

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ANDREW HANSEN, JR.,

Defendant-Appellant.

UNPUBLISHED

August 4, 2000

No. 216722

Kalamazoo Circuit Court

LC No. 97-001170 FH

Before: Meter, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals by right from his conviction, following a bench trial, of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court sentenced him to two to fifteen years' imprisonment. We affirm.

Defendant first argues that his trial counsel rendered ineffective assistance of counsel by refusing to subpoena one alibi witness and by failing to call another alibi witness, who was in the courtroom during trial, to testify on defendant's behalf. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's unprofessional error or errors, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Moreover, there is a strong presumption that counsel's actions constituted sound trial strategy. *Id.* Here, because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to mistakes that are apparent from the record. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

The record is devoid of any indication that defense counsel refused to subpoena an alibi witness or that he refused to call an alibi witness present in the courtroom. Although defendant appended an affidavit containing this information to his appellate brief, defendant may not enlarge the record on

appeal by ex parte affidavit. *People v Taylor*, 383 Mich 338, 362; 175 NW2d 715 (1970). Therefore, defendant has failed to make the requisite showing under *Stanaway*, *supra* at 687-688.¹

Next, defendant argues that the prosecutor failed to present sufficient evidence to sustain the trial court's finding of guilt. When reviewing the sufficiency of the evidence in a bench trial, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-279; 380 NW2d 11 (1985). Here, viewing the evidence in the light most favorable to the prosecution, we conclude that the trial court could indeed have found that the essential elements of the offense were proven beyond a reasonable doubt, since the victim's testimony established that defendant engaged in sexual contact with her for the purpose of sexual arousal or gratification and that she was under the age of thirteen at the time of the contact. See MCL 750.520a(k); MSA 28.788(1)(k); MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). While defense witnesses maintained that no sexual contact occurred, the conflict between the testimony of these witnesses and the prosecution's witnesses was for the trier of fact to resolve. See *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), and *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Moreover, and contrary to defendant's implication, there was no requirement that the victim's testimony about the sexual contact be corroborated by other witnesses. *People v Lemmon*, 456 Mich 625, 632 n 6; 576 NW2d 129 (1998).

Affirmed.

/s/ Patrick M. Meter

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

¹ We further note that the affidavit attached to defendant's appellate brief does not identify the purported witnesses by name or provide any indication regarding (1) what their testimony would have been had they been called to the stand, or (2) why defense counsel did not call the witnesses. Moreover, several alibi witnesses did in fact testify at trial. Under these circumstances, we presume that counsel's failure to call the additional alibi witnesses constituted sound trial strategy, see *Stanaway*, *supra* at 687-688, and *People v Hoyt*, 185 Mich App 531, 537; 462 NW2d 793 (1990), and we will not second-guess strategic decisions on appeal. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).