

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN O. BELL,

Defendant-Appellant.

UNPUBLISHED

August 13, 2002

No. 222174

Wayne Circuit Court

LC No. 98-009839

ON REMAND

Before: Whitbeck, C.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant appealed as of right from a jury conviction of first-degree criminal sexual conduct [CSC I], MCL 750.520b(1)(a)(sexual penetration with a person under the age of thirteen; the victim was a nine-year-old girl) for which he was sentenced to life imprisonment. We affirmed the conviction, but remanded for resentencing in *People v Bell*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2001 (Docket No. 222174). Defendant was in fact resentenced by the trial court after remand. In the meantime, our Supreme Court, in lieu of granting leave to appeal, remanded the case to us to address the issues raised in defendant's Standard 11 brief, which was filed late in this Court and therefore not addressed. 466 Mich 865. After consideration of the issues presented in defendant's Standard 11 brief, we once again affirm defendant's conviction.

Defendant first argues that he was denied a fair trial where the prosecutor elicited testimony from a police officer that defendant smoked marijuana. We disagree. It is unnecessary to determine whether the evidence was improper under MRE 404(b) because defendant was not prejudiced by the testimony and any error was harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). We fail to see how a minor reference to marijuana use denied defendant's right to a fair trial in relation to a CSC case, and the police officer further testified that defendant gave no indication that he had smoked marijuana on the day of the crime.

Defendant next argues that he received ineffective assistance of counsel because his trial counsel (1) failed to investigate and call numerous favorable witnesses, (2) failed to object to prosecutorial misconduct concerning the prosecutor's recitation of incorrect law to the jury, (3) failed to investigate or request questioning of a juror who was sleeping during trial, and (4) failed to request that the jury view the crime scene.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Regarding the claim that counsel was ineffective for failing to call numerous favorable witnesses, our review is limited to the record, *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997), and we have no evidence as to what the allegedly favorable witnesses would testify to if actually called upon. Therefore, defendant has failed to overcome the strong presumption that counsel’s performance constituted sound trial strategy. Regardless, considering the victim’s multiple identifications of defendant, whom she had seen before at her neighbor’s house, there did not exist a reasonable probability that the result of the proceeding would have been different had the proposed witnesses testified.

Regarding the claim that counsel was ineffective for failing to object to prosecutorial misconduct concerning the prosecutor’s recitation of incorrect law to the jury, defendant’s argument lacks merit. The prosecutor did not assert that sexual penetration could be accomplished by simply touching the vaginal area for purposes of CSC I, and even assuming a misstatement of law, defendant was not prejudiced because the trial court properly instructed the jury on CSC I.

Regarding the claim that counsel was ineffective for failing to question a juror who was allegedly sleeping, we do not believe that counsel’s actions were deficient and could have been a matter of strategy so as to not alienate the juror by reacting in an overly aggressive manner to the incident. Moreover, assuming ineffectiveness, there was no reasonable probability that the result of the proceeding would have been different.

Regarding the claim that counsel was ineffective for failing to request a jury view, defendant’s argument lacks merit. A jury view is proper when it is believed that a personal view of the scene would enable the jurors to comprehend more clearly the evidence already received. *People v Connor*, 295 Mich 1, 6; 294 NW 74 (1940); *People v Curry*, 49 Mich App 64, 67; 211 NW2d 254 (1973). A review of the record does not indicate the need for a jury view, and we

cannot say that had a view occurred, there would have been a reasonable probability that the result of the proceeding would have been different.

Defendant next argues that his conviction should be vacated because the victim's version of the offense was contrary to indisputable physical facts. We disagree. The so-called indisputable physical facts recited by defendant did not negate or make impossible the victim's allegations concerning the circumstances of the offense. Those facts may have lead one to question the credibility of the victim; however, this Court defers to the jury's determination regarding the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Moreover, as held in our first opinion, there was sufficient evidence for the jury to find defendant guilty of CSC I. *Bell, supra*, slip op at 2.

Defendant next argues that he is entitled to resentencing because the presentence investigation report [PSIR] contained prejudicial inaccurate information. We disagree. Under MCR 6.429(C), a defendant may not raise an issue challenging the accuracy of information contained in a PSIR unless the issue was raised at or before sentencing. *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). Here, there was no challenge to the information defendant now challenges on appeal. Regardless, we do not find the PSIR to be inconsistent, in any meaningful manner, with the testimony presented at trial.

Defendant finally argues that he was denied effective assistance of appellate counsel because of counsel's failure to preserve issues contained in defendant's Standard 11 brief, which failure was allegedly caused by budget cuts at the State Appellate Defenders Office. We disagree. As indicated in this opinion, the issues raised by defendant in his Standard 11 brief lack merit; therefore, there is no basis to find appellate counsel ineffective for failing to preserve issues contained within the brief.

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Kathleen Jansen