

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNIE JASPER,

Defendant-Appellant.

UNPUBLISHED

March 11, 2003

No. 237792

Wayne Circuit Court

LC No. 00-004818

Before: Hoekstra, P.J., and Smolenski and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a nonjury trial of two counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(b),¹ stalking, MCL 750.411h(2)(a), and aggravated assault, MCL 750.81a(1).² Defendant was sentenced to serve concurrent terms of imprisonment of 9 to 15 years on each of the CSC-III convictions, and 9 to 12 months on the stalking and on the aggravated assault convictions. We affirm.

The charges against defendant arose from an incident during the early morning hours on December 13, 1998. According to the victim's testimony at trial, the following occurred on that date. Defendant, who at the time lived with the victim, returned to their home intoxicated,

¹ Defendant was charged with two counts of first-degree criminal sexual conduct (CSC-I) involving penetration during the commission of a felony, MCL 750.520b(1)(c), with the underlying felony charge being assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court found the evidence insufficient to prove the felony assault and, accordingly, concluded that the sexual penetration during the commission of a felony was not proved. However, the trial court went on to conclude that CSC-I was proved because the penetrations were accomplished by use of force or coercion. At sentencing, the trial court acknowledged that it had made a mistake and corrected the verdict to show that defendant was convicted of CSC-III, rather than CSC-I.

² Defendant's aggravated assault conviction was entered as a lesser offense to the unproven charge of assault with intent to do great bodily harm less than murder. MCL 750.84. The trial court made no finding, despite testimony that the victim and defendant were living together at the time of the offense, that the conviction was pursuant to MCL 750.81a(2), and therefore we assume the conviction is pursuant to MCL 750.81a(1). The judgment of sentence only designates that the conviction is pursuant to MCL 750.81a, without referencing either subsection.

aroused her from her sleep, and commenced to accuse her of being unfaithful to him. Defendant's verbal accusation escalated into a physical attack. Defendant grabbed, choked, and beat her until at one point she lost consciousness. When she awakened, she was lying on her stomach on the bed. Defendant continued to physically attack her on the bed and then he pulled up her gown and penetrated her vaginally and anally with his penis. Afterward, defendant passed out and she was able to contact a friend. Eventually, the victim and her friend went to a hospital where the victim received treatment and reported the incident to the police. She did not immediately press charges because she was afraid. After the incident, she no longer lived with defendant. Further, from the date of this occurrence until defendant's arrest over one year later, defendant repeatedly came to the friend's house where she stayed, banged on the door in the middle of the night, screamed her name and asked her to come outside, called her on the phone there, came to her job and sat in his car across the street from her job and followed her home in his car.

In his testimony, defendant presented a polar opposite version of the events. Defendant testified as follows. When he returned to their home, the victim confronted him with an accusation that he was sleeping with his former wife. In the course of this confrontation, the victim assaulted him with a small knife, but he was able to disarm her; however, he did, in fact, inflict some injuries upon the victim as a result. After they cooled down, he apologized to the victim and they reconciled. Thereafter, they engaged in consensual vaginal and anal intercourse. Further, he and the victim continued to live together after the incident.

After listening to this testimony and that of the other prosecution and defense witnesses, the trial court convicted defendant of the above referenced offenses and imposed sentence. This appeal ensued.

In his statement of questions presented on appeal, defendant first challenges the sufficiency of the evidence for the two CSC-III convictions. In support of this argument, defendant cites the law applicable to the issue; however, he completely fails to present any cogent argument based on the facts of this case from which a reviewing court could conclude that this argument has merit. Rather, defendant merely reviews the contrasting versions to which the parties testified. Defendant fails to make any argument in support of the assertion that these divergent recollections constitute a basis upon which this court can or should find the evidence insufficient. Consequently, we find no basis upon which to grant defendant any relief on this issue. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). ("A party may not merely announce a position and leave it to us to discover and rationalize the basis for the claim.") Moreover, to the extent that the credibility of the witnesses is argued in this issue, we note that that determination is properly left to the trier of fact and this Court will not resolve them anew on appeal. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Defendant also argues that his trial counsel rendered ineffective assistance to him because counsel failed to call as witnesses the victim's treating physician at the hospital, the Family Independence Agency worker that handled defendant's wife's neglect case, and the insurance agent that processed the claim for defendant's car that was stolen. Defendant maintains that if these witnesses had testified, defendant's credibility would have been enhanced because these witnesses would have confirmed that the victim and defendant remained together after the incident date.

This Court explained the law applicable to ineffective assistance of counsel claims in *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999):

Effective assistance of counsel is presumed. The defendant bears a heavy burden of proving otherwise. In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance. Defense counsel's performance must be measured against an objective standard of reasonableness. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. Finally, in making the testimonial record necessary to support a claim of ineffective assistance of counsel, the testimony of trial counsel is essential. The absence of such testimony limits this Court's review to what is contained in the record. [Citations omitted.]

Here, because defendant has made no testimonial record of trial counsel, our review is limited to the trial record. In that context, we conclude that defendant cannot overcome the presumption that the decision whether to call these witnesses was a matter of trial strategy. The claim that defendant and the victim continued to live together after the alleged conduct by defendant was presented at trial through defendant's own testimony. On the record before us, whether that claim would have been enhanced or diminished by the testimony of the witnesses that defendant claims trial counsel should have presented is a matter of mere speculation by defendant.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski
/s/ Karen Fort Hood