

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WYDELL GULLEY,

Defendant-Appellant.

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UNPUBLISHED

September 19, 1997

No. 193532

Oakland Circuit Court

LC No. 95-138046-FC

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(2)(1)(b), and assault with intent to rob while unarmed, MCL 750.88; MSA 28.283. Defendant subsequently pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1083, and was sentenced to concurrent terms of fifteen to thirty years' imprisonment. Defendant now appeals as of right. We affirm.

On appeal, defendant first argues that he was denied the effective assistance of counsel because his trial counsel failed to move to suppress the statement defendant claims was the result of police compulsion. We disagree.

In determining whether a defendant's right to effective assistance of counsel has been so undermined that it justified reversal of an otherwise valid conviction, a defendant must show two things. First, defendant must establish that his counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *People v Johnson*, 451 Mich 115, 121; 545 NW2d 637 (1996). Second, defendant must show that the deficient performance prejudiced the defense to the extent that defendant was deprived of a fair trial. *Id.* A defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Here, we find that it is not apparent from the record that defendant was denied effective assistance of counsel. First, defendant failed to establish at trial that he was actually injured at the time of his arrest. Second, defendant offered no evidence to prove that he was suffering from pain or

discomfort as a result of this injury and, therefore, in need of medical treatment. Additionally, the record does not suggest that defense counsel was even aware of defendant's allegation at the time of trial and, therefore, able to properly object. Furthermore, even if defense counsel was aware of defendant's contention that his statement was coerced, it may have been a defense tactic for counsel not to object to the admission of defendant's statement so that the statement could be used to substantiate defendant's theory that the sex was consensual. Therefore, we conclude that defendant's claim of ineffective counsel is without merit.

Defendant next argues that his due process rights were violated because of prosecutorial misconduct in the prosecution's closing arguments. Specifically, defendant argues that he was denied a fair trial because the prosecution improperly shifted the burden of proof to defendant by commenting on defendant's silence, and by denigrating defense counsel. Again, we disagree.

Claims of prosecutorial misconduct are reviewed on a case by case basis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). A prosecutor's remarks must be examined in context to determine whether a defendant was denied a fair and impartial trial. *Id.*; *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993).

For both instances of alleged misconduct, when considered in context, we conclude that the remarks were not intended to either shift the burden of proof or to denigrate defense counsel. However, to the extent that they could have been misinterpreted by the jury, we find that the curative instructions given by the trial court were sufficient to dispel any prejudicial effect. The jury was properly instructed that the prosecution had the entire burden of proof. The court emphasized that defendant's decision not to testify was not to affect the verdict because defendant had an absolute right not to testify. In addition, the trial court cautioned the jury that the lesser included offenses were valid options for the jury to consider in evaluating defendant's conduct, and that the prosecutor's comments regarding the lesser included offenses being a joke were untrue and improper. The trial court also emphasized to the jury that the lawyers' comments were not evidence, but were only means to assist the jury in understanding the evidence and summarizing each side's legal theory. Therefore, because the trial court provided sufficient curative instructions to the jury, we find that defendant was not denied a fair trial.

Affirmed.

/s/ David H. Sawyer

/s/ Harold Hood

/s/ Joel P. Hoekstra