

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
July 24, 2014

v

GABRIEL RAY GARCIA,  
  
Defendant-Appellant.

No. 316113  
Wayne Circuit Court  
LC No. 12-007630-FC

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Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of third-degree criminal sexual conduct, MCL 750.520d(1)(c) (sexual penetration of a victim who is physically helpless), for which the trial court sentenced him to a prison term of 8 to 15 years. Defendant appeals as of right. We affirm.

Defendant was convicted of sexually assaulting a female acquaintance after she became intoxicated at a party at defendant's home. The victim testified that she consumed large amounts of beer and tequila throughout the evening. She rated her level of intoxication as a "ten" on a scale of one to ten, with ten being the most intoxicated, and stated that she had "never been that intoxicated." Sometime after midnight, the victim fell asleep on a fold-out couch in the living room of defendant's home. The victim recalled waking up around 3:00 a.m. to discover defendant standing over her. Defendant was talking to her, but she could not recall what he said because she was in a "fog." The victim then blacked out again. She later woke a second time and saw defendant kneeling on the bed, touching her. She felt a horrible burning sensation in her vagina and discovered that her pants and underwear had been removed. She was fully clothed when she went to sleep. A synthetic penis belonging to defendant's girlfriend was found under the pillow where the victim was sleeping. Defendant admitted engaging in sexual activity with the victim, but claimed that it was consensual. He denied that the victim was ever passed out, asleep, or physically immobile or helpless during any of his encounters with her that night.

Defendant argues that the trial court erred by failing to instruct the jury on the affirmative defense of consent. At trial, defendant expressly agreed to the jury instructions, and "thereby waived appellate review of the instructions." *People v Meissner*, 294 Mich App 438, 458; 812 NW2d 37 (2011). Defendant also argues, however, that defense counsel was ineffective for failing to request a jury instruction on the defense of consent, so we consider this issue within the

context of defendant's ineffective assistance of counsel claim. Ultimately, we disagree that defense counsel was ineffective for failing to request a jury instruction on consent.

Because defendant did not raise an ineffective assistance of counsel claim in a motion for a new trial or request a *Ginther*<sup>1</sup> hearing, 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). "To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice." *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013), citing *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Nix*, 301 Mich App at 207. It is presumed that trial counsel used effective trial strategy, and a defendant has a heavy burden to overcome this presumption. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant was convicted of violating MCL 750.520d(1)(c), which provides:

(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

\* \* \*

(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

MCL 750.520a(m) provides that "[p]hysically helpless" means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act."

Defense counsel was not ineffective for failing to request a jury instruction on consent. A consent defense is not available for a charge pursuant to MCL 750.520d(1)(c) because consent requires "a willing, noncoerced act of sexual intimacy or intercourse between persons of sufficient age who are neither 'mentally deficient,' 'mentally incapacitated,' nor 'physically helpless.'" *People v Khan*, 80 Mich App 605, 619 n 5; 264 NW2d 360 (1978) (citations omitted). Consent requires that a person agree to a sexual act freely and willingly, whereas a person is physically helpless when the person is "physically unable to communicate unwillingness to an act." MCL 750.520a(m). Consent cannot exist where a person meets the definition of being physically helpless because, by definition, such a person is not able to willingly agree to a sexual act. A person who is physically helpless is unable to consent.

Here, the prosecution only pursued a charge under MCL 750.520d(1)(c), and, thus, the only disputed issue was whether the victim was physically helpless. The victim's consent was only relevant to show that the victim was not physically helpless.

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 212 NW2d 922 (1973).

The record shows that defense counsel researched this issue and determined, properly, that a consent instruction is not appropriate where a defendant is charged with criminal sexual conduct against a physically helpless victim. Counsel is not ineffective for failing to present a meritless argument. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Accordingly, counsel was not ineffective for failing to request that the trial court instruct the jury on the issue of consent.

Affirmed.

/s/ Jane E. Markey

/s/ Donald S. Owens

/s/ Karen M. Fort Hood