

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 15, 2012

v

SCOTT EVERETT PAYNTER,
Defendant-Appellant.

No. 302488
Oakland Circuit Court
LC No. 2010-230856-FC

Before: O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). We affirm.

This case arose from allegations that defendant sexually assaulted two young girls. Defendant raises two issues on appeal. First, defendant argues that he was denied the effective assistance of counsel. A defendant who believes that trial counsel's performance was ineffective should raise the issue in a motion for a new trial or for an evidentiary hearing. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Here, defendant did not raise the issue in the trial court, so this Court's review is limited to mistakes that are apparent from the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

This Court summarized the analysis applicable to claims of ineffective counsel in *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001):

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991),

citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed2d 674 (1984).

Defendant first argues that defense counsel was ineffective for failing to object to a detective's testimony. The detective testified that the disclosure of one of the complainants was credible, on the ground that certain details of the allegations matched the detective's independent investigation of those details. We need not decide whether the lack of objection constituted ineffective assistance because defendant has not established a reasonable probability that, but for the alleged error, the result of the proceedings would have been different. *Id.* Although the complainant's credibility was at issue because of a recantation, the record demonstrates that the complainant had disclosed her allegations to multiple individuals. Moreover, the trial court specifically instructed the jurors that they were responsible for deciding which witnesses to believe, and that the jurors could decide to believe all, part, or none of any witness's testimony. Based upon the specific evidence in this case, defendant has not demonstrated that the lack of objection could have altered the outcome of the trial.

Next, defendant argues that defense counsel was ineffective because she failed to object when the detective testified that defendant declined to talk to him. The detective testified that his investigation was limited because defendant, defendant's wife, and defendant's mother would not speak with him. Defendant contends that this testimony violated his Fifth Amendment right to remain silent. US Const, Am V.

“[I]n general, prosecutorial references to a defendant's post-arrest, post-*Miranda*¹ silence violate a defendant's due process rights under the Fourteenth Amendment of the United States Constitution.” *People v Shafier*, 483 Mich 205, 212-213; 768 NW2d 305 (2009). Here, however, defendant has not established whether the detective's comment involved pre- or post-*Miranda* silence; moreover, the brief reference in the record suggests that the comment involved pre-*Miranda* silence. Therefore, defendant has failed to establish a factual predicate to support his claim. See *People v Hoag*, 460 Mich 1, 6-7; 594 NW2d 57 (1999) (a defendant must establish a factual predicate to support a claim of ineffective assistance of counsel). Moreover, defendant cannot demonstrate that the alleged error prejudiced him. There is no indication in the record that the prosecutor used this testimony against defendant or suggested to the jury that defendant's silence indicated defendant's guilt. Accordingly, defendant has not overcome the presumption that counsel provided effective assistance.

Defendant next argues that there was insufficient evidence to support his convictions. Specifically, defendant maintains that there was no credible or reliable evidence from which the jury could find that he committed the charged crimes. This Court reviews de novo defendant's challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* Witness credibility is a matter for a jury to determine,

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed2d 694 (1966).

and we will not interfere with the jury's assessments of credibility. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

Having reviewed the record, we conclude that the evidence was sufficient for a reasonable juror to find defendant guilty. The jury had the opportunity to observe the complainants and to form opinions about their credibility, and the jury resolved the issue of credibility against defendant. Defendant has not demonstrated that the complainants' testimony, or that of the other witnesses, was inherently implausible or contrary to physical realities. Cf. *People v Lemmon*, 456 Mich 625, 643-646; 576 NW2d 129 (1998) (trial court may set aside jury's assessment of credibility if the testimony defies physical reality or is inherently implausible). In short, we defer to the jury's determination of credibility.

Affirmed.

/s/ Peter D. O'Connell

/s/ David H. Sawyer

/s/ Michael J. Talbot