

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 23, 2018

v

DAVID JAMES NEFF,
Defendant-Appellant.

No. 335999
Kent Circuit Court
LC No. 15-009057-FH

Before: MARKEY, P.J., SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant, David James Neff, was convicted in a jury trial of two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(b)(i). Defendant appeals by right his conviction and sentences. We affirm.

Defendant first argues that the prosecution failed to present sufficient evidence to sustain his convictions. Defendant essentially argues that the victim's testimony was not believable. This Court reviews de novo a claim challenging the sufficiency of the evidence in a criminal case. *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015).

"To determine whether the prosecutor has presented sufficient evidence to sustain a conviction, [appellate courts] review the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Smith-Anthony*, 494 Mich 669, 676; 837 NW2d 415 (2013) (quotation marks and citation omitted). "The standard of review is deferential: a reviewing court is 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). This is because the jury observes the witnesses first hand and is in a much better position than an appellate court to determine witness' credibility and decide the weight to assign their testimony. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Satisfactory proof of the elements of a crime may be made with circumstantial evidence and reasonable inferences arising from the evidence. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The prosecution need not negate every reasonable theory consistent with innocence. *Nowack*, 462 Mich at 400. An appellate court must resolve all conflicts in the evidence in favor of the prosecution and not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses.

People v Unger, 278 Mich App 210, 222; 749 NW2d 272 (2008). “The testimony of a victim need not be corroborated in [CSC] prosecutions.” MCL 750.520h. Therefore, the victim’s testimony alone may be sufficient to support a conviction of criminal sexual conduct. *People v Szalma*, 487 Mich 708, 724; 790 NW2d 662 (2010).

Defendant was charged with violating MCL 750.520c(1)(b)(i), which provides that “[a] person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person,” the victim is “at least 13 but less than 16 years of age,” and the defendant “is a member of the same household as the victim.” “Sexual contact” is defined to mean “the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.” MCL 750.520a(q). Defendant does not contest that the victim was related to him or that she was a member of his household or that the victim was between the ages of 13 and 16 during the relevant time period. Defendant only challenges the “sexual contact” element.

The victim’s testimony that defendant repeatedly came into her bedroom late at night and touched her vagina and breasts under her clothing was sufficient to prove that defendant engaged in sexual contact with the victim, and that he therefore committed the offense of CSC-II. See MCL 750.520h; *Szalma*, 487 Mich at 724. Although defendant argues that the victim should not be believed, this was the same argument that defendant presented at trial, and the jury was free to determine the weight and credibility to be given to the witness testimony. *Wolfe*, 440 Mich at 515. Drawing all reasonable inferences and making credibility choices in support of the jury verdict, *Nowack*, 462 Mich at 400, we conclude that the evidence was sufficient to support defendant’s conviction of two counts of CSC-II.

Defendant next argues that the sentence imposed by the trial court was unreasonable and that he is entitled to a remand for resentencing. We disagree.

When a trial court exercises its discretion to depart from the sentencing guidelines, that sentence will be reviewed by an appellate court for reasonableness. *People v Lockridge*, 498 Mich 358, 365; 870 NW2d 502 (2015). “[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion.” *People v Steanhouse*, 500 Mich 453, ___; 902 NW2d 327 (2017). A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, “[w]hen a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information.” *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016), citing MCL 769.34(10).

Defendant was convicted of two counts of CSC-II, MCL 750.520c, which is a Class C felony. MCL 777.16y. The trial court scored the sentencing guidelines for defendant’s CSC-II conviction, with a PRV score of 10 points and an OV score of 55 points.¹ These scores placed

¹ Defendant does not object to the scoring of the sentencing variables.

defendant in PRV level C and OV level V. The minimum sentence range was 36 to 71 months' imprisonment. MCL 777.64. The trial court sentenced defendant to a term of 5 to 15 years' imprisonment for the CSC-II conviction, a sentence within the appropriate guidelines range.

As this Court explained in *Schrauben*, 314 Mich App at 196 n 1, our Supreme Court's decision in *Lockridge* "did not alter or diminish MCL 769.34(10)." That statute provides, in pertinent part, "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). Defendant does not dispute that his sentence was within the recommended minimum guidelines range, and he does not argue that the trial court relied on inaccurate information or that there was an error in scoring the guidelines. Because the sentence the trial court imposed was within the recommended minimum guidelines range, this Court must affirm the sentence.

Defendant next argues that he was deprived of the effective assistance of counsel at sentencing, so he is entitled to a remand for resentencing. We disagree.

"The question whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). This determination requires a court to first find the facts, and then determine whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). "Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

In this case, because defendant did not move in the trial court for a new trial or an evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). To establish a claim of ineffective assistance of counsel, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51. Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *Id.* at 52. In doing so, a defendant must overcome a strong presumption that the challenged conduct might be considered sound trial strategy. *Heft*, 299 Mich App at 83. This Court "neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Mutuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant argues that the defense counsel who handled his trial did not appear for sentencing and that substitute counsel appeared at sentencing in her place. Defendant argues that substitute counsel knew nothing about his case and failed to articulate any facts in support of defendant that may have had a favorable impact on the trial court. But defense counsel indicated at sentencing that he prepared for the hearing by discussing the case with his colleague who handled the trial. Defense counsel also brought to the court's attention factors that favored

defendant. Because there are no errors apparent on the record, *Heft*, 299 Mich App at 80, we conclude that defendant's argument regarding ineffective assistance of counsel is without merit.

We affirm.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola