

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE WALTER LOWE,

Defendant-Appellant.

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UNPUBLISHED

February 6, 2007

No. 263725

Kent Circuit Court

LC Nos. 04-010064-FC

04-010419-FC

Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

Following a joint jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f), in case no. 04-010064-FC, and of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and second-degree criminal sexual conduct, MCL 750.520c(1)(f), in case no. 04-010419-FC. Defendant appeals as of right. We affirm in part, vacate in part, and remand.

Defendant and his friend, Herman Moffett, spent the evening of June 11, 2004, at The BOB in Grand Rapids, where Moffett met Angela Derivera. Derivera was at The BOB with victim A, the victim in case no. 04-010419-FC. When The BOB closed, victim A, Derivera, Moffett, and defendant went to victim A's apartment in Kent City. Soon after arriving at the apartment, victim A went to bed. She woke up when defendant put his hand around her throat. After pulling down victim A's underwear, defendant inserted his penis into her vagina. When defendant got off victim A, she left her bedroom and the apartment. She went to her neighbor's apartment upstairs. Defendant also left the apartment. Standing in the hallway outside the apartment, defendant heard victim A tell her neighbors that she was assaulted. Defendant then drove to the apartment of victim B, the victim in case no. 04-010064-FC. After using her bathroom, defendant forced victim B to perform fellatio. Defendant also penetrated victim B's vagina with his penis.

On appeal, defendant claims that the trial court erred in not granting his motion for substitute counsel. We review a trial court's decision regarding the substitution of counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

This Court has stated the following regarding substitution of counsel:

An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *People v Charles O Williams*, 386 Mich 565; 194 NW2d 337 (1972). [*People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).]

Defendant argues that the trial court's inquiry into his disagreement with counsel was superficial and completely inadequate. If a defendant asserts that counsel is not adequate, diligent, or interested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusions on the record. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). The trial court twice heard defendant's complaints regarding the performance of counsel, once after the jury was selected on the first day of trial and then before opening arguments on the second day of trial. Accordingly, the trial court gave defendant substantial opportunity to present and establish his claim that he was entitled to substitute counsel. We, therefore, conclude that defendant's argument that the trial court failed to adequately inquire into the differences between him and counsel is without merit.

In addition, defendant has failed to establish that either good cause existed or that substitution of counsel would not unreasonably disrupt the judicial process. Defendant requested substitute counsel because he believed that defense counsel had not given 100 percent to his case when counsel only visited him once in jail, failed to subpoena certain witnesses and their phone records, and failed to file a motion to suppress a CD. A defendant's mere allegation that he lacks confidence in counsel is not good cause to substitute counsel. *Traylor, supra* at 460. In addition, disagreements over matters involving professional judgment or trial strategy, which include decisions regarding what evidence to present and whether to call certain witnesses, do not justify substitution of counsel. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979). Because defendant's disagreements with counsel did not involve a fundamental trial tactic, defendant has failed to establish that good cause existed for his request for substitute counsel. *Mack, supra* at 14. Moreover, because defendant did not request substitute counsel until the second day of trial, the substitution of counsel would have unreasonably disrupted the judicial process. The trial court did not abuse its discretion in denying defendant's motion for substitute counsel.

Defendant also claims that the trial court erred in not severing the two cases for trial because the two cases involved unrelated offenses. Because defendant did not request the trial court to sever the two cases for separate trials, this issue is unpreserved. We review an unpreserved claim of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A trial court is required to sever unrelated offenses for separate trials. MCR 6.120(B).<sup>1</sup> Two offenses are related if they are based on the same conduct, a series of connected acts, or acts constituting part of a single scheme or plan. MCR 6.120(B)(1)-(2); *People v Tobey*, 401 Mich 141, 151-152; 257 NW2d 537 (1977). In the present case, immediately after defendant forced victim A to engage in sexual intercourse, victim A left the bedroom and walked out of her apartment. She went to her neighbor's apartment to report defendant's conduct. Standing in the hallway outside of victim A's apartment, defendant heard victim A tell her neighbors that she was assaulted. Upon hearing this, defendant left victim A's apartment and drove to the apartment of victim B. After using victim B's bathroom, defendant forced her to perform fellatio and to engage in sexual intercourse. Then, while he laid on top of victim B, defendant told her that the crime he previously committed was nothing compared to what he had done to her. Given this series of events, which occurred within an approximate timeframe of three hours, we cannot conclude that the offenses committed against the two victims were clearly not "a series of connected acts." Accordingly, the trial court did not commit plain error when it failed to sever the two cases for separate trials.

Defendant next claims that his conviction for second-degree criminal sexual conduct in case no. 04-010419-FC was not supported by sufficient evidence. In reviewing the sufficiency of the evidence to sustain a conviction, we view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

To be convicted of second-degree criminal sexual conduct, a defendant must engage in sexual contact with another person. MCL 750.520c(1). Sexual contact is defined as follows:

"Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor'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, or in a sexual manner for:

- (1) Revenge.
- (2) To inflict humiliation.
- (3) Out of anger. [MCL 750.520a(n).]

Victim A testified that she woke up when defendant put his hand around her throat. After telling victim A that he "was going to fuck" her, defendant pulled down her underwear. Defendant's penis was not hard, but he was able to penetrate victim A's vagina with his penis. Defendant held himself and pushed his penis into her vagina. Defendant then got off victim A, and victim A left her bedroom and the apartment.

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<sup>1</sup> Effective January 1, 2006, MCR 6.120 was amended. Because defendant's trial took place before January 1, 2006, and because the parties have argued the issue under the old rule, we review defendant's argument under the rule in effect at the time of defendant's trial.

Victim A's testimony is insufficient to sustain defendant's conviction for second-degree criminal sexual conduct. Any contact that defendant made with victim A's vagina or with her underwear, the clothing covering the immediate area of her intimate parts, was done to further his attempt to penetrate victim A's vagina with his penis. There was no intentional touching of victim A's intimate parts or of the clothing covering the immediate area of her intimate parts other than what was done to enable defendant to penetrate her vagina with his penis.

The prosecution has the burden to prove each element of a crime beyond a reasonable doubt. *People v Rios*, 386 Mich 172, 181; 191 NW2d 297 (1971). Due process requires that the prosecution present sufficient evidence that would justify a trier of fact in concluding that the defendant was guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). Further, at the close of the prosecution's case-in-chief, if the evidence presented is insufficient to justify a rational trier of fact from finding the defendant guilty beyond a reasonable doubt, the defendant is entitled to a directed verdict of acquittal. MCR 6.419(A); *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998).

Because victim A's testimony was insufficient to support defendant's conviction for second-degree criminal sexual conduct, if defense counsel had moved for a directed verdict, a directed verdict of acquittal on the charge of second-degree criminal sexual conduct would have been granted to defendant. In other words, the prosecution failed to present sufficient evidence that would justify a trier of fact from finding defendant guilty of second-degree criminal sexual conduct. *Lemmon, supra* at 633-634. Because the prosecution failed to present sufficient evidence of defendant's guilt in regard to the second-degree criminal sexual conduct charge, thereby failing to satisfy its burden of proving each element of a charged crime beyond a reasonable doubt, we vacate defendant's conviction for second-degree criminal sexual conduct.

Defendant also requests us to remand for resentencing on his remaining three convictions for first-degree criminal sexual conduct because those sentences may have been affected by his conviction for second-degree criminal sexual conduct. However, defendant's sentences for second-degree criminal sexual conduct, 10 to 40 years' imprisonment, was less than his sentences for first-degree criminal sexual conduct, 20 to 40 years' imprisonment. Because defendant's sentence for his conviction of second-degree criminal sexual conduct was the shorter sentence, and because defendant's sentences for first-degree criminal sexual conduct fell within the sentencing guidelines, defendant's conviction for second-degree criminal sexual conduct did not influence the length of his sentences for first-degree criminal sexual conduct. Compare *People v Yowell*, 422 Mich 964, 964-965; 372 NW2d 515 (1985). Defendant is not entitled to be resentenced on his three first-degree criminal sexual conduct convictions.

Finally, defendant claims that he received ineffective assistance of counsel when counsel failed to object to him wearing his green jail uniform during jury selection, when counsel failed to request the two cases be severed for separate trials, and when counsel failed to move for a directed verdict on the second-degree criminal sexual conduct charge. Because defendant did not move the trial court for a new trial or for a *Ginther* hearing, our review of defendant's claim that he was denied the effective assistance of counsel is limited to the trial record. *People v Sabin (On Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000).

To establish a claim for ineffective assistance of counsel, "a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness,

defendant was denied his Sixth Amendment right to counsel.” *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). A defendant must also prove that his counsel’s deficient performance was prejudicial to the extent that “but for counsel’s error, the result of the proceedings would have been different.” *Id.* Counsel is presumed to have provided effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise. *Id.*

A defendant has a due process right to go to trial dressed in civilian clothing. *People v Harris*, 201 Mich App 147, 151-152; 505 NW2d 889 (1993). However, a defendant is not denied due process by wearing jail clothing that resembles civilian clothing. *Id.* In the present case, the record only provides that defendant was wearing his “jail greens” during jury selection. Thus, because the record fails to demonstrate that defendant’s clothing would have been recognized as jail clothing, defendant has failed to establish that any objection to him wearing his green jail uniform would not have been futile. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Accordingly, defendant has failed to prove that counsel’s failure to object to him wearing his jail greens fell below an objective standard of reasonableness. *Mack, supra* at 129.

Similarly, defendant has failed to demonstrate that counsel rendered constitutionally deficient representation when she failed to request severance of these cases. As previously observed, these cases were properly joined. Secondly, any motion to sever would have been futile. Trial counsel is not ineffective for failing to make a futile motion. *Fike, supra.*

Because we have vacated defendant’s conviction for second-degree criminal sexual conduct, we decline to address his argument that he received ineffective assistance of counsel when counsel failed to move for a directed verdict.

Affirmed in part, vacated in part and remanded for entry of an amended judgment consistent with this opinion. The trial court shall forward the amended judgment to the Department of Corrections. We do not retain jurisdiction.

/s/ David H. Sawyer  
/s/ Janet T. Neff  
/s/ Helene N. White