

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE MCQUEEN, JR.,

Defendant-Appellant.

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UNPUBLISHED

May 12, 2005

No. 255124

Wayne Circuit Court

LC No. 03-013791

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) (during commission of a felony), and one count of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced to concurrent prison terms of eight to fifteen years for each of the CSC I convictions, and five to twenty years for the first-degree home invasion conviction. We affirm.

Defendant asserts that the trial court erred when it failed sua sponte to dismiss or direct verdicts of acquittal on two of the four CSC I counts with which he was charged. Because defendant did not preserve this issue, review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Each single alleged sexual penetration, regardless of whether it is accompanied by more than one of the aggravating circumstances enumerated in MCL 750.520b, may give rise to only one criminal charge for purposes of trial, conviction, and sentencing. *People v Johnson*, 406 Mich 320, 331; 279 NW2d 534 (1979). In the present case, the prosecution brought four charges of CSC I against defendant. However, these charges stemmed from only two alleged acts of sexual penetration. Accordingly, only two CSC I charges were appropriate.<sup>1</sup>

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<sup>1</sup> Plaintiff asserts that what occurred was that defendant was charged under alternative theories and that this does not violate the rule of *People v Johnson*, 406 Mich 320; 270 NW2d 534 (1979). See *Johnson, supra* at 331 n 3. However, the court's jury instructions and the verdict form do not indicate that defendant could only be convicted of two counts of CSC I by either (1) convicting only under subsection 520b(1)(c) or subsection 520b(1)(e), or (2) by convicting under

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However, defendant is not entitled to reversal because his substantial rights were not affected. In *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998), our Supreme Court held that the error committed by a trial court in permitting multiple CSC I charges to reach the jury for a single alleged act of sexual penetration is cured when the jury acquits the defendant of the unwarranted charges. “We are persuaded by the view that a defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury.” *Id.* In the present case, the jury convicted defendant of only two charges of CSC I under subsection 520b(1)(c). This was consistent with the jury finding defendant guilty of home invasion, but not guilty of either weapons charge brought against him.<sup>2</sup>

Defendant asserts that, despite the fact that he was only convicted of two counts of CSC I, his convictions nonetheless cannot stand because there is clear evidence of jury compromise. Defendant asserts that such a compromise is evidenced by the fact that the case was largely a credibility contest between himself and the complainant, as well as the fact that the only contested issue was that of consent. Defendant argues that if the jury did not believe the complainant consented, then the only explanation for not convicting him on all four counts was that the jury reached a compromise verdict.

In *Graves*, *supra* at 487-488, our Supreme Court observed that “[i]f . . . sufficiently persuasive indicia of jury compromise are present, reversal may be warranted in certain circumstances.” Specifically, *Graves* states that reversal may be required “where the jury is presented an erroneous instruction, and: 1) logically irreconcilable verdicts are returned, or 2) there is clear record evidence of unresolved jury confusion, or 3) as the prosecution concedes in the alternative, where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense.” *Id.* at 488. Defendant’s challenge is based on the second of these scenarios.

Here, the jury was improperly instructed that it could convict defendant of four counts of CSC I based on only two sexual acts. However, despite defendant’s assertions to the contrary, there is no clear evidence of jury compromise. The fact that the case involved a credibility contest between defendant and the complainant is not evidence of compromise. Further, the fact that the jury did not find defendant guilty of all four counts, despite clearly rejecting the consent defense, can be explained by noting that it also did not convict defendant of either weapons charge. If the jury did not believe that there was sufficient evidence of the presence of a gun—which seems to be a reasonable conclusion given defendant’s acquittal of felon in possession, despite his stipulation that he was ineligible to carry a firearm—then the finding of not guilty on

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both subsections, once for cunnilingus and once for sexual intercourse. Rather, the instruction and verdict form would lead a reasonable jury to conclude that it was free to convict of all four counts. As *Johnson* indicates, proof of one or more aggravating circumstances does not transform one criminal sexual act into many. *Id.* at 331.

<sup>2</sup> Defendant was charged with felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.224b.

the two CSC I counts predicated on the use of a weapon is entirely consistent and does not evidence jury compromise.

Defendant also asserts that he received ineffective assistance of counsel. Specifically, defendant argues that counsel's ineffectiveness is evidenced by (1) his failure to object to testimony by the complainant's ex-husband regarding a statement made to him by the complainant, (2) his failure to object to two of the four CSC I counts with which defendant was charged, and (3) his failure to point out alleged inconsistencies in the complainant's testimony. Again, we disagree.

The defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, the defendant must show the deficiency was so prejudicial that he was deprived of a fair trial, *Strickland, supra* at 687-688; *Pickens, supra* at 309, so that there is a reasonable probability that, but for counsel's unprofessional error(s), the trial outcome would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Moreover, constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993); *Pickens, supra* at 312 n 12.

Defendant argues that trial counsel was ineffective when he failed to object to complainant's ex-husband's testimony that the complainant told him on the day the assault occurred that defendant had raped her. Defendant asserts that this testimony constituted inadmissible hearsay. MRE 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Clearly, the testimony in issue constituted hearsay.

However, MRE 803(2) provides that an excited utterance is not barred by the hearsay rule. An excited utterance is defined as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* Testimony by the complainant's ex-husband regarding the complainant's demeanor at the time the statement was made establishes that the challenged testimony was admissible as an excited utterance pursuant to MRE 803(2). Trial counsel is not required to advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant also argues that trial counsel was ineffective in failing to object when defendant was charged with four CSC I counts based on only two alleged acts of sexual penetration. While we conclude defense counsel should have raised the issue with the court, defendant cannot establish the requisite prejudice because he was only convicted of two counts of CSC I. *Graves, supra* at 486-487.

Defendant also argues that counsel was ineffective for failing to highlight for the jury certain alleged inconsistencies between the complainant's preliminary examination and trial testimony, as well as an alleged internal inconsistency in her trial testimony. Specifically,

defendant cites: (1) the complainant's preliminary examination testimony that being pinned down "felt like forever" versus her trial testimony that the sexual intercourse lasted a short period of time; (2) the complainant's preliminary examination testimony that she and defendant slept on the couch after the attack versus her trial testimony that she remained awake all night; and (3) the complainant's trial testimony that allegedly evidenced that she consented to the sexual encounter.

Regarding the first alleged inconsistency, we do not conclude that the testimony cited is inherently inconsistent. While the complainant testified at trial that the act of sexual intercourse was short, she also repeatedly testified to being pinned down by defendant for a considerable period of time during the course of the evening. It is not inconsistent for the complainant to state that defendant had her restrained for a long period of time and that during that period he performed a sexual act that only lasted a short period of time.

As for the second alleged inconsistency, it does appear that the complainant did contradict herself with respect to whether she slept after the assault had ended. However, the trial transcript shows that defense counsel questioned the complainant at length about potential inconsistencies in her testimony. For example, counsel questioned her about inconsistencies in her story with respect to whether defendant's tongue had penetrated her vagina, about how defendant could continue to forcibly immobilize her while performing cunnilingus, as well as why she had let her children into the home while defendant was still there, allegedly armed. Counsel's "decision not to delve into all the differences [in the complainant's testimony] constituted a matter of trial strategy for which this Court will not substitute its judgment." *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987).

Finally, defendant argues that because the record shows that the jury was confused on the issue of consent, counsel was ineffective for failing to "elaborate" on aspects of the complainant's testimony addressing consent. The complainant testified on direct examination that during the act of sexual intercourse, after she had spotted the gun on the floor, she decided that "this has got to stop because I already told him no to begin with. And I figured just let him get this over with and then he'll leave. But when I saw the guns [that is] when I . . . firmed up and said that's enough."

We conclude that defendant has failed to show that the outcome of trial would have been different had defense counsel specifically addressed the challenged testimony about consent. First, if counsel had pursued the matter during cross-examination, the complainant would have been given the opportunity to clarify her remarks. Second, we do not conclude that counsel could have said anything during closing argument that would have changed the result of the case. The jury was clearly aware of the testimony in issue. Further, the court instructed the jury that the complainant need not say no to every individual sexual act. Following our review, we conclude that it is not reasonably probable that further elaboration by counsel would have changed the outcome of the case.

Affirmed.

/s/ Hilda R. Gage  
/s/ Mark J. Cavanagh  
/s/ Richard Allen Griffin