STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 2013
v	No. 307564 Kalamazoo Circuit Court
TERRENCE ALVIN BELL, Defendant-Appellant.	LC No. 2011-000722-FH

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for three counts of third-degree criminal sexual conduct (CSC III) against a person receiving special education services, MCL 750.520d(1)(f); one count of CSC III by force or coercion, MCL 750.520d(1)(b); one count of fourth-degree criminal sexual conduct (CSC IV) against a person receiving special education services, MCL 750.520e(1)(g); three counts of child sexually abusive activity, MCL 750.145c(2); and one count of furnishing obscenity to a minor, MCL 750.142. We reverse the conviction for CSC III by force or coercion because the jury was not properly instructed, but affirm the remaining convictions.

The victim was a 17 year-old high school student who received special education services through the Kalamazoo Public School System. Defendant was an employee of the Kalamazoo school district. During the victim's senior year of high school, she and defendant had numerous sexual encounters. These encounters often involved defendant penetrating the victim vaginally, anally, or orally. At defendant's instruction, the victim took numerous explicit photographs of herself, which she sent to defendant through text messages. On one occasion, defendant texted the victim a photograph of a penis. At trial, the parties stipulated to the admission of the explicit photographs, as well as Facebook communications between defendant and the victim and defendant's telephone records.

Defendant first argues that we should vacate his conviction of CSC III by force or coercion because the trial court failed to instruct the jury on the elements of the offense. The trial court did not instruct the jury on the elements of that count. The prosecution concedes that it cannot be said that the "instructions fairly presented the issues to be tried and sufficiently protected defendant's rights." *People v Eisen*, 296 Mich App 326, 330; 820 NW2d 229 (2012). The prosecution also agrees that the case should be remanded for resentencing. Because

vacating the conviction for CSC III by force or coercion does not alter defendant's sentencing guidelines, remand is not required. *People v Jackson*, 487 Mich 783, 785; 790 NW2d 340 (2010). However, this Court "has the *discretion* to remand for resentencing when it vacates a conviction as justice demands." *Id.* at 800 n 35 (emphasis in original). The Sentencing Information Report relied on this count for scoring purposes, and the prosecution agrees that remand for resentencing is appropriate in this case. We will, therefore, remand for resentencing.

Defendant next argues that the Facebook and text messages between defendant and the victim constituted inadmissible hearsay. Defendant waived his hearsay challenge when defense counsel stipulated to the admission of the challenged evidence at trial. *People v McDonald*, 293 Mich App 292, 295; 811 NW2d 507 (2011) (holding that the defendant waived his claim that the challenged evidence was inadmissible hearsay where defendant "affirmatively stated that he had no objection to the admission of the" challenged evidence).

Defendant also raises a concomitant claim that defense counsel was ineffective for stipulating to the admission of the challenged hearsay. Defendant does not cite to or specify any specific message, but rather addresses the "text and Facebook messages sent between the Defendant and victim" as a general, collective group of inadmissible hearsay statements. Any Facebook or text message that defendant sent to the victim would constitute a party admission and would not be hearsay. MRE 801(d)(2).[1]

Moreover, even assuming that some or all of the victim's messages were hearsay statements, in order to establish ineffective assistance of counsel, defendant must "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "This 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 Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The record shows that the defense cited to and relied on the victim's messages to support its theory that the victim was in love with defendant and was doggedly pursuing him against his wishes. "Following an unsuccessful strategy does not mean that an attorney was ineffective." *In re CR*, 250 Mich App 185, 199; 646 NW2d 506 (2002); see also *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008) ("A failed strategy does not constitute deficient performance."). Accordingly, defendant has not "overcome the strong presumption that" defense counsel's stipulation "constituted sound trial strategy under the circumstances." *Toma*, 462 Mich at 302.

Finally, defendant argues that defense counsel was ineffective for failing to challenge whether the victim was qualified to receive her special education services and, thus, we should vacate his convictions for CSC III against a special education student. The record supports, and defendant does not dispute, that the victim was receiving special education services at the time of the offenses. In order to find a defendant guilty of CSC III against a special education student,

[1] MRE 801(d)(2) provides, in relevant part, that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement, in either an individual or a representative capacity . . . ."

the victim must be "receiving special education services." MCL 750.520d(1)(f). "Our overriding goal for interpreting a statute is to determine and give effect to the Legislature's intent. The most reliable indicator of the Legislature's intent is the words in the statute." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (citations and quotations omitted).

The language of MCL 750.520d(1)(f) requires the victim to be "*receiving* special education services." (Emphasis added). Nothing in the statutory language indicates that the prosecution must establish the victim's qualifications for the special education services she receives, and defendant does not cite any authority supporting such a proposition. We decline to construe MCL 750.520d(1)(f) as requiring the fact finder to find that the services the victim received were necessary. *Ericksen*, 288 Mich App at 203-204. Accordingly, it would have been meritless for defendant's trial counsel to challenge the victim's need for the special education services that she was receiving and, thus, defendant has not shown that his counsel was ineffective for failing to raise such a challenge. *Id*. at 201.

Affirmed in part, reversed in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro