

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID BRIAN BUHNERKEMPER,

Defendant-Appellant.

UNPUBLISHED
September 3, 1996

No. 160845
LC No. 92-27076-FC

Before: Young, P.J., and Holbrook, Jr., and J. Richard Ernst,* JJ.

PER CURIAM.

Defendant was convicted by a Washtenaw Circuit Court jury of three counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and was convicted, following a bench trial, of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. This Court granted defendant's motion to remand to allow him to file a motion for new trial in the trial court. Following an evidentiary hearing, the trial court denied defendant's motion for a new trial. Defendant now appeals as of right and we affirm.

Defendant first claims that he was denied a fair trial because the trial court failed to instruct the jury on the defense of consent. We find no merit to this claim. Because the issue whether a consent instruction was requested by defendant was in dispute, an evidentiary hearing was conducted on remand. At the conclusion of the hearing, the trial court determined that no consent instruction had been requested by the defense. We review a trial court's findings of fact for clear error. MCR 2.613(C); *People v Stoughton*, 185 Mich App 219, 227; 460 NW2d 591 (1990). A finding is clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made. *Id.* In this case, it was undisputed that no request for a consent instruction was made on the record, and that defense counsel expressed satisfaction with the instructions as given. Defense counsel's testimony at the remand hearing that he and the assistant prosecutor had a bench conference with the trial judge as the jury left to begin its deliberations is belied by the record, by the prosecutor's testimony, and by the trial judge's own recollection. Accordingly, the court's finding that no request was made is not clearly erroneous.

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

Given the finding that no request for a consent instruction was made, defendant's alternative argument that the trial court was under a duty to give the instruction sua sponte must fail. See *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995).

Defendant next argues that he was denied effective assistance of counsel because of the failure of trial counsel to request a consent instruction. Counsel is presumed to have provided effective assistance and the defendant bears a heavy burden to prove otherwise. *People v Wilson*, 180 Mich App 12, 17; 446 NW2d 571 (1989). To establish such a claim, a defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness and that this deficient performance resulted in outcome determinative prejudice. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Here, defendant has failed to establish that trial counsel's performance was deficient. At the remand hearing, the trial court determined that defense counsel chose not to request the instruction because, if he did so, the prosecutor would have been allowed to call as a rebuttal witness a victim in another first-degree CSC case involving defendant. This strategic decision was reasonable, and this Court will not second-guess matters of trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant next argues that his convictions are against the great weight of the evidence because the victim's description of his face during the attack was bizarre, certain portions of her trial testimony differed from her pretrial statements, and there was a lack of physical evidence to corroborate her claims. Defendant's claim is without merit. Determinations of weight and credibility are made by the jury that heard the testimony and observed the witnesses, and an appellate court will not substitute its judgment for that of the jury. *People v Atkins*, 397 Mich 163, 172; 243 NW2d 292 (1976); *People v Sharbnow*, 174 Mich App 94; 435 NW2d 772 (1989). The challenged portions of the victim's testimony did not preclude the jury's finding that defendant committed the acts alleged. See *People v Carson*, 87 Mich App 163; 274 NW2d 3 (1978). Moreover, while the testimony of a CSC victim need not be corroborated by other testimony or physical evidence, MCL 750.520h; MSA 28.788(8), the victim's testimony in this case was corroborated by various witnesses' accounts of blood on her face and fingerprints on her neck, and by testimony regarding the presence of defendant's semen on the victim and her underclothes. Accordingly, the jury's verdicts were not against the great weight of the evidence.

Finally, defendant argues that the trial court abused its discretion in allowing a nurse who examined the victim to testify that the victim's demeanor following the assault was similar to that of other rape victims she had encountered in her duties as a nurse. We find no abuse of discretion. The witness was not offered as an expert but as a fact witness who treated the victim following the assault. Her testimony as a lay witness was proper under MRE 701 because it was rationally based on her perception of the witness and was helpful to the jury's determination of whether the victim's behavior following the incident was consistent with heroin withdrawal, as

defendant had claimed in his opening statement and during cross-examination of prosecution witnesses. Cf. *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995). We find no error.

Affirmed.

/s/ Richard P. Young

/s/ Donald E. Holbrook, Jr.

/s/ J. Richard Ernst