

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PETER MICHAEL-LAWRENCE KURTZ,

Defendant-Appellant.

UNPUBLISHED

September 27, 2005

No. 254028

Wayne Circuit Court

LC No. 03-012620

Before: Fort Hood, P.J., and White and O’Connell, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b). He was sentenced to two years of probation. We affirm.

Defendant first alleges that there was insufficient evidence to support the conviction. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The reviewing court should not interfere with the fact finder’s role of determining the weight and credibility of witnesses, but must draw all reasonable inferences and resolve credibility choices in support of the verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

“A defendant can be found guilty of criminal sexual conduct in the fourth degree if he engages in sexual contact with another person and force or coercion is used to accomplish a sexual contact.” *People v Lasky*, 157 Mich App 265, 271; 403 NW2d 117 (1987); see also MCL 750.520e(1)(b). The force or coercion element may be satisfied “when the actor achieves the sexual contact through concealment or by the element of surprise.” MCL 750.520e(1)(b)(v). Sexual contact is defined as follows:

“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, done for a sexual purpose, or in a sexual manner for:

- (i) Revenge.
- (ii) To inflict humiliation.
- (iii) Out of anger. [MCL 750.520a(n).]

“Sexual contact may be proven by establishing that the touching of an intimate part of the victim’s body was intentional and can reasonably be construed as being for the purpose of sexual arousal or gratification.” *People v Duenaz*, 148 Mich App 60, 65; 384 NW2d 79 (1985). Intimate parts include the buttocks. MCL 750.520a(c). Fourth-degree CSC is not a specific intent crime, and personal injury to the victim is not required. *Lasky, supra* at 271-272.

In the present case, there was sufficient evidence of the elements of the offense to support the conviction. The evidence established that an intentional touching occurred, it was achieved through surprise, and it occurred for sexual gratification purposes. The victim testified that an intentional touching occurred. She was next to defendant when he took his middle finger and placed it up the victim’s rear end. Defendant then placed his finger near his nose and said, “um sweet.” The victim admonished defendant regarding his actions in front of another coworker. The victim was purportedly visibly upset when she told other coworkers of the incident. She was in the process of completing a note regarding the incident when the parish priest arrived, and she then relayed the incident to the priest. An intentional touching of the victim’s intimate parts occurred over her clothing, MCL 750.520a(n), which the victim did not anticipate, MCL 750.520e(1)(b)(v), and defendant’s statement indicated that he was sexually gratified by the act, MCL 750.520a(n). Viewing this evidence in the light most favorable to the prosecutor, the essential elements of the crime were proven beyond a reasonable doubt, *Johnson, supra*, particularly in light of the trial court’s assessment of the weight of the evidence and the credibility of the witnesses. *Nowack, supra*.

Next, defendant alleges that he was denied the effective assistance of counsel because his attorney failed to adequately cross-examine and attack the credibility of the complainant, failed to call witnesses, and failed to present an adequate defense. We disagree. The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Findings of fact by the lower court are reviewed for clear error, and questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which requires the defendant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The defendant bears a “heavy burden” on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel’s

performance constituted sound trial strategy. *Riley, supra* at 140. “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *Garza, supra*. Counsel’s determinations of which witnesses to call, and how to present them, are presumed to be matters of trial strategy. *Rockey, supra*.

Defendant contends that trial counsel failed to adequately cross-examine the victim and attack her credibility. This argument lacks merit because trial counsel vigorously cross-examined the victim by eliciting errors, gaps, and inconsistencies in her story. For instance, the victim told the police that she did not work the rest of the week after the incident occurred because she was afraid of defendant. However, the victim’s time sheet, which was admitted by defense counsel, established that she did work the days after the incident. The victim could not recall telling the police that she wanted defendant fired. Defense counsel obtained admission of the victim’s prior statements to the police.¹ Defense counsel also highlighted the fact that the victim and coworker did not reach the same conclusion regarding the statement made after the touching. Furthermore, review of the record reveals that trial counsel explored the nature of the relationship between the victim and defendant, attempting to elicit evidence of a motive to fabricate the story and prior allegations of sexual misconduct by the victim. Although appellate counsel challenges the adequacy of trial counsel’s investigation with regard to past sexual allegations, there was no evidence presented at the *Ginther*² hearing to support any alleged inadequacy. The mere assertion that there might be some evidence out there, somewhere, does not adequately substantiate a claim of ineffective assistance of counsel. See *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

Defendant next argues that trial counsel failed to call other witnesses for defendant. The decision to call witnesses is a matter of trial strategy and constitutes ineffective assistance of counsel when the failure to do so deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one that could have made a difference in the trial’s outcome, such as the failure to present alibi witnesses. *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990). The additional witnesses presented at the *Ginther* hearing did not witness the incident between the victim and defendant. Although one witness presented a possible motive for a false sexual assault claim, the witness was unclear in the timing of the statement by the victim. Moreover, this theory was presented at trial. Defendant opined that the victim made up the allegation because he had complained about her work performance and that she was not working the hours scheduled. The appellate challenge of failure to call witnesses at trial did not deprive defendant of a substantial defense and was unsupported in light of the trial court’s factual findings that were not clearly erroneous.³

¹ Although the record does not specifically indicate, the victim’s statements to the police apparently contained her statement that she wanted defendant fired, and that is why defense counsel moved for admission of the statement.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

³ Additionally, we note that the trial court’s factual findings are reviewed for clear error. The
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Next, defendant alleges that trial counsel failed to present an adequate defense. Specifically, defendant contends that, at the time of the motion for directed verdict, the trial court believed there was insufficient evidence to convict on a criminal sexual conduct charge, though possibly on assault and battery, but that after defendant had taken the stand, the trial court was convinced of defendant's guilt on the criminal sexual conduct charge. The decisions regarding the witnesses to call and the evidence to be admitted presents a question of trial strategy that we do not review with the benefit of hindsight. *Garza, supra; Rockey, supra*. Defense counsel testified that it was defendant's decision to testify at trial, and the trial court made such a factual finding. Under the circumstances, this challenge is without merit.

Defendant next contends that trial counsel failed to object to argumentative cross-examination by the prosecution during which defendant became agitated. However, at the *Ginther* hearing, trial counsel provided a rationale for his failure to object. He testified that defendant got excited, but that when the prosecutor used a louder tone of voice, defendant responded in a respectful manner, albeit in a comparable tone of voice. Defense counsel opined that the strong reaction was evidence of innocence, and the trial court would view the testimony as such. Moreover, he opined that there were sufficient inconsistencies in the victim's testimony to establish reasonable doubt.

Although defendant has questioned, in hindsight, the failure to object to argumentative questioning, defendant's demeanor on the stand was problematic and indicative of culpability in the eyes of the trier of fact, and there is no evidence that an objection by trial counsel would have cured that appearance. Defendant's argument lacks merit because it was not shown that, but for the alleged error, the result of the trial would have been different. *Garza, supra*.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Peter D. O'Connell

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trial court expressly concluded that the testimony of the coworker at the church was biased in favor of defendant and against the victim. The trial court further held that if the testimony had been presented as a motion for new trial based on newly discovered evidence, the motion would be denied based on his assessment of the witness' credibility.