

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIUS SYLVESTER LABA,

Defendant-Appellant.

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UNPUBLISHED  
February 21, 1997

No. 181037  
Huron Circuit Court  
LC No. 94-003668-FH

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,\* JJ.

PER CURIAM.

Defendant was convicted by jury of assault and battery, MCL 750.81; MSA 28.276, and assault with a dangerous weapon, MCL 750.82; MSA 28.277. He was sentenced to thirty days in jail.<sup>1</sup> The convictions resulted from charges that defendant, while opening and closing bull pinchers near his stepgrandson's groin, touched the stepgrandson's penis and threatened to castrate him. Defendant appeals as of right. We affirm.

Defendant argues that there was insufficient evidence to support his convictions given the asserted incredibility of the complainant's testimony. This Court reviews a challenge to the sufficiency of the evidence by viewing the evidence in the light most favorable to the prosecution to determine whether a rational fact finder could decide that the essential elements of the crime were proven beyond a reasonable doubt. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). Inherent in considering the proofs most favorably to the prosecution is resolving all credibility concerns in the prosecution's favor. See *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993). Viewed in this light, we find sufficient evidence to support defendant's convictions. The complainant's testimony that defendant grabbed his penis, without consent, and the police officer's testimony that defendant admitted threatening to castrate the boy support the assault and battery conviction. *People v Jones*, 443 Mich 88, 92; 504 NW2d 158 (1993); *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). The complainant testified that defendant, without consent, said

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

he was going to castrate him. Defendant frightened the complainant by sitting on top of him and opening and closing bull pinchers about two or three inches from his groin. This was sufficient to establish that defendant committed assault with a dangerous weapon. *Grant, supra; People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993).

We also conclude that defendant has not established that he received ineffective assistance of counsel. In the absence of a *Ginther*<sup>2</sup> hearing, our review is limited to mistakes apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and prejudiced defendant, i.e., a reasonable probability exists that but for counsel's error, the result would have been different. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW 2d 557 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Here, we find no objective evidence of unprofessional conduct and no resulting prejudice to defendant, despite defendant's assertions that trial counsel performed unreasonably by asking the complainant questions on cross-examination at both the trial and preliminary examination related to the complainant's asserted sexual obsession and that these questions established a motive for the charged assaults. With regard to the questions asked at trial, four were an effort to impeach the complainant's credibility by bringing out arguable contradictions between his trial and preliminary examination testimony. Because trial counsel could have reasonably concluded that any risk of highlighting a possible motive was outweighed by the damage done to the complainant's credibility, defendant has not overcome the presumption that counsel's actions constituted a permissible exercise of trial strategy. Cf. *People v Johnson*, 451 Mich 115, 122-124; 545 NW2d 637 (1996). Accordingly, there is no reasonable probability that this line of questioning impacted the jury's verdicts, and defendant has not articulated how he might have been harmed by counsel's cross-examination of the complainant at the preliminary examination.

Affirmed.

/s/ Jane E. Markey  
/s/ Michael J. Kelly  
/s/ Michael J. Talbot

<sup>1</sup> The judgment of sentence indicates that, if for medical reasons defendant could not be incarcerated, he would serve two days in a tether program for each day not served in jail. From the record, it is unclear whether defendant served his sentence in jail, under a tether program or in some combination of the two.

<sup>2</sup> *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).