

STATE OF MICHIGAN

COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY DUNCAN,

Defendant-Appellant.

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UNPUBLISHED

June 4, 1996

No. 167950

LC No. 92-012277

Before: Reilly, P.J., and Cavanagh, and R.C. Anderson,\* J.J.

PER CURIAM..

Following a bench trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and was sentenced to three concurrent sentences of ten to fifteen years in prison. He appeals as of right. We affirm.

Defendant first asserts that each of the convictions was not supported by sufficient evidence. We disagree. Review of a challenge to the sufficiency of the evidence in a bench trial requires this Court to view the evidence in a light most favorable to the prosecution and determine whether the evidence was sufficient to support a conclusion by the trier of fact that the essential elements of the crime were proven beyond a reasonable doubt. *People v Vaughn*, 186 Mich App 376, 379; 465 NW2d 365 (1990); *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748 (1992). However, this Court should not interfere with the factfinder's role of determining the weight or credibility of the evidence. *Wolfe, supra* at 514-515.

By statute, first-degree criminal sexual conduct includes: "sexual penetration with another person . . . if . . . [t]he actor is aided or abetted by 1 or more other persons and . . . [t]he actor uses force or coercion to accomplish the sexual penetration." MCL 750.520b(1)(d); MSA 28.788(2)(1)(d).

With respect to his three convictions of first-degree criminal sexual conduct, defendant claims that there was insufficient evidence of the element of aiding and abetting. A finding of aiding and abetting requires proof that: (1) the charged crime was either committed by the defendant or some other

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

person, (2) the defendant gave encouragement or performed acts that assisted or aided the commission of the crime, and (3) that, at the time of giving aid and encouragement, the defendant intended the commission of the crime or had knowledge that the principal intended to commit the crime. MCL 767.39; MSA 28.979; *People v Partridge*, 211 Mich App 239, 240; \_\_\_ NW2d \_\_\_ (1995). Aiding and abetting describes all forms of assistance rendered to the perpetrator and comprehends all words or deeds which might support, encourage or incite the commission of a crime. *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991).

With respect to the first and third counts, taken most favorably to the prosecution, the evidence that Betty Duncan held the victim down while defendant was engaged in the forcible sexual penetration of the victim, was sufficient to establish the element of aiding and abetting. With respect to the conviction on the second count, the evidence establishes that defendant's actions in restraining the victim assisted Betty Duncan in her digital penetration of the victim. Furthermore, we disagree with defendant's assertion that the victim's testimony was inherently incredible and will not invade the province of the trial court as the sole determiner of credibility. *Wolfe, supra* at 514-515. Therefore, we conclude that there was sufficient evidence to support defendant's convictions of first-degree criminal sexual conduct.

Defendant next asserts that he was denied the effective assistance of counsel at trial. We disagree. Defendant failed to move for a new trial or a *Ginther*<sup>1</sup> hearing before the trial court. Therefore, unless the appellate record contains sufficient detail to support defendant's claim, he has effectively waived the issue. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). A defendant that claims he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

First, defendant maintains that he was coerced by counsel to waive his right to a jury trial. In light of the properly executed oral and written waiver of his right to a jury trial and the lack of any evidence that he was coerced by counsel in waiving this right, we conclude that defendant's assertion is without merit.

Next, defendant argues that his counsel failed to investigate the facts surrounding the heavy scarring on defendant's body. The victim testified that she did not get a good look at defendant. Therefore, her failure to identify the scarring was of little weight. Hence, there is little possibility that this alleged error by counsel would have affected the outcome of trial.

Finally, defendant asserts that his counsel failed to investigate the circumstances surrounding the victim's identification of defendant. Given that the victim was acquainted with defendant before the incident and immediately led police to his home following the assault, identification was not an issue at

trial. Further investigation of that issue would have been fruitless. Hence, counsel's performance did not fall below an objective standard of reasonableness. Pickens, supra at 303. Therefore, we conclude that defendant has failed to establish that he was denied the effective assistance of counsel.

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Mark J. Cavanagh

/s/ Robert C. Anderson

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<sup>1</sup> People v Ginther, 390 Mich 436, 443, 212; NW2d 922 (1973).