

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERTO VISTORT FIGUEREDO,

Defendant-Appellant.

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UNPUBLISHED

April 12, 2002

No. 228563

Ingham Circuit Court

LC No. 98-073461-FC

Before: Cavanagh, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b) (force or coercion used to accomplish sexual penetration). The trial court sentenced defendant to a term of four to fifteen years’ imprisonment. We affirm.

Defendant first argues he was denied effective assistance of counsel. He bases this claim on three mistakes allegedly made at trial, any one of which, according to him, could have changed the outcome of trial. First, defendant claims defense counsel failed to produce an alleged eyewitness who was standing on the porch of a house where defendant and the complainant were parked shortly before the complainant was assaulted. Second, defendant claims defense counsel failed to impeach the complainant with her inconsistent testimony at the preliminary examination. Finally, defendant claims defense counsel failed to subpoena any witnesses or cross-examine the complainant regarding an alleged argument that occurred at a bar sometime before the incident that led to defendant’s conviction. According to defendant, this potential evidence would have greatly diminished the victim’s credibility and would have affected the outcome of trial.

Because defendant failed to request an evidentiary hearing or new trial on the basis of ineffective assistance of counsel in the trial court, our review is limited to errors apparent from the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). In *People v Rodgers*, 248 Mich App 702, 714; \_\_\_ NW2d \_\_\_ (2001), this Court articulated the standard for a claim of ineffective assistance of counsel.

To establish ineffective assistance of counsel, defendant must show that counsel’s performance fell below an objective standard of reasonableness under

prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). [*Rodgers, supra* at 714.]

Further, this Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy with the benefit of hindsight on appeal. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

It is well-settled that decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Rockey, supra* at 76. The failure to call a witness or present certain evidence constitutes ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). In the instant case, we are not persuaded that counsel's performance fell below an objective standard of reasonableness. Specifically, a review of the record does not reveal that the specific identity of the potential witnesses was known to defense counsel, or that their testimony would have aided the defense and diminished the complainant's credibility. Indeed, a review of the record demonstrates that defense counsel vigorously cross-examined the complainant on matters pertaining to her credibility. Defendant has failed to rebut the presumption that defense counsel's decision to not call potential witnesses or impeach the complainant with prior testimony was not the product of sound trial strategy. Consequently, we reject defendant's claim that he was denied effective assistance of counsel.

Defendant next argues that the prosecution's failure to produce *res gestae* witnesses at trial violated his due process rights. Whether a defendant's due process rights have been violated is a question of law that is reviewed *de novo*. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). "A *res gestae* witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing full disclosure of the facts." *People v Gadomski*, 232 Mich App 24, 32-33, n 2; 592 NW2d 75 (1998), quoting *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990).

Under MCL 767.40a, the prosecutor does not have a duty to produce *res gestae* witnesses at trial. Rather, the prosecutor is under a continuing duty to advise the defendant of all *res gestae* witnesses the prosecutor intends to call at trial and all *res gestate* witnesses known to the prosecutor or law enforcement officials. MCL 767.40a(1), (2); *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000); *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). Further, the prosecutor must provide reasonable assistance to locate *res gestae* witnesses on a defendant's request. MCL 767.40a(5); *Gadomski, supra* at 36. As our Supreme Court observed in *Burwick, supra* at 289:

The Legislature [in amending MCL 767.40a] has thus eliminated the prosecutor's burden to locate, endorse, and produce unknown persons who might be *res gestae* witnesses and has addressed defense concerns to require the

prosecution to give initial and continuing notice of all known res gestae witnesses, identify witnesses the prosecutor intends to produce, and provide law enforcement assistance to investigate and produce witnesses the defense requests.

Likewise, the prosecutor's suppression of evidence that is favorable to an accused and that has been requested by the accused may violate due process. *People v Snell*, 118 Mich App 750, 760; 325 NW2d 563 (1982). Further, "[a] prosecutor has a duty to 'make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree of the offense.'" *People v Kyall Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001), quoting MRPC 3.8(d).

In the instant case, there is nothing in the record to suggest that the prosecutor suppressed evidence that was favorable to defendant's case or would have negated his guilt. The record reflects that defendant requested a court-appointed investigator to aid in the investigation of potential witnesses, and that an ex parte order granting this request was entered by the trial court on April 9, 1998. However, there is nothing in the record to indicate that the prosecutor withheld any requested information from defense counsel or failed to provide reasonable assistance in locating res gestae witnesses. The thrust of defendant's argument on appeal is that the prosecutor had a duty to investigate all potential witnesses for the defense. On the basis of the foregoing, this argument is without merit.

In his supplemental brief on appeal, defendant argues that he was prejudiced by the presentation of extraneous evidence to the jury. Specifically, during the course of the jury deliberations it became apparent that a written instruction from an unrelated case was left in the jury room. When the matter was brought to the trial court's attention, it gave the following instruction.

Ladies and gentlemen, I had a note here that you found some papers laying in [the jury room]. Apparently, this is from some other lawsuit or something. It's not even relevant to this lawsuit so I wanted to advise you of that. The instructions I give you are the instructions pertinent to this case. This is not an instruction from this matter at all, so don't concern yourselves. Sometimes we have people in [the jury room] on a lot of different matters that may have left papers in there. So don't let that play any role in your deliberations.

After the trial court gave the instruction, it inquired of the parties whether they were satisfied with the instruction. Both parties answered in the affirmative. Thus, defendant waived this issue on appeal because defense counsel expressed his unequivocal satisfaction with the court's curative instruction. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). In any event, a review of the record indicates that the extraneous evidence found by the jury was a special jury instruction that was not related to defendant's case. There is nothing to indicate the jury considered this document in its deliberations or that it affected the verdict.

Defendant also challenges the sufficiency of the evidence at trial. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of

the offense were proven beyond a reasonable doubt. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In criminal cases, due process requires that the prosecutor introduce evidence sufficient to conclude that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Questions of credibility are left to the trier of fact to resolve and this Court will not determine them anew on appeal. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Circumstantial evidence and the reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *Terry*, *supra* at 452.

As used in the CSC III statute, “force or coercion” requires that the defendant either used physical force or did something to render the victim reasonably afraid of present or future danger during the commission of the offense. *People v Kline*, 197 Mich App 165, 166; 494 NW2d 756 (1992). In the present case, the complainant testified that defendant tore the button off her pants in the course of forcing himself on her. She further testified that when she resisted his sexual advances, defendant threatened to punch her in the mouth, and that she believed he had the ability to do so. Although the victim’s credibility may have been called into question by defense counsel’s vigorous cross-examination, it was within the province of the jury to weigh her testimony and to either accept or discredit it. *Avant*, *supra* at 506. Consequently, we are satisfied that the record evidence, viewed in the light most favorable to the prosecutor, was sufficient for a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt.

Finally, given our conclusions that defendant was not denied effective assistance of counsel, that there was no prosecutorial misconduct, and that defendant waived any issue pertaining to extraneous material viewed by the jury, we reject defendant’s contention in his supplemental brief on appeal that he was subjected to cumulative error warranting a new trial.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ David H. Sawyer  
/s/ Peter D. O’Connell