

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD B. LITTLEJOHN,

Defendant-Appellant.

UNPUBLISHED

May 22, 2003

No. 233773

Wayne Circuit Court

LC No. 00-005398-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD B. LITTLEJOHN,

Defendant-Appellant.

No. 233860

Wayne Circuit Court

LC No. 00-005452-01

Before: Murray, P.J., and Neff and Talbot, JJ.

PER CURIAM.

In Docket No. 233773, defendant appeals as of right his jury trial convictions of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under thirteen years of age), and disseminating sexually explicit matter to a minor, MCL 722.675. In Docket No. 233860, defendant appeals as of right his bench trial convictions of first-degree home invasion, MCL 750.110a(2), and third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion). Defendant was sentenced to concurrent terms of ten to twenty years' imprisonment for the first-degree home invasion conviction, nine to fifteen years' imprisonment for the criminal sexual conduct convictions, and one to two years' imprisonment for the disseminating sexually explicit matter to a minor conviction. The appeals have been consolidated for this Court's consideration. We affirm.

I. Basic Facts and Procedural History

A. Docket No. 233773

Defendant's girlfriend, Shaquila Jones, lived next door to the victim. On January 26, 2000, the victim's mother arranged for Shaquila to take the victim to get her hair done. That morning, the victim went next door to Shaquila's house after defendant called to tell her he was suppose to take her to get her hair done. No one else was home but defendant. While at the house defendant rubbed the victim's chest area under her bra with his hand and showed the victim pornographic websites on the computer. The website was titled, "Teen Sex," and depicted naked women touching themselves and each other on their breasts and other private parts. Defendant told the victim that "whatever happened between us, that's between us." When the victim returned from getting her hair braided, she told her mother what happened with defendant.

At trial, defendant presented an alibi defense, claiming that on the morning of January 26, 2000, he took his car to a repair shop in River Rouge at 8:45 to get fixed and waited there until it was ready between 12:00 and 1:00 p.m. The mechanic from the repair shop testified that on that day he worked on defendant's GEO Prizm and presented a receipt from the repair shop with defendant's signature on it. Shaquila was called as a rebuttal witness for the prosecution and testified that on January 26, 2000, she had an arrangement with the victim's mother to take the victim to get her hair braided. On that day, defendant took Shaquila to class at 8:00 a.m. and picked her up at 10:30 a.m. When defendant picked Shaquila up, the victim was in the passenger seat of the car. Defendant and Shaquila took the victim to get her hair braided at Shaquila's mother's house and brought the victim home around 2:30 or 3:00 in the afternoon. The jury convicted defendant of second-degree criminal sexual conduct and disseminating sexually explicit matter to a minor.

B. Docket No. 233860

During the trial in Docket No. 233860, Shaquila testified that she ended her relationship with defendant in January 2000. She changed the locks on her house and called defendant's probation officer and told him that she wanted to cease contact with defendant. During the early morning hours of February 23, 2000, Shaquila found defendant in her downstairs living room on the couch. Shaquila asked defendant to leave but he refused. A confrontation and physical altercation ensued between Shaquila and defendant regarding their infant son. Defendant still refused to leave and stated that he had to stay until he could trust Shaquila not to call the police. At some point, defendant told Shaquila to take off her clothes and Shaquila begged defendant not to make her have sex with him. Defendant proceeded to try and get on top of Shaquila to have sex with her, but she resisted. Instead, defendant performed oral sex on Shaquila by putting his tongue and mouth on her vagina. Shaquila told defendant to stop and two or three minutes later he did. Defendant then started crying, complaining that he was depressed and intended to kill Shaquila and then himself. Eventually defendant left around 4:00 or 5:00 p.m. After defendant left, Shaquila noticed that the second set of house keys and \$174 were missing. It appeared the back window of the apartment had been tampered with by a screwdriver or pliers as the panel was bent. Shaquila reported the incident to the police the next day.

Defendant presented an alibi defense. Defendant's wife, Evelyn Littlejohn, testified that Shaquila came to their house on February 23, 2000, to talk to defendant about their baby. A fight broke out between Evelyn and Shaquila. Defendant pulled Evelyn off Shaquila and took Shaquila outside. Apparently, Shaquila left her keys behind in defendant's house. After Shaquila left that day, defendant took Evelyn to the doctor. Defendant also testified in his own

defense. Defendant testified that on the morning of February 23, 2000, he was at home with his wife. Defendant further testified that on that morning Shaquila came over to his house, wanting defendant back. Defendant told Shaquila to “get the hell out.” When Shaquila refused to leave, defendant grabbed her by the shoulder and escorted her to her car. The trial court found defendant guilty of first-degree home invasion and third-degree criminal sexual conduct.

II. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to support his convictions. We disagree. In reviewing a claim that insufficient evidence was presented to support a conviction, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each essential element of the crime was proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citations omitted).

In Docket No. 233773, defendant argues that there was insufficient evidence to find him guilty beyond a reasonable doubt of second-degree criminal sexual conduct and disseminating sexually explicit matter to a minor. A person is guilty of the offense of second-degree criminal sexual conduct if he engages in sexual contact with a person who is under thirteen years of age. MCL 750.520c(1)(a). “Sexual contact” is defined as the intentional touching of the victim’s intimate parts if that intentional touching “can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose” MCL 750.520a(1). To prove a claim of disseminating sexually explicit material to minors, the prosecutor was required to prove that defendant knowingly disseminated to the victim sexually explicit visual material that is harmful to minors. MCL 722.675(1)(a).

In this case, there was sufficient evidence to convict defendant of both offenses. The victim was eleven years old when the offenses occurred. The victim testified that defendant rubbed her breasts with his hand underneath her bra and shirt, while showing her pornographic websites depicting naked women engaged in sexually explicit acts. This evidence, when viewed in the light most favorable to the prosecution, was sufficient for a rational trier of fact to find that defendant committed the charged crimes beyond a reasonable doubt. *Johnson, supra*.

In Docket No. 233860, defendant argues that there was insufficient evidence to find him guilty beyond a reasonable doubt of third-degree criminal sexual conduct and first-degree home invasion. A person is guilty of the offense of third-degree criminal sexual conduct if he engages in sexual penetration with a person and force or coercion is used to accomplish the sexual penetration. MCL 750.520d(1)(b). “Sexual penetration” is defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body” MCL 750.520a(m). Likewise, the elements of first-degree home invasion are (1) that the defendant (a) broke and entered a dwelling or (b) entered a dwelling without permission; (2) that when the defendant broke and entered the dwelling or entered without permission, he intended to commit a felony, larceny, or assault therein; and (3) when the defendant entered, was present in, or was leaving the dwelling, (a) he was armed with a dangerous weapon, or (b) another person was lawfully in the dwelling. MCL 750.110a(2). The intent element may be reasonably inferred from the nature, time, and place of the defendant's acts before and during the breaking and entering. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). Minimal circumstantial

evidence of a defendant's intent is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Here, the evidence was sufficient to convict defendant of both crimes. Shaquila testified that she found defendant in her home without permission at 3:00 a.m. Defendant's own statements to Shaquila demonstrated his intent to commit a felony or assault while in the home, as defendant stated that he intended to kill Shaquila and then himself. Shaquila further testified that defendant sexually assaulted her by forcing her to engage in cunnilingus. Thus, when viewed in the light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant committed the crimes of first-degree home invasion and third-degree criminal sexual conduct. *Johnson, supra*.

Defendant argues that there was insufficient evidence because the testimony of the victims was refuted by defendant's witnesses, casting a reasonable doubt on the evidence. However, this Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Questions of credibility are left to the trier of fact and will not be decided on appeal. *Id.* The jury and the trial court had the opportunity to hear and observe the witnesses in these cases, found the victims' testimony credible, and convicted defendant accordingly.

III. Ineffective Assistance of Counsel

Defendant also argues that he was denied the effective assistance of counsel during both trials. We disagree. Because there was no *Ginther*¹ hearing in either of these cases, our review of this issue is limited to errors apparent on the existing record. *Id.* at 507. In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445.

Defendant first claims that in Docket No. 233860, his counsel was ineffective in failing to introduce exculpatory evidence and present a known alibi witness. Defendant asserts that his trial counsel "reneged on his duty" when he failed to present a doctor's note and call Dr. Upfall as a witness to establish that on February 23, 2000, defendant could not have been at Shaquila's house because he was at the doctor's office. "Decisions regarding what evidence to present and

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Failure to call witnesses constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). However, defendant was not deprived of a substantial defense and has failed to establish that he was prejudiced by trial counsel’s failure to call Dr. Uphall as a witness. Indeed, defendant did present an alibi defense through his testimony and that of his wife. Defendant and his wife testified that defendant was at a doctor’s appointment on the day the offenses allegedly occurred. Nonetheless, the jury found defendant guilty of both charges. Therefore, the failure to present this evidence did not constitute the ineffective assistance of counsel.

In Docket No. 233773, defendant argues that his trial counsel was ineffective in failing to present evidence of the computer’s hard drive to establish the nonexistence of the alleged viewing of pornography, and thereby, cast reasonable doubt on the prosecution’s case. Again, decisions regarding what evidence to present are presumed to be matters of trial strategy. *Rockey, supra*. Further, there is nothing in the record to support defendant’s claim that the presentation of the computer’s hard drive would have provided defendant with a substantial defense or altered the outcome of the trial. Thus, defendant has not established the requisite amount of prejudice. Moreover, defendant’s trial counsel brought to the jury’s attention the prosecution’s failure to present the record of the computer’s hard drive to corroborate the charge that defendant visited the pornographic website on the date of the alleged offenses and argued that this lack of easily accessible evidence provided reasonable doubt. Accordingly, defendant has failed to show that he was denied the effective assistance of counsel on this basis.

In Docket No. 233773, defendant further claims he was denied the effective assistance of counsel when his trial counsel failed to object to the admission of evidence of defendant’s prior conviction. On redirect examination of the victim’s mother by the prosecutor, the following colloquy occurred:

Q. Now, you said that day you filed a police report over the phone?

A. It was later on that night. I mean it was like—yes, later on that night.

Q. And then you followed, you followed up and kept going to the police station?

A. The detective ended up coming to the house. I think it was Detective Terry, and then it was the prosecutor that came to the house also, I mean not a prosecutor, a what you call—probation officer that came to the house also. I can’t remember his name.

Q. Okay. Then you spoke to a few people; is that correct, then you spoke to me?

A. Yes.

Defendant asserts that his trial counsel’s failure to object to the reference that a probation officer came to the victim’s house amounted to ineffective assistance of counsel. This claim fails for two reasons. First, defendant has failed to overcome a strong presumption that the failure to object was sound trial strategy. *Rice, supra*. The failure to object in this instance may be

deemed reasonable trial strategy as defendant's trial counsel may not have wanted to draw the jury's attention to such a brief reference or emphasize any impact the testimony would have on the jury. See *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Barker*, 161 Mich App 296, 304; 409 NW2d 813 (1987); *People v Lawless*, 136 Mich App 628, 635; 357 NW2d 724 (1984). Second, defendant has failed to show that he was so prejudiced by the remark that, but for counsel's alleged error, the result of the proceedings would have been different. *Noble, supra*. The reference did not indicate whether it was defendant's probation officer that came to the house and did not specifically reveal whether defendant had a prior conviction. Therefore, defendant was not denied the effective assistance of counsel.

IV. Prosecutorial Misconduct

Defendant also claims that the prosecutor's solicitation of the above reference to a probation officer constituted prosecutorial misconduct that denied defendant a fair trial. We disagree. Because defendant failed to object to the admission of the testimony, this issue is reviewed for plain error affecting defendant's substantial rights, which generally requires a showing of prejudice. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). After a review of the alleged reference in context, it is clear that the prosecutor did not solicit the reference to the probation officer. Rather, the reference was an unsolicited, isolated, and volunteered response by the witness to a proper question, of which the prosecutor made no further inquiry. Therefore, contrary to defendant's argument, the reference was not a "deliberate, calculated foul blow launched" by the prosecution in violation of defendant's due process rights. Further, reversal is not required because a curative instruction could have alleviated any prejudicial effect. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), quoting *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Accordingly, we find no error.

V. Hearsay Statements

In Docket No. 233773, defendant argues that the trial court erred in admitting the hearsay testimony of the victim's mother, Portia Harris, as to statements made by the victim regarding sexual acts done by defendant. However, defendant failed to object to the admission of the testimony. Therefore, this issue is also reviewed for plain error. *Carines, supra*. Reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* We find no such error warranting reversal. Here, the victim's mother testified to statements made by the victim shortly after the assault. However, defendant was not prejudiced by the admission of such statements, because the victim previously testified to the same statements that she made to her mother when she told her about the assault. See *People v Martin*, 75 Mich App 6, 16-17; 254 NW2d 628 (1977) (because the credibility of the declarant could be tested at trial, the likelihood of prejudice was minimal).

VI. Proportionality of Defendant's Sentence

Defendant next argues that his sentence violates the principle of proportionality as set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Because defendant's crimes were committed after January 1, 1999, the statutory sentencing guidelines were used to determine defendant's sentences. MCL 769.34(1) and (2); *People v Oliver*, 242 Mich App 92,

99; 617 NW2d 721 (2000). However, under the legislative sentencing guidelines, “[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *shall affirm* that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence.” *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000), quoting MCL 769.34(10) (emphasis in original). Accordingly, this Court must affirm sentences falling within the appropriate guidelines range. In this case, because defendant was sentenced within the recommended guidelines sentence range for each offense, and does not allege a scoring error or argue that his sentences were based on inaccurate information, we must affirm defendant’s sentences.² MCL 769.34(10); *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001); *Babcock, supra*; *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Affirmed.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Michael J. Talbot

² Although defendant’s sentence for second-degree criminal sexual conduct was not in the recommended guidelines range of 43 to 107 months, we find any error harmless as defendant’s nine to fifteen year prison term for third-degree criminal sexual conduct was within the guidelines and is to be served concurrently to the sentence for second-degree criminal sexual conduct.