

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL WARREN FISHER,

Defendant-Appellee.

UNPUBLISHED

December 30, 1997

No. 193591

Grand Traverse Circuit Court

LC No. 95-006813-FH

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and was sentenced to one year in jail and five years' probation. He now appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial when the trial court admitted testimony regarding his silence during his interrogation. We disagree. In *People v McReavy*, 436 Mich 197, 222; 462 NW2d 1 (1990), our Supreme Court held that a defendant's waiver of his right to remain silent during an interrogation constitutes a "continuing waiver" until he invokes that right again. The testimony offered at trial fits squarely within the situation contemplated by *McReavy*. Here, as in *McReavy*, defendant waived his right to remain silent and did not invoke that right again during his interrogation. According to an investigator, defendant was cooperative during his interrogation, but during certain questions he simply stopped talking. His failure to answer certain questions, without more, does not form the basis for a Fifth Amendment challenge. *Id.* Accordingly, we find no infringement of defendant's right to remain silent.

Next, defendant argues that the trial court abused its discretion in reversing a district court's refusal to bind defendant over on charges of CSC II. This Court's review of the bindover process is de novo. *People v McBride*, 204 Mich App 678, 681; 516 NW2d 148 (1994). We must determine if the magistrate abused his discretion in determining whether there was probable cause to believe that the defendant committed the offense charged. *Id.* A defendant must be bound over for trial if evidence is presented at the preliminary examination that a crime has been committed and there is probable cause to

believe that the defendant committed the crime. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). There must be some evidence from which each element of the crime may be inferred. *Id.* Probable cause is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in believing that the accused is guilty of the offense charged. *Id.*

MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) provides that a person is guilty of CSC II if the person engages in sexual contact with another person if that other person is under thirteen years of age. MCL 750.520a(iv)(k); MSA 28.788(1)(iv)(k) provides:

“Sexual contact” includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

Defendant maintains that the prosecution did not show that his conduct could reasonably be construed as having a sexual purpose, and therefore the district court properly found the evidence insufficient to bind defendant over for trial. We disagree. Evidence was presented that defendant laid down on a couch and asked an eleven-year-old female to give him a back rub. During this back rub, defendant flipped down his running shorts, exposing a portion of his buttocks, and requested that the complainant “finger it.” Whether such activity could be reasonably construed as having a sexual purpose was a question properly left to the jury. See *Reigle*, *supra* at 37. Accordingly, we find that the district court abused its discretion in finding that there was no probable cause to bind defendant over for trial.

Defendant also argues that the trial court erred in reversing the district court’s ruling without remand. However, defendant cites no authority for this proposition. Therefore, this issue is not preserved for appeal. *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997).

Next, defendant argues that he was denied a fair trial when the prosecuting attorney repeatedly offered the complainant’s prior consistent statements to bolster her credibility. Specifically, defendant challenges the testimony of Annette Conners, Deputy Scott Fewins and Deputy Richard Stowe. Because defendant did not object to this testimony at trial, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). We find that no manifest injustice would result from this Court’s failure to review this issue. Furthermore, we find that the testimony was properly admitted under MRE 801(d)(1)(B) as a prior consistent statement offered to rebut a charge of recent fabrication.

Next, defendant argues that he was denied a fair trial when the trial court failed to properly swear the key prosecution witness. Instead of administering the customary oath as described in MCL 600.1432(1); MSA 27A.1432(1) and MRE 603, the trial court asked the complainant a series of questions that pertained to her ability to tell the truth. She concluded with an assurance that she would tell the truth. First, we note that because defense counsel did not object to the failure of the trial court to insist upon an oath or affirmation, this issue is not preserved for appeal. *People v Knox*, 115

Mich App 508, 511; 321 NW2d 713 (1982). Furthermore, MRE 603 states that the purpose of an oath is to “awaken the witness’ conscience” and “impress” upon the witness the duty to testify truthfully. We are persuaded that the trial court’s thorough examination of the complainant, culminating in her promise to tell the truth, was sufficient and did awaken in her the duty to testify truthfully. Therefore, we find no error.

Next, defendant argues that he was denied the effective assistance of counsel. He maintains that his counsel was ineffective for failing to object or properly preserve all of the above claimed errors. He also argues that his counsel was ineffective for failing to challenge three jurors after they testified that they knew family or friends who had been convicted of crimes similar to those charged against defendant. A claim of ineffective assistance of counsel requires a showing (1) that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel’s errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303, 314; 521 NW2d 797 (1994); *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996). A defendant must overcome a strong presumption that counsel’s action was sound trial strategy. *Id.* In this appeal, defendant has not identified any error requiring reversal. Therefore, he is unable to meet his burden of demonstrating that counsel was incompetent, and that counsel’s error was prejudicial. *Pickens, supra* at 326-327. His claim that counsel should have attempted to strike three jurors fails as well. Here, the jurors swore that, despite their experience with friends and family members convicted of criminal sexual conduct, they could fairly and impartially render a verdict in this case. Furthermore, it is conceivable that a juror who had a personal relationship with someone who had been accused of a similar crime would be sympathetic to defendant. Therefore, defendant has not overcome the presumption that trial counsel’s failure to attempt to challenge the jurors was sound trial strategy.

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald