

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 27, 2014

v

JOHN ERIC BENNETT,

Defendant-Appellant.

No. 311903
Oakland Circuit Court
LC No. 2012-239748-FH

Before: CAVANAGH, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

Defendant John Eric Bennett appeals by right his jury convictions of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b)(i). The trial court sentenced Bennett as a third habitual offender, MCL 769.11, to serve concurrent prison terms of 10 to 30 years for the third-degree CSC conviction, and two to four years each for the fourth-degree CSC convictions. Because we conclude there were no errors warranting relief, we affirm.

I. BASIC FACTS

On the night at issue, Bennett came home from work and did not want to wake his fiancée and young child, so he went to the basement of his apartment complex and lay down on a mattress in the laundry room. Another resident at the apartment complex, DT, awoke in the middle of the night and realized that she left a load of laundry in the washer. DT went downstairs to the laundry room to move the clothes from the washer to a dryer. After she entered the laundry room, Bennett approached her, introduced himself using his full name, and had a brief conversation with her.

DT testified that she felt uncomfortable with Bennett in the room and tried to leave. Bennett moved up to her, put his hands under her pajamas, and groped her bare breasts and buttocks. He then used his fingers to separate her labia in an attempt to digitally penetrate her. DT finally got away from him, ran to her apartment, and called 911.

DT told responding police officers that they could find the perpetrator in the basement. The police went to the basement and found Bennett sleeping on a mattress. He smelled of intoxicants and matched the description given by DT. Bennett told the officers that he had conversed with a woman who identified herself as “T,” but initially denied having any physical

contact with her. He later told an officer that he had massaged T's shoulders and that his hand might have brushed against her buttocks when she slipped as he helped her with the laundry.

DT attended a corporal lineup, but selected a differed individual. At trial, Bennett's lawyer attacked DT's credibility, noting her failure to identify Bennett in the lineup and inconsistencies in recounting what occurred. Bennett's lawyer also argued that DT had various motives, including financial, for falsely accusing Bennett.

The jury, however, found DT credible and found Bennett guilty. Bennett now appeals.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

On appeal, Bennett argues that his trial lawyer did not provide him with effective assistance. In order to establish a claim of ineffective assistance, Bennett must identify an act or omission by his lawyer that he believes was not the result of reasonable professional judgment—that is, an act or omission that fell below an objective standard of reasonableness under prevailing professional norms. *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), vacated not in relevant part 493 Mich 864. He must then show that there is a reasonable probability that, but for the act or omission, the result of the proceeding would have been different. *Id.*

This Court reviews de novo whether a lawyer's act or omission fell below an objective standard of reasonableness under prevailing professional norms and prejudiced the defendant's trial. *Id.* at 19-20. Where, as here, the trial court did not hold a hearing on the claim of ineffective assistance, this Court's review is limited to mistakes that are apparent on the record alone. *Id.* at 20. In such cases, the defendant must additionally overcome a strong presumption that his or her trial lawyer's act or omission was a matter of legitimate trial strategy. *Id.* at 22. Indeed, this Court will affirmatively entertain the range of possible reasons for the act or omission and, if there might have been a legitimate strategic reason for the act or omission, this Court must conclude that the act or omission fell within the range of reasonable professional conduct. *Id.* at 22-23.

A. IMPEACHMENT EVIDENCE

Bennett first argues that his lawyer should have introduced a letter from a law firm notifying the apartment complex that DT hired a lawyer regarding allegations of injuries, which included rape. Bennett's lawyer questioned DT about the letter at trial, but did not seek its admission. Bennett contends that the letter would have impeached DT's credibility by showing that she had a financial motive to falsely accuse him of sexual assault.

In the letter, the writer indicates that the law office had been retained to represent DT in connection with "injuries suffered in an accident, which occurred . . . on March 11, 2011. The injuries include, but are not limited to rape." At trial, DT admitted that she hired a lawyer, but denied that it was in relation to the November 3, 2011, sexual assault by Bennett and denied having any knowledge about the letter.

Given the date of the incident to which the letter refers and the parties to whom it was sent, Bennett's lawyer's reasons for proceeding as he did are both apparent and reasonable. On its face, the letter does not describe the incident at issue and appears to refer to an earlier accident. Thus, even though the letter refers to possible injuries from a "rape", a reasonable lawyer might have determined that the letter itself was not very persuasive as impeachment evidence. And Bennett's lawyer effectively introduced the issue that DT might have had a financial motive for falsely accusing Bennett by questioning her about the letter. Bennett's lawyer also referred to the letter in closing and stated that DT had a "motive to get money for damages" and argued that her false claims were "suppose[] to yield her some money if everything goes right."

Moreover, the record indicates that defense counsel used other available means to attack DT's credibility. For example, defense counsel questioned DT about her failure to identify defendant during a corporeal lineup, about her inconsistent statements regarding the exact nature of the assault, about inaccurate information that she provided on her housing application, and other details concerning the night at issue. Under the circumstances, Bennett has not overcome the strong presumption that his lawyer's use of the letter was merely a matter of sound trial strategy. *Gioglio*, 296 Mich App at 22-23. "The fact that trial counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

B. PRE-ARREST STATEMENTS

Bennett also argues that his lawyer should have moved to suppress the statements that he made to the officers in the basement at the apartment complex. Specifically, he argues that his statements were inadmissible because he was effectively in custody at the time and not advised of his constitutional rights as required by the decision in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Miranda warnings are not required unless the accused is subject to a "custodial interrogation." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). A custodial interrogation occurs when law enforcement officers initiate questioning after the accused "has been taken into custody or otherwise deprived of his freedom of action in a significant way." *Id.* (citation omitted). Stated differently, a person is in custody where the "person has been formally arrested or subjected to a restraint on freedom of movement or of the degree associated with a formal arrest." *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997). Whether the accused was in custody depends on the totality of the circumstances, but the key question is whether the accused could reasonably believe that he was not free to leave. *Zahn*, 234 Mich App at 449. This inquiry "depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned." *Id.* "[A] police officer may ask general on-the-scene questions to investigate the facts surrounding the crime without implicating the holding in *Miranda*." *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002).

The totality of the objective circumstances demonstrates that Bennett was not in custody at the time the officers questioned him in the basement. The officers arrived at the scene in response to a dispatch for a “possible assault” shortly after it was reported. They immediately spoke with DT, who told them that she was assaulted in the basement and that the perpetrator was still down there sleeping on a mattress. The officers went downstairs and found Bennett sleeping on a mattress. After waking him, they asked if he had had any contact with anyone in the laundry room, and why he was sleeping there. The brief questioning occurred in the basement next to the mattress where Bennett had been sleeping. He was not under arrest or deprived of his freedom of action in any significant manner during this questioning. There is no indication that the officers subjected Bennett to a coercive, police-dominated environment while questioning him. *Ish*, 252 Mich App at 118.

Bennett’s primary argument is that he did not feel free to leave because he was the focus of the investigation and had outstanding warrants. However, the pertinent inquiry is objective, not subjective. *Zahn*, 234 Mich App at 449. There is no evidence that the officers knew about or discussed his outstanding warrants. Further, “the requirement of warnings [are not] to be imposed simply because . . . the questioned person is one whom the police suspect.” *People v Mendez*, 225 Mich App 381, 384; 571 NW2d 528 (1997) (quotation marks and citation omitted). Because Bennett was not in custody, the officers had no obligation to advise him of his rights, and his lawyer cannot be faulted for failing to move to suppress his statements on that basis. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

C. IMPROPER REFERENCES

We also reject Bennett’s claim that his trial lawyer should have objected to improper references to Bennett’s post-arrest, post-*Miranda* silence. Bennett correctly notes that testimony concerning a defendant’s post-arrest, post-*Miranda* silence is generally inadmissible. *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976). However, when the exchange at issue is read in context, it appears that his lawyer did object.

On direct examination, Bennett’s lawyer asked the witness about the length of time that he questioned Bennett:

Q. After three and a half hours of questioning, that’s what you got from him [defendant].

A. Yes.

Q. And you wanted to question him some more, correct?

A. Yes.

Q. And he didn’t want to answer any more questions, he asked for an attorney, right?

A. That is correct.

Q. And you stopped.

A. Yes.

Immediately after that, the prosecutor began to cross-examine the witness about Bennett's reasons for stopping the interview:

Q. Before he, before he—the interview stopped, did he make any statements about why he didn't want to make any further statements to you?

Defense counsel: Well, that's a constitutional right.

The prosecutor: No, that doesn't—

Defense counsel: He doesn't have to give an explanation for that.

The court: Hold on.

The prosecutor: All right, let me ask, let me ask it in this way in case—

The court: Okay.

Q. Did he make any statements about his future or anything in that regard?

A. The state—

Defense counsel: Objection as to relevancy, Judge, as to his future.

The court: Overruled, go ahead, you can answer.

A. The statements were made prior to asking for his attorney because he was unsure that the statements that continuing this conversation with me would be—work out in a positive way for him for this investigation.

As the exchange discloses, Bennett's lawyer did object to the line of questioning on constitutional and relevancy grounds. Because counsel did in fact object, there is no merit to his claim. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). Moreover, Bennett cannot establish that his lawyer's failure to do anything more affected the outcome of the case. Even if he had successfully objected to the testimony, as a result of his lawyer's own questioning of the witness, the jury already knew that Bennett stopped the interview and requested an attorney. Defense counsel's apparent tactical reason for introducing Bennett's post-arrest, post-*Miranda* silence was to argue that after 3-1/2 hours of "grilling," Bennett continuously denied any wrongdoing and stated only that he accidentally touched DT's buttocks. Bennett has not overcome the presumption that his lawyer's decision to pursue this line of questioning and object in this manner were matters of sound trial strategy. *Gioglio*, 296 Mich App at 22-23.

Bennett argues that his lawyer also should have objected when the prosecutor elicited similar testimony from Detective Michael Pieroni, who observed the interview via closed-circuit television:

Q. Okay, did the Defendant, John Bennett, make any statements regarding his interaction with [DT] on November 3, 2011?

A. Yes.

Q. What do you recall him stating if anything?

A. Mr. Bennett stated that he was in the basement when [DT] was down there. Mr. Bennett stated that he did have a conversation with [DT], and at one point, he did rub her shoulders. Mr. Bennett stated that the victim told him she had a boyfriend or something to that effect, I believe is what he stated in the interview. He also stated that as he was following [DT] up the stairs, she slipped and fell, and his hand may have brushed against her butt. He also stated that he didn't want to let—he didn't want to let a few minutes of digression jeopardize his future.

Q. At some point in time, did the interview stop?

A. It did.

Bennett argues that Pieroni's testimony that Bennett "didn't want to let a few minutes of digression jeopardize his future" was an improper comment regarding his post-arrest, post-*Miranda* silence. In context, Bennett's comment had nothing to do with the invocation of his rights. Instead, the remark appears to refer to Bennett's decision to not engage in anything beyond conversing with DT and rubbing her shoulders, which would have led to a potentially jeopardizing "few minutes of digression." This interpretation is consistent with Bennett's continuous denial that he acted inappropriately and provides an explanation for why he would not have had any sexual contact with her. Consequently, because Pieroni's testimony did not reference Bennett's post-arrest, post-*Miranda* silence, Bennett's lawyer cannot be faulted for failing to object on that ground. *Thomas*, 260 Mich App at 457.

III. STANDARD 4 BRIEF

Bennett raises three additional issues in his pro se supplemental brief. See Administrative Order No. 2004-6, Standard 4.

A. HEARSAY TESTIMONY

Bennett argues that his lawyer was ineffective for eliciting improper testimony from Sergeant Timothy Boal. Specifically, Bennett contends that his lawyer should not have elicited testimony from Boal that Bennett's fiancée told him that Bennett "probably did it" because her roommate once told her about an incident in which the roommate had been drinking heavily and woke up to find Bennett having sex with her.

The decision to call a particular witness and to pursue a particular line of questioning are generally matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). And a trial lawyer has wide discretion in matters of trial strategy. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012).

Reading the questions in context, it is apparent that Bennett's trial lawyer did not elicit the statement to show that Bennett had engaged in a prior bad act. Rather, it appears that Bennett's lawyer was trying to demonstrate that the police officers' reports were unreliable and inaccurate. Bennett's lawyer was able to challenge the accuracy and reliability of information contained in the report because it was odd that Boal took no further action on a reported crime and because Bennett's fiancée would deny making the statement. Bennett's lawyer elicited from Boal that no one else was present when the fiancée supposedly made this damaging statement, that he did not take notes during the interview, and that he merely relayed the statement to a patrol officer, who then included it in the report. Bennett's lawyer highlighted the fact that Boal claimed to be repeating the fiancée's statement verbatim and yet did not take notes. Immediately after Boal's testimony, Bennett's lawyer called Bennett's fiancée, who vehemently denied making the statement and explained that she's never had a roommate.

In addition to this line of questioning, Bennett's lawyer raised questions regarding other aspects of the investigation, including the failure to collect DNA evidence, inaccuracies in the police report, and the "grilling" of Bennett for 3-1/2 hours. The jury could have determined that the police investigation and report should not be trusted, which might have bolstered the defense that DT was not credible and that Bennett was innocent. Given that the case essentially involved judging the credibility of DT, as well as the police witnesses, attacking the reliability of the police investigation and report was reasonable trial strategy. Therefore, we cannot conclude that Bennett's lawyer was ineffective for proceeding in this manner. *Gioglio*, 296 Mich App at 22-23.

B. IN-COURT IDENTIFICATION

Bennett argues that his lawyer should also have moved to suppress DT's in-court identification as unduly suggestive. "An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). The fairness or suggestiveness of an identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). "The need to establish an independent basis for an in-court identification arises [only] where the pretrial identification is tainted by improper procedure or is unduly suggestive." *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

Here, Bennett has not identified any act by officers or the prosecution that improperly suggested that he was the perpetrator. Bennett's argument regarding DT's failure to select him at the corporeal lineup involves the reliability of DT's identification testimony, which is primarily a question for the jury. See *People v Johnson*, 202 Mich App 281, 286; 508 NW2d 509 (1993). The jury was aware that DT had not identified him as the perpetrator and actually selected a different lineup participant who was three inches taller and weighed 35 pounds less. Further, the prosecutor never asked DT to identify Bennett in court at the preliminary examination. Rather, it was Bennett's lawyer who asked DT if the person who assaulted her was in the courtroom. DT answered affirmatively, and Bennett's lawyer used her previous inaccurate identification at the lineup to argue that she was not a credible witness. Thus, there is no evidence of any pretrial identification procedure that was unduly suggestive.

Moreover, Bennett's identity as the person who had contact with DT in the basement was not a significant issue at trial. Although DT could not describe or identify the suspect by his face, she was able to provide his location, a description, and his name. As directed by DT, the officers went to the basement where they found Bennett sleeping on a mattress; Bennett was the only person in the basement. An officer testified that Bennett "absolutely matched" the description provided by DT and was sleeping "exactly" where DT explained he would be. Upon investigation, it was determined that Bennett lived in an upstairs apartment with his fiancée and child, just as he told DT. Most significantly, Bennett admitted that he had conversed with a woman named T—the name DT gave him—in the basement on the night at issue. Further, Bennett explained why he was in the basement to the officers and his explanation was consistent with the explanation he had previously given to DT, and he identified aspects of his conversation with DT that were unique to DT. In light of this evidence, Bennett's identity as the person who had contact with DT in the basement was not a principal issue at trial. Instead, the principal issue for the jury to resolve was the credibility of DT's allegations that Bennett sexually assaulted her. Consequently, Bennett has failed to show either that his lawyer's decision to not move to suppress DT's in-court identification was objectively unreasonable under prevailing professional norms or that there is a reasonable probability that the outcome would have changed if DT's identification testimony had been suppressed. *Gioglio*, 296 Mich App at 22-23.

C. CUSTODIAL STATEMENT

Bennett's last claim is that the trial court erred in admitting his post-arrest, post-*Miranda* statement because it was given after he had twice requested counsel and, accordingly, was obtained in violation of his right to counsel. We review de novo a trial court's decision regarding a motion to suppress, but a court's factual findings are reviewed for clear error. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000). A finding is clearly erroneous if it leaves the reviewing court with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

The right to counsel is guaranteed by both the Fifth and Sixth Amendments to the United States Constitution, as well as Const 1963, art 1, §§ 17 and 20. The Sixth Amendment directly guarantees the right to counsel in all criminal prosecutions, while the Fifth Amendment right to counsel indirectly recognizes the right to counsel as a corollary to the right against self-incrimination because counsel's presence at a custodial interrogation is one way to secure freedom from compelled self-incrimination. *People v Elliott*, 494 Mich 292, 301; 833 NW2d 284 (2013). Once a defendant invokes his right to counsel, the officer must terminate the interrogation immediately and may not resume questioning until counsel arrives or the defendant initiates further communication. *Id.* 302. Evidence obtained in violation of this principle is subject to suppression. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004).

At an evidentiary hearing on Bennett's statements, the interviewing agent testified that he immediately ceased the questioning once Bennett requested an attorney. In contrast, Bennett testified that he had invoked his right to counsel three separate times before the agent finally honored his request. The trial court considered the conflicting testimony and expressly found the agent to be credible. The court also observed that the waiver of rights forms supported its finding that Bennett knowingly and willingly waived his right to consult with an attorney. It was undisputed that Bennett was advised of his *Miranda* rights, indicated that he understood those

rights, initialed each right, and signed a written waiver. The record also showed that Bennett has some college education and was familiar with the criminal legal system. For that reason, we cannot conclude that the trial court clearly erred when it found that the agent terminated the interrogation immediately after Bennett requested a lawyer. *Givans*, 227 Mich App at 119.

There were no errors warranting relief.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Donald S. Owens

/s/ Michael J. Kelly