throw her over the balcony. He tried to pick her up, but was unsuccessful. The victim then moved to the stairway and sat down. Respondent came up to her and said, "Suck my penis." When she pushed him away and said, "No," respondent straddled her and told her to "lick his penis." At that point, his penis was exposed, and it was about six inches from the victim's face. She had her head turned away, but respondent put his hand on her head and tried to force her to look at his penis. She again pushed him and said, "No." Respondent eventually stepped back and said, "Well, I better stop because if I keep doing this, then all you're going to do is call the police." The victim's testimony about respondent instructing her to suck and lick his penis, placing his penis against her pants and six inches from her face, and touching the outer part of her vagina with his finger was sufficient for a reasonable juror to conclude that he intended a sexual penetration. The "testimony of a victim need not be corroborated in prosecutions under . . . [MCL 750.]520g." MCL 750.520h. Moreover, Huntoon testified that she spoke to the victim over the phone at the time of the assault and heard a boy say, "Suck my,

before I push you over the balcony." The credibility of the witnesses' testimony was for the jury to determine. See *Wolfe*, 440 Mich at 514-515.

Viewed in the light most favorable to the prosecution, the evidence was more than sufficient for a reasonable juror to find that respondent intended to commit sexual penetration beyond a reasonable doubt.

III. ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent next argues that he was denied the effective assistance of counsel. Again, we disagree.

A claim of ineffective assistance of counsel should be raised by a motion for new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Because respondent failed to move for a new trial or a *Ginther* hearing before the trial court, our review is limited to mistakes apparent on the record. See *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

To establish ineffective assistance of counsel, respondent must show that his trial counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, respondent must show that, but for counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, respondent must overcome the presumption that counsel's performance constituted sound trial strategy. *Id*.

Respondent first argues that his trial counsel rendered ineffective assistance of counsel by failing to request the trial court's assistance in obtaining text messages "and/or" phone messages until the day of trial. Respondent does not identify the messages to which he refers. The lower court record indicates that counsel attempted to obtain respondent's cell phone records—specifically, records of text messages—from Metro PCS. Counsel issued subpoenas for the records approximately five months before trial and filed a motion to compel discovery, which was granted, four months before trial. On the first day of trial, just before jury selection, counsel informed the court that Metro PCS had not presented the records and asked whether the court would consider adjourning the trial or directing a representative of Metro PCS to appear at a show cause hearing. The court stated that counsel's requests were too late. Although the court might have ordered Metro PCS to pay a fine, held the company in contempt, or adjourned the trial, among other things, the court would not do so on the day the trial was scheduled to commence. Counsel indicated that he had been hoping PCS would present the records by the time the trial started. The prosecutor noted that the trial had already been adjourned three times.

We agree with respondent that his trial counsel should not have waited until the first day of trial to request the court's assistance in obtaining the phone records at issue if, in fact, the records might have benefited respondent. That said, respondent has not explained how the records would have been beneficial, or even relevant, to his case. It appears from the lower court record that counsel may have intended to use the records to contradict the victim's testimony

about how well she knew respondent. But without any information as to what the records would have revealed, respondent cannot establish that they would have benefited him. It is equally likely that they would have harmed his case. Furthermore, counsel cross-examined the victim about how well she knew respondent. She admitted that in addition to knowing respondent from school and the apartment complex, she had called him on his cell phone "once or twice," although he never answered, "just to see what he was doing because he was the new student in school . . . ," and had texted him to say "hey, what's up or what are you doing" and once to ask him if he had been at the mall because she thought she saw him there. She testified that their text messages were superficial and general and were never personal or sexual. Counsel also called Annette Doby to testify about the victim's interaction with respondent in Doby's apartment. Doby testified that she observed the victim and respondent sitting close to each other on her son's bed, although she admitted that there was limited space for the two to sit. Given counsel's effort to obtain respondent's cell phone records and elicit testimony regarding the victim's relationship with respondent before the assault, and that the records' content is unknown, respondent cannot establish that counsel's performance denied him a fair trial and likely affected the outcome of the case. See *Henry*, 239 Mich App at 146.

Next, respondent argues that his trial counsel was ineffective for failing to make an offer of proof as to the relevance of certain witnesses' testimony. Respondent does not specifically name the witnesses to which he refers. We must assume, based on the trial transcript pages cited by respondent in his brief on appeal, that he is referring to Brianka Cantrell.[1] On the first day of trial, just before the jury was selected, counsel informed the court that some of the witnesses the defense had subpoenaed had not yet appeared. One of the witnesses was Cantrell. Counsel requested that the court issue a bench warrant for her. The prosecutor noted, and the court acknowledged, that before the court could issue a warrant, defense counsel was required to present proof of personal service and a petition. Further, because Cantrell was a minor, counsel must have proof that her parents were personally served. Counsel stated that although Cantrell's parents were not served, Cantrell had been served. The court could not locate proof of service in the record, and counsel stated that he would attempt to locate proof. During the discussion between the court and the parties regarding proof of service, the prosecutor said, "Your Honor, I would actually ask that Respondent make an offer of proof as to what this person's testimony would be to see if it's even relevant. This person was not present at the scene of the crime, and I'm not quite sure what her testimony - - could be that would be relevant." The court did not instruct counsel to make an offer of proof, nor did it otherwise respond to the prosecutor's request. Later that day, counsel stated that he had not yet located proof of service and did not have a phone number for Cantrell. When the court reiterated that it could only issue a warrant for Cantrell's parents, counsel stated that he would attempt to work with respondent and respondent's family to contact Cantrell.

[1] Although respondent uses the term "witnesses" in his brief on appeal, there is no other witness named or otherwise referenced on the cited transcript pages that could arguably have been the subject of an offer of proof by defense counsel.

On the second and final day of trial, the prosecution requested an offer of proof on the proposed testimony of two other witnesses. One of the witnesses was Jeffrey Kozen, who was the assistant principal of the school where the victim, respondent, and Cantrell attended. According to counsel, Kozen would testify that one day before the victim reported respondent's assault on her, Cantrell told Kozen that respondent had touched her inappropriately. Cantrell's allegations against respondent were later determined to be false. The court held that Kozen's proposed testimony was irrelevant and inadmissible. After the court issued its ruling, counsel asked, "Is the Court's order also prohibiting any testimony as it relates to that [Cantrell's allegations against respondent] should the respondent or any other witness testify?" The court responded, "Yes." No other mention of Cantrell was made during the remainder of the trial. Considering that Cantrell did not appear to testify and the court could not issue a warrant for her, along with the court's ruling that any testimony related to Cantrell's allegations against respondent was irrelevant and inadmissible, respondent cannot establish that counsel's failure to make an offer of proof regarding the relevance of Cantrell's potential testimony was in error or made any difference in the outcome of the case. See *Henry*, 239 Mich App at 146.

Respondent further argues that his trial counsel rendered ineffective assistance of counsel by failing to object to the victim's testimony about his possession of a firearm and use of alcohol and marijuana because the testimony was irrelevant and prejudicial. We disagree. First, the victim's testimony that respondent possessed a gun was relevant. She testified that one to two months before the assault, respondent told her and other students on the school bus that he had a gun. He showed the victim the gun at that time. She explained that during the assault, she did not tell Fairley or Huntoon, who she was on the phone with, what respondent was saying or doing because she was scared of what respondent might do and she did not want him to know that she was scared. The knowledge that respondent might have a gun with him made her more frightened of him. The victim's knowledge that respondent possessed a gun was relevant to explaining why she did not ask for help or report the assault as it was happening. See *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996) (holding that evidence concerning the defendant's conduct toward the victim was relevant to explaining her delay in reporting sexual abuse). The victim's testimony about respondent's alcohol use was also arguably relevant. The victim testified that when she was playing in the puddle shortly before the assault, respondent went into his apartment. He returned with a cup of liquid that he said was liquor, drank some of the liquid, and then dumped the rest into the puddle. In *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996), our Supreme Court held that evidence that the defendant, who was convicted of third-degree CSC involving force or coercion, MCL 750.520d(1)(b), had used marijuana on the night he and the victim had sexual relations was admissible as part of the res gestae of the offense. The defendant's use of marijuana could have affected his behavior and "inferences made by a person about the intended conduct of another might have been affected by the person's knowledge that the other's conduct was taking place in a setting where illegal drugs were being used." *Id*. Here, evidence that respondent, a minor, was drinking alcohol shortly before the assault and showed the alcohol to the victim could have affected his behavior as well as her perception of him. Moreover, respondent has not established how the testimony regarding his possession of a firearm or alcohol use was so prejudicial to him that it affected his right to a fair trial. See *Henry*, 239 Mich App at 146.

Further, respondent's trial counsel cannot be deemed ineffective for eliciting or failing to object to testimony about respondent purchasing marijuana. When cross-examining the victim,

counsel asked whether she saw anyone walking by during the assault. The victim responded that when she was playing in the puddle, respondent talked to a man who came out of the area of the complex where respondent lived. When she asked respondent what they had talked about, he said, "'I'm trying to buy a blunt.'" Counsel then repeated his question to the victim regarding whether she saw anyone else during the assault itself, not before or after. We agree with the prosecution that the victim gave an unexpected response to counsel's proper question and counsel may have determined, as a matter of trial strategy, that it would draw more attention to the victim's brief marijuana reference to raise an objection. Counsel cannot be found ineffective on this basis. See *id*. at 146; see also *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Additionally, respondent requests an evidentiary hearing to determine whether his trial counsel was ineffective. Respondent does not, however, state what evidence could be uncovered to establish his ineffective assistance claim. Respondent states in his brief on appeal that although it is not clear in the record, there may be evidence that the victim was not truthful. But, without some indication of what specific evidence could be introduced regarding the victim's truthfulness or otherwise, there is no merit to respondent's request to remand for an evidentiary hearing. The request is therefore denied.

Affirmed.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens