

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OLONDAH ALFRED WILSON,

Defendant-Appellant.

UNPUBLISHED

March 1, 2005

No. 251320

Ingham Circuit Court

LC No. 02-001161-FH

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Defendant Olondah Wilson appeals as of right his jury conviction for third-degree criminal sexual conduct.¹ We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

This case arose when Wilson sexually assaulted the fourteen-year-old daughter of his live-in girlfriend, Kristin Lennon. At trial, the complainant testified that on June 5, 2002, after the family ate dinner together, Wilson left the home around 5:30 or 6:00 p.m. and her mother left around 6:30 or 6:45 p.m. The complainant stated that Wilson returned about half an hour later and came into her bedroom. According to the complainant, Wilson pushed her down on the bed, pulled down her pants and his pants, put a condom on, and then stuck his penis in her vagina. Wilson then told her not to tell anyone what had happened. After Wilson left the room, the complainant called her father and stepmother, who came to get her; however, the complainant did not tell them about the assault because she was embarrassed and scared.

The complainant testified that she stayed home the day after the assault, which was a Thursday, but she returned to school on Friday. On that day, according to the complainant, she told a friend what had happened, and they then told a teacher, Kendra Washington. The complainant said that she did not talk to police or the FIA until the following week.

¹ MCL 750.520d.

The complainant testified that she had problems with Wilson before; specifically, he had asked her to strip for money and he repeatedly came into her room when she was not fully dressed. The complainant stated that she eventually told a school counselor, Melissa Flood, about Wilson's behavior. Flood contacted the Family Independence Agency in May 2002, and they sent an investigator to discuss the problem with Wilson and Lennon; however, no action was taken as a result.

Flood testified that on Monday, June 10, Kendra Washington approached her while chaperoning a school dance to discuss the complainant's situation, and Flood told Washington that if Washington did not report the information to the authorities, Flood would do so herself. The following morning, according to Flood, she and Washington called protective services and the police. Flood believed that Washington learned what had happened to the complainant before June 10.

Washington's testimony contradicted that of Flood and the complainant. After some initial confusion regarding the dates, Washington ultimately testified that on Friday, June 7, the complainant and a classmate came into her classroom several times, but that the complainant refused to talk. According to Washington, the complainant never told her that she had been sexually assaulted. Washington stated that the school dance was on Friday, June 7, and that Flood came to her classroom the following Monday and told Washington that she needed to fill out a report regarding the complainant based on Washington's concerns about the complainant coming into her room repeatedly but refusing to talk. Washington maintained that on June 11, she filled out some paperwork with the help of Flood and two police officers based only on this behavior, not on an alleged rape. Washington testified that she never told the police that the complainant had been sexually assaulted, and she acknowledged that she would be in serious trouble if she failed to report an assault.

Washington's testimony was contradicted by that of Child Protective Services employee Erica Engel. Engel testified that she received a referral regarding the complainant from the school on June 11, and that the person who reported the incident was Kendra Washington. Defense counsel objected on hearsay grounds to Engel's testifying about the source of the June 11 referral; however, the trial court allowed the question after finding that the evidence was not offered for the truth of the statement but to impeach Washington. Engel continued, stating that, according to the report, Washington told the protective services worker that the complainant had told her on Friday, June 7 that Wilson had raped her on Wednesday, June 5. Engel testified that she took a statement from the complainant, then made arrangements for her to stay with her aunt.

Sexual assault nurse examiner Catherine Van Wyke testified that she examined the complainant on June 11, 2002. According to Van Wyke, the complainant said she had been sexually assaulted by her mother's boyfriend. Van Wyke stated that she saw the complainant over seventy-two hours after the assault, so she did not collect any evidence. Dr. Stephen Guertin examined the complainant on September 23, 2002. Dr. Guertin said that the complainant described being sexually assaulted by a bigger, stronger person. Dr. Guertin said that there was a deep notch in the complainant's hymen, indicating an injury that had healed. According to Dr. Guertin, the findings were consistent with the complainant's description of forced sexual intercourse and the report taken at the initial evaluation was consistent with his findings.

Wilson presented an alibi defense consisting of testimony that he was with Jamie Gomez, Lennon's and Wilson's former neighbor, during the time of the alleged assault. Gomez testified that she got home around 6:00 or 6:30 p.m. on June 5, 2002, and Wilson came over a half hour or an hour later. Wilson then left around 8:30 p.m. to go to his brother's house. Gomez's stepbrother, Chad Garbacik, testified that he arrived at the Gomez residence between 5:30 and 6:00 p.m. on June 5, that Wilson arrived about 30 to 45 minutes later, and that Wilson left after about an hour and a half. When Wilson left the Gomez residence, he was driving Lennon's car. Gomez testified that around 10:00 p.m. that night, Lennon called to ask for help in getting her car back, and she drove with her husband to meet Wilson to return Lennon's car. According to Gomez, Lennon told her that Wilson had been accused of sexually assaulting the complainant. Gomez testified, however, that Lennon continued to have a relationship with Wilson even after the complainant made the accusation.

The jury convicted Wilson as charged. Wilson moved for a new trial, and the trial court held a *Ginther* hearing on May 14, 2004. Wilson's trial counsel testified that his strategy was to attack the complainant's credibility by presenting inconsistencies in her testimony. Trial counsel said that he allowed in evidence of Wilson's other acts to raise further inconsistencies in the complainant's testimony. The trial court denied the motion for a new trial, finding that trial counsel used reasonable trial strategy and that the medical evidence would have been admissible over Wilson's objection.

II. Ineffective Assistance Of Counsel

A. Standard Of Review

Wilson asserts that he was denied the effective assistance of trial counsel when his attorney failed to object to testimony from medical witnesses about the complainant's statements. Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.² This determination requires a judge first to find the facts, then determine "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."³ We review the trial court's factual findings for clear error and review de novo its constitutional determination.⁴

B. The Trial Court's Ruling

To establish an ineffective assistance of counsel claim, a defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.⁵

² *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

³ *Id.* at 579.

⁴ *Id.*

⁵ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Here, the trial court found that counsel used a reasonable trial strategy of allowing the evidence to be admitted in order to develop inconsistencies in the complainant's testimony and attack her credibility. As the statements were likely admissible under MRE 803(4), and counsel identified a strategic reason for allowing them into evidence, we conclude that Wilson has failed to overcome the presumption of effective assistance.

III. Hearsay Evidence

A. Standard Of Review

Wilson also argues that he was denied a fair trial where a hearsay protective services report was improperly admitted. We review a trial court's decision to admit evidence for an abuse of discretion; however, we review de novo the preliminary legal determination regarding whether the report was hearsay.⁶

B. Reasons For Admission Of The Report

Hearsay is a statement offered in evidence to prove the truth of the matter asserted.⁷ Our review of the record leads us to conclude that the report was not admitted to prove that Wilson was the assailant. Rather, it was admitted to impeach a teacher, who denied that the complainant had told her about the assault. Therefore, the statement was not hearsay; and, in any event, Wilson was not denied his right to confront the complainant where she testified at trial.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen

⁶ See *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

⁷ MRE 801(c).