

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CECIL WAYNE EVANS,

Defendant-Appellant.

UNPUBLISHED

September 11, 2003

No. 240598

Oakland Circuit Court

LC No. 01-181357-FC

Before: Meter, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant was charged with first-degree criminal sexual conduct (CSC I), MCL 750.520b(f), and convicted by a jury of the lesser included offense of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a). Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to a term of five to twenty-two years and six months' imprisonment. Defendant appeals of right. We affirm.

Defendant's sole argument on appeal is that he received ineffective assistance of trial counsel on the ground that his counsel stipulated to an element of the offense. Defendant asserts that there could be no legitimate strategy for his counsel to stipulate to the fact that the complainant is "a minor."

Because defendant did not move below for a new trial or a *Ginther*¹ hearing, this Court's review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was not sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will this Court

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

assess counsel's competence with the benefit of hindsight. *People v Pickens*, 446 Mich 298, 344; 521 NW2d 797 (1994).

During deliberations, the jury sent a note to the court asking in part: "[i]s there any evidence that [the complainant] is truly a minor?" Defense counsel and the prosecutor agreed to the following response to this query: "It is agreed between the prosecution and defense that [the complainant] . . . is a minor."

Defendant's argument on appeal is predicated on the erroneous premise that an element of both CSC I and CSC III is that the victim was a "minor." Rather, the age element for both crimes is that the complainant was at least thirteen but less than sixteen years old at the time of the alleged crime. MCL 750.520b(1)(b); MCL 750.520(d)(1)(a). The age of minority includes, but is not limited, to the above specified age group. Thus, counsel did not, as alleged by defendant, stipulate to an element of the crime. Moreover, to assume that the jury took the stipulation as proof of the complainant's age at the time of the crime is to presume that the jury failed to follow the instructions. This assumption contradicts the well established principle that juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The evidence establishing the complainant's age at the time of the alleged crime was uncontested. The complainant testified that she was born in 1986 and that the alleged crime occurred between January 2001 and July 2001, after she had turned fifteen years of age. In light of the above, we do not believe that defendant was deprived of the effective assistance of counsel.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello