

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD JAY HAYDEN,

Defendant-Appellant.

UNPUBLISHED
September 23, 2014

No. 316758
St. Clair Circuit Court
LC No. 12-002334-FH+

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right his jury-based convictions of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a), and fourth-degree CSC, MCL 750.520e(1)(a). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to a prison term of 20 to 30 years on the third-degree CSC conviction and to time served on the fourth-degree CSC conviction. We affirm.

Defendant's convictions arose from a sexual assault on a 15-year-old female acquaintance. According to the testimony at trial, defendant, who was age 34, took the 15-year-old girl and her 17-year-old boyfriend to defendant's house to smoke marijuana. Defendant's cousin was in the house at the time. Defendant later asked the two minors to come to his detached garage to see a car that he owned. While in the garage, defendant sent the boyfriend to a store. Defendant told the girl to stay with him in the garage, ostensibly because she recently had foot surgery and was using crutches. After the boyfriend left, defendant sexually assaulted the girl in the garage.

Defendant first argues that defense counsel was ineffective for eliciting certain testimony during cross-examination of a prosecution witness, Roberta Moley. Defense counsel asked Moley about a "falling out" with defendant. Moley responded that she ceased contact with defendant because of "a situation that had come up with my minor child that I did not agree with and how it was addressed and that was the end of it. I was not putting my children in danger." Defendant maintains that Moley's response was prejudicial, and that defense counsel should not have asked Moley about the "falling out."

Because defendant did not raise an ineffective assistance of counsel issue in a motion for a new trial or request for an evidentiary hearing in the trial court, our review of this issue is limited to errors apparent from the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d

94 (2002). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *Id.* at 579. To establish ineffective assistance of counsel, defendant must show: (1) that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different; and (3) that the resultant proceeding was fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must overcome a strong presumption that counsel’s actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). To establish ineffective assistance of counsel, a defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

In this case, defendant has not demonstrated that his counsel’s cross-examination of Moley was ineffective. On direct examination, Moley had testified that defendant got “intoxicated and high” with the complainant and the complainant’s mother. Moley further testified that she had known defendant for 20 years, but that she had a falling out with him. From the context of defense counsel’s cross-examination, it appears that his decision to ask Moley about the falling out was a matter of trial strategy, to indicate to the jury that she was biased against defendant. This strategy was not objectively unreasonable. Moreover, Moley’s testimony was not directly responsive to defense counsel’s question. Defense counsel asked Moley a “yes or no” question, as follows:

Q: Okay. And you agree with me when you say a falling out, --

A: Yes.

Q: -- there was a decision that at least you made unilaterally there was just going to be no more contact and things of that nature?

Moley responded as follows:

A: There was going to be no more contact under one condition and the only reason why is there was a situation that had come up with my minor child that I did not agree with and how it was addressed and that was the end of it. I was not putting my children in danger.

Once Moley presented this answer, defense counsel’s decision regarding whether to raise an objection was also a matter of strategy. Raising an objection could have drawn the jury’s attention to Moley’s answer. As our Supreme Court has noted, “[T]here are times when it is better not to object and draw attention to an improper comment.” *People v Bahoda*, 448 Mich 261, 282 n 54; 531 NW2d 659 (1995). Moreover, Moley’s testimony was vague, and she did not offer details regarding the “situation.” Under the circumstances, counsel reasonably may have decided that it was preferable not to object. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it use the benefit of hindsight when assessing

counsel's competence. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). Defendant has not overcome the presumption that counsel's strategy was sound.

Defendant next challenges his sentence and argues that the trial court erred by assessing 15 points on Offense Variable (OV) 8, victim asportation or captivity. MCL 777.38(1)(a). The guideline requires a 15-point assessment when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." We review the sentencing court's factual findings for clear error, and the findings must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

Asportation requires some movement of the victim beyond that incidental to the commission of the underlying offense. *People v Dillard*, 303 Mich App 372, 379; 845 NW2d 518 (2013). "Asportation does not require force; asportation for the purpose of OV 8 may occur even when the victim voluntarily accompanied the defendant to a place or situation of greater danger. A place of greater danger includes an isolated location where criminal activities might avoid detection." *Id.* at 522-523 (citations omitted).

In *Dillard*, this Court affirmed a 15-point assessment under OV 8. The *Dillard* defendant assaulted the complainant (his girlfriend) in a driveway, and then the complainant voluntarily accompanied the defendant into his apartment. *Id.* at 523. The *Dillard* panel concluded that the asportation into the apartment warranted the assessment of points under OV 8, because the facts indicated that the complainant was not free to leave the apartment and that the apartment was more isolated than the driveway. *Id.*

Similarly, the evidence in this case showed that defendant picked up the complainant and her boyfriend and then drove them to his home. The defendant took them to his detached garage, away from defendant's cousin who was inside the house. Defendant then asked the boy to go to the store, leaving the complainant alone with defendant in the garage. While the victim was sitting on a bench in the garage, defendant moved her crutches to the other side of the room. These facts establish that defendant transported the complainant to a place of greater danger, i.e., from his home into the detached garage. The complainant's limited mobility further supports the OV 8 assessment, in that defendant placed the victim in a situation of greater danger when he moved her crutches, limiting her ability to move. Accordingly, the trial court did not err in assessing 15 points under OV 8.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell