STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY LEE CUNNINGHAM,

Defendant-Appellant.

UNPUBLISHED
May 7, 1996

No. 164910
LC No. 92-013343

Before: Reilly, P.J., and Michael J. Kelly and C.L. Bosman,* JJ.

PER CURIAM.

Following a bench trial on February 9, 1993, in Detroit Recorder's Court defendant was found guilty of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2); MSA 28.788(7)(2). Defendant was sentenced on March 25, 1993, to two to five years in prison and now appeals as of right.

The testimony at trial related to events on election day, November 3, 1992, when defendant drove his adult cousin, Gwendolyn to a nearby poling place located in a school. Gwendolyn and defendant were accompanied by the victim, an eleven-year-old girl who was cousin of both the adults. The victim was a student at the school and had been a problem student which resulted in her suspension from class.

When returning from the school Gwendolyn had decided to ride with another relative and defendant and the victim were alone in the vehicle. Testimony established that defendant parked the vehicle on a street, in darkness, near the victim's home and sexually assaulted the victim in the back seat of the car. Defendant denied any assault and claimed that the victim was falsely accusing him because he had lectured her about her school behavior and because he was talking about obtaining employment at the school as a security guard where he would be checking on her behavior.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant argues that the trial court erred in believing the testimony of the victim as she had a history of telling lies and there is no physical evidence to corroborate her version of the incident. Although defendant did not challenge the sufficiency of the evidence by moving for a directed verdict at trial, this Court may review the issue. *People v Wolfe*, 440 Mich 508, 516 n 6;489 NW2d 748 (1992); *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987). We view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Wolfe*, 440 Mich at 515.

In a bench trial, the judge, as the trier of fact, has the duty to determine the credibility of the witnesses and the weight to be given to their testimony. *People v Szymanski*, 32 Mich 248, 253; 32 NW2d 451 (1948); *People v Hogan*, 9 Mich App 78, 85-86; 155 NW2d 866 (1967). It is also basic that a judge who sits without a jury in a criminal trial must make specific findings of fact and conclusions of law. MCR 6.403; *People v Jackson*, 390 Mich 621, 627; 212 NW2d 918 (1973); P*eople v Shields*, 200 Mich App 554, 58; 504 NW2d 711 (1993). The factfinder may choose to believe or disbelieve, in whole or in part, any portion of a witness' testimony. *People v Fuller*, 395 Mich 451, 453; 236 NW2d 58 (1975).

The elements of assault with intent to commit sexual conduct are: assault involving the use of force or coercion, with the specific intent to touch the victim's genital area, groin, inner thigh, buttock, breast, or clothing covering those areas, for the purpose of sexual arousal or sexual gratification. *People v Evans*, 173 Mich App 631, 634; 434 NW2d 452 (1988); *People v Lasky*, 157 Mich App 265, 269-270; 403 NW2d 117 (1987). In the instant case, the victim testified that she and defendant were alone in his car when defendant pushed her into the back seat, got on top of her, forcibly pulled her pants half way down, held a knife to her head and threatened to kill her. She testified that he pulled his own pants down and put his penis against her. Her testimony is unequivocal that his penis was touching her genital area. This evidence was sufficient to support an inference that the assault was for the purpose of defendant's sexual arousal or gratification. Viewed in the light most favorable to the prosecution, there was sufficient evidence to support a finding beyond a reasonable doubt that defendant assaulted the victim with intent to commit criminal sexual conduct.

Defendant further argues that he was denied effective assistance of counsel. A *Ginther* hearing was held on defendant's motion and the ineffective assistance issues have been preserved. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, AM VI; Const 1963, art 1, § 20, is the right to effective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. *People v La Vearn*, 448 Mich 207, 216; 528 NW2d721 (1995).

Defendant first alleges that trial counsel was ineffective in failing to interview or subpoena a witness, David White, who, according to appellate counsel's brief, "could have" negated the victim's accusation that defendant had a knife. Failure to interview a witness does not necessarily establish that defense counsel was inadequately prepared and therefore ineffective. *People v Caballero*, 184 Mich App 636, 640,642; 457 NW2d 80 (1990). The decision whether to call witnesses is a matter of trial strategy, and the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 495 NW2d 569 (1990).

At the *Ginther* hearing defendant admitted that he told counsel that he, defendant, would ensure that the witness was present for the trial. In light of this testimony counsel's conduct in failing to subpoena the witness was not below an objective standard of reasonableness. Furthermore, the result would not have been different if the witness had testified that, on the day in question, defendant had told him that he (defendant) did not have a knife in his possession. Counsel's failure to subpoena the witness did not deprive defendant of a defense that would have made a difference in the outcome of the trial.

Defendant next alleges ineffective assistance of counsel in that counsel failed to investigate defendant's assertion that the locks in his car did not work. Counsel believed that evidence that the locks were "inoperative" would not be helpful, and counsel's decision not to investigate the locks was made for strategic reasons, and this Court will not now second-guess these reasons with the benefit of hindsight. Further, according to the victim's testimony, by the time she was trying to get out of the car, defendant had already attacked her.

Defendant also claims that counsel failed to object to the hearsay testimony of two family members when they testified about what the victim said that defendant did to her. The statements were made within a few minutes of the occurrence, and would therefore have been admissible under the excited utterance exception to the hearsay rule. MRE 803(2). See, e.g., *People v Taylor*, 185 Mich App 1, 9-10; 460 NW2d 582 (1990), and see generally *People v Straight*, 430 Mich 418, 423-433 (1988).

Defendant next claims that counsel failed to arrange for defendant to take a polygraph test, after defendant had agreed to take one. Polygraph evidence is inadmissible. *People v Kosters*, 175 Mich App 748, 754; 438 NW2d 651 (1989); *People v Ray*, 431 Mich 260, 265-268; 430 NW2d 626 (1988). Thus, counsel's failure to submit his client to a polygraph analysis cannot be said to be below the standard of objective reasonableness.

Defendant's final assignment of error is that counsel failed to obtain the victim's school records, which would have shown how poor her school behavior was, that she was severely emotionally disturbed and that she had a history of not telling the truth. Counsel was able to elicit from both family members on cross-examination, that the victim had trouble telling the truth, that she had emotional problems of such severity that she had been examined by psychiatrists and social workers, and that she had been suspended from school for disturbing her classes and fighting. Assuming, without deciding, that the school records would have been admissible, it is difficult to imagine what more they would have added. Counsel's failure to obtain the school records does not fall below a standard of objective reasonableness, and in any event, defendant was not prejudiced by failure to admit the records into evidence because they would merely have been cumulative of the testimony of family members on this issue. Defendant was not denied effective assistance of counsel at trial.

Affirmed.

/s/Maureen Pulte Reilly
/s/ Michael J. Kelly
/s/ Calvin L. Bosman