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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY TODD BAILEY,

Defendant-Appellant.

UNPUBLISHED
April 16, 2019

No. 343603
Clare Circuit Court
LC No. 17-005704-FH

Before: SWARTZLE, P.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b) (sexual penetration of an individual less than 13 years of age by an individual 17 years of age or older). The trial court sentenced defendant to 25 to 50 years' imprisonment. Defendant appeals as of right, alleging that there was insufficient evidence to support his conviction and that his trial counsel was constitutionally ineffective. We affirm.

I. RELEVANT FACTS

At the preliminary hearing in November 2017, DW, who was eight years old at the time, testified that "Gub molested me" by putting "his wiener in my mouth," and he clarified that his "wiener" is "[w]hat he pees out of." DW stated that he refers to his mother's uncle, who is his great-uncle, as "Gub" or "Uncle Gub," and he identified defendant as that person. DW testified that he was "like, four or three . . . or five . . . around that age" when the assault happened, and "it wasn't before [his] birthday," but after. He stated that it occurred at night, in the living room of "Gub's house," on a couch that was "brown and a little bit of gray." He also testified that there were two other people in the house, but they were not in the room when defendant assaulted him because "[t]hey went to bed before it happened." DW did not know the names of those people. On cross-examination, defense counsel asked DW if "any other person ever hurt you or touched you where you didn't wanna be touched?" and he responded, "No." Defense counsel then asked, "So, Gub would be the only one that ever touched you in that manner?" and DW responded, "Yes."

At the jury trial in February 2018, DW testified that "Gub sticked his wiener in my mouth," and stated that his "wiener" is "[w]hat you pee out of." DW identified defendant as the person who did this to him. DW stated that when this happened, he was lying on the couch and defendant "was on" him, because defendant was "on his knees . . . [o]n the couch." Defendant was wearing blue jeans, and he "unzipped his pants" and "stuck his wiener in [DW's] mouth . . . and then took it right back out." Afterwards defendant "told [DW] not to tell anyone," and then "[h]e zipped up his pants." DW "stayed on the couch . . . [f]or the rest of the night." DW did not tell anyone about what happened "right away," but he eventually told his father.

DW further testified that the assault occurred "[a]t [defendant's] house" and that DW "was on the couch," but he did not remember what the couch looked like. He could not remember when it happened, but he thought he "was around five," and he thought it was before his birthday. He stated that it was "probably night" when this occurred, but when the prosecutor asked him whether it could "have been the morning or some other time?" he responded, "I really don't know." The prosecutor asked DW, "When this happened, was there was anybody else there with you and Gub?" and DW responded, "No." On cross-examination, defense counsel asked DW, "When you testified before, you said two adults were there during that period of time in the house?" and DW responded, "No. I can't—I can't remember."

Defense counsel also asked DW about other possible instances of abuse. He asked DW, "[D]o you remember [your mother] touching you inappropriately?" and DW responded, "Yes." He asked whether DW "remember[ed] telling any of the doctors that mom pulled on your penis and flicked it," and DW stated, "No, but I don't—I don't remember telling any doctors," but he agreed that it did happen. DW also stated that someone who he thought was named Mike Ballis, who "used to be [his] mom's boyfriend," "abused" him; DW explained that "he would usually spank us for no reason" and "he would just beat us up." Additionally, the prosecutor asked DW whether Mr. Ballis had ever touched his private parts, and DW responded, "No, I can't remember." The prosecutor asked, "Did Mr. Ballis put his pee-pee in your mouth?" and DW stated, "No."

II. SUFFICIENCY OF THE EVIDENCE

Defendant claims that there was insufficient evidence to support his CSC-I conviction because the prosecution's case was primarily based on DW's testimony, which was inconsistent and uncorroborated. We disagree.

When reviewing a challenge to the sufficiency of the evidence to support a criminal conviction, this Court must view the evidence in the light most favorable to the prosecution "and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000) (quotation marks and citation omitted). "The standard of review is deferential," and this Court "is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id*. at 400.

MCL 750.520b(1)(a) provides, in relevant part, that a "person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . [t]hat other person is under 13 years of age." MCL 750.520a(r) further provides that actions

constituting "sexual penetration" include "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." In addition, MCL 750.520h provides that in a prosecution for CSC-I pursuant to MCL 750.520b, the prosecution is not required to corroborate a victim's testimony.

Defendant contends that the prosecution presented insufficient evidence to support his CSC-I conviction because the prosecution's case against him was based entirely on DW's testimony, which was "brief," "uncertain," and "was not corroborated by the testimony of any other trial witness" whom DW told of the assault. There were a number of instances in DW's trial testimony when he was unable to remember certain details and events. There were also occasions where his trial testimony differed from the testimony he provided at the preliminary examination. He offered conflicting testimony regarding the time of year and the time of day when the assault occurred, his age at the time, and whether anyone else was present in the house when it happened. However, DW's testimony with respect to the assault itself did not change. He maintained that it occurred at defendant's house, on a couch, and that defendant inserted his penis into DW's mouth. At trial, DW provided greater detail of the assault, and stated that he was lying on the couch when defendant got on top of him with his knees on the couch, unzipped his blue jeans, put his penis in DW's mouth, "and then took it right back out." Further, DW testified that he was "around five" years old when the assault took place.

DW's testimony establishes that the essential elements of CSC-I were met. See MCL 750.520b(1)(a). First, defendant engaged in "sexual penetration" because he had DW perform fellatio on him, and as MCL 750.520a(r) states, any intrusion by defendant, however slight, into DW's body was sufficient to satisfy the "sexual penetration" element of CSC-I. Second, DW testified that he was "around five" years old when the assault occurred. While defendant asserts that DW's testimony was "brief" and "uncertain," the question is whether there was sufficient evidence that the jury, sitting as the trier of fact, could choose to believe that would justify convicting defendant. See *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994). Given that DW's testimony established both elements of CSC-I, and the jury evidently chose to believe that testimony, the jury's finding that defendant was guilty of CSC-I was justified. See *id*. Further, while defendant contends that DW's testimony was uncorroborated by any other witness to whom he disclosed the assault, MCL 750.520h provides that a prosecutor is not required to corroborate a victim's testimony in a CSC-I prosecution. *People v Solloway*, 316 Mich App 174, 181; 891 NW2d 255 (2016). Accordingly, because DW's testimony established both elements of CSC-I, there was sufficient evidence for a rational trier of fact to conclude that the prosecution proved the essential elements of the crime beyond a reasonable doubt.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant alleges that he was not afforded effective assistance of trial counsel because counsel did not impeach DW's trial testimony with the inconsistent statements he made at the preliminary examination. 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). A claim of ineffective assistance of counsel is preserved by moving for a new trial or for a *Ginther*[1] hearing. *People v Lopez*, 305 Mich App 686, 693; 854 NW2d 205 (2014). Where the trial court has not conducted a *Ginther* hearing, this Court's review is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Defendant did not move for a new trial or for a *Ginther* hearing in the trial court and, accordingly, this Court's review is limited to mistakes apparent in the record.

There are two requirements that the defendant must show in order to obtain a new trial based on the ineffective assistance of trial counsel. *Trakhtenberg*, 493 Mich at 51. First, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness. *Id*. As a prerequisite, the defendant must overcome the presumption that counsel's performance was sound trial strategy. *Id*. at 52. Second, the defendant must establish that he or she suffered prejudice, such that but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. *Id*. at 51.

Defendant bases his claim of ineffective assistance of trial counsel on counsel's failure to impeach DW on the inconsistencies between his testimony at the preliminary hearing and at trial. However, "decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (quotation marks, alteration, and citation omitted). Accordingly, trial counsel's decisions about how to cross-examine DW, and whether to impeach him on particular points, were a matter of trial strategy. The inconsistencies defendant points to concern the time of year and time of day of the assault, DW's age at the time, and his description of the couch on which the assault occurred. Defendant does not allege that there were inconsistencies regarding DW's description of the assault itself that defense counsel failed to highlight on cross-examination. Defendant is not able to overcome the presumption that defense counsel's decision not to impeach every inconsistency in the eight-year-old witness's testimony was not sound trial strategy.

Further, because defendant did not move for a *Ginther* hearing, this Court does not have the benefit of trial counsel's testimony regarding his trial strategy. However, the record makes clear that defense counsel sought to demonstrate that DW had experienced other instances of abuse by other perpetrators, including his mother, likely to suggest an alternative explanation for DW's allegations in this case. Additionally, defense counsel did impeach DW's testimony that no one else was there when defendant assaulted him with his testimony at the preliminary examination that there were two other individuals present in the house at the time. Defendant is unable to establish that counsel's performance fell below an objective standard of reasonableness because counsel attacked DW's credibility and provided other explanations for his account of the assault. See *Solloway*, 316 Mich App at 189; *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999).

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

Defendant relies on *Trakhtenberg*, 493 Mich 38, for the proposition that defense counsel's failure to impeach a key prosecution witness can amount to error requiring reversal. While the *Trakhtenberg* Court did reach that conclusion, it was largely based on the Court's determination that defense counsel had unreasonably failed to undertake necessary investigation. *Id*. at 55. Defendant has not made a similar allegation here; instead, he asserts that counsel was aware of the inconsistences between DW's testimony at trial and at the preliminary examination, and should have employed them to greater effect during cross-examination. However, again, counsel's chosen method of cross-examination is a matter of trial strategy. See *Dixon*, 263 Mich App at 398; *In re Ayres*, 239 Mich App at 23. In this case, there is no suggestion that counsel's decision not to impeach DW on particular points was due to his failure to adequately investigate.

Turning to the issue of prejudice, the "defendant must show that but for counsel's deficient performance, a different result would have been reasonably probable." *Trakhtenberg*, 493 Mich at 55-56 (quotation marks and citation omitted). In *Trakhtenberg*, defense counsel failed to impeach key elements of the complainant's allegations, including the defendant's mental state, and to present strong evidence of bias against the defendant by both the complainant and her mother, the defendant's ex-wife. *Id*. at 57-58. In contrast, the inconsistencies between DW's testimony at trial and at the preliminary hearing did not concern the elements of CSC-I or any bias DW may have harbored against defendant. DW testified consistently at the preliminary hearing and the trial concerning defendant's commission of criminal sexual conduct. While DW testified that he could not remember some minor details of the assault, including the time of day and what the couch looked like, the jury heard this testimony. There were two points on which DW offered directly contradictory testimony,[2] and defense counsel impeached him on one of those points.[3] Given that the points on which defense counsel failed to impeach DW with his prior testimony were extraneous to the essential elements of the offense, defendant has not shown that there is a reasonable probability that the outcome of the trial would have been different had defense counsel confronted DW with his inconsistent statements.

Defendant has not satisfied his burden of showing that the manner in which defense counsel conducted cross-examination of DW was not sound trial strategy. Accordingly, he has not shown that counsel's performance was deficient. In addition, defendant has not shown prejudice, because he has not demonstrated that, but for counsel's performance, there is a reasonable probability that the outcome of the trial would have been different.

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[2] The first was whether the assault occurred before or after his birthday, and the second was whether there were any other people in the house when the assault occurred. As to the first instance, DW is still under the age of 13 now and, therefore, whether the assault took place before or after his birthday is not relevant to an element of the offense.

[3] Defense counsel impeached DW's testimony that there was not "anybody else there with" him and defendant when the assault happened by asking, "When you testified before, you said two adults were there during that period of time in the house?"

IV. CONCLUSION

DW's trial testimony provided sufficient evidence for a rational trier of fact to conclude that the prosecution had proved the essential elements of CSC-I beyond a reasonable doubt. In addition, defendant failed to show that defense counsel's decision not to impeach DW with his inconsistent testimony from the preliminary examination was not sound trial strategy. Likewise, defendant failed to show that there is a reasonable probability of a different result had defense counsel impeached DW's testimony.

Affirmed.

/s/ Brock A. Swartzle
/s/ Mark J. Cavanagh
/s/ Thomas C. Cameron