

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD DECARLO BAKER,

Defendant-Appellant.

UNPUBLISHED

December 11, 2007

No. 272246

Wayne Circuit Court

LC No. 06-002743-01

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a) (sexual penetration with a person at least 13 years of age and under 16 years of age). Defendant was sentenced to 7 to 15 years' imprisonment. We affirm.

I.

Defendant first argues that the prosecution presented insufficient evidence to support his third-degree CSC conviction. We disagree. We review sufficiency of the evidence claims de novo in determining whether the evidence, viewed in a light most favorable to the prosecution, warrants any rational trier of fact finding that all the essential elements of the crime have been proven beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

To prove third degree CSC, the prosecution must establish that defendant engaged in sexual penetration with a person at least 13 years of age, but under 16 years of age. *People v Starks*, 473 Mich 227, 235; 701 NW2d 136 (2005). An underage child cannot legally consent to sexual penetration with another person; thus, proof of sexual penetration of an underage child automatically constitutes third-degree CSC. *Id.* 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, but emission of semen is not required." MCL 750.520a(p).

We find that the evidence presented at trial, viewed in the light most favorable to the prosecution, was sufficient to support defendant's third-degree CSC conviction. Defendant befriended the victim, a 15-year-old female, in February 2006. The victim was stranded alone in

the Detroit area and defendant provided her with drugs, cigarettes, and food. Thereafter, defendant took the victim to a motel room where they smoked crack cocaine. While in the motel room, defendant kissed the victim. The victim testified that defendant then pushed her on the bed and pulled down her pants. She felt defendant's penis between her "butt cheeks" and he "entered once" in the anus. In response to defendant's conduct, the victim screamed, pulled up her pants, and ran to the lobby of the motel.

Although defendant argues that the victim's testimony lacked credibility and that she has a reputation for lying, questions of credibility are properly resolved by the trier of fact. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998). Therefore, we will not second-guess the victim's credibility. Additionally, although corroboration of a complainant's testimony is unnecessary to secure a CSC conviction, MCL 750.520h, Travis Hancock corroborated much of the victim's recitation of events. Hancock testified that, on the night in question, he observed the victim, sad and crying in the lobby of the motel, approach him and ask for money to call her mother. According to both the victim and Hancock, defendant followed the victim into the lobby and stopped her from making the telephone call. The victim then ran to a nearby White Castle restaurant, where she succeeded in calling home. Defendant and Hancock followed the victim.¹ The victim's testimony was also corroborated by her father, who testified about the telephone calls the victim made to his home on the night in question.

In questioning the victim's credibility, defendant also points to the lack of physical evidence proving anal penetration. The medical doctor who examined the victim, however, testified that the lack of physical evidence in this case was not unusual. The doctor maintained that in CSC cases, the presence or absence of physical evidence depends on the person penetrating and the person being penetrated, and that tears in the anus are not always present following anal penetration. Furthermore, the prosecution is not required to negate every reasonable defense theory. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Instead, "it need only convince the [trier of fact] 'in the face of whatever contradictory evidence the defendant may provide.'" *Id.*, quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). In this case, the victim testified that defendant entered her anus with his penis and the trial court, as the trier of fact, was entitled to judge the victim's credibility. *Lemmon, supra* at 646-647.

Reversal is not warranted on the grounds of insufficiency of the evidence.

¹ While Hancock and defendant were following the victim to the White Castle, defendant stated that the victim was a "freak," and after he found her he planned to take her back to the motel room to "fuck her."

II.

Next, defendant argues that he was denied the effective assistance of counsel. We disagree. A claim of ineffective assistance of counsel should be raised by a motion for new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because the trial court denied defendant's motion for new trial and declined to hold an evidentiary hearing, our review of this issue is limited to the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id.* at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id.*

Defendant argues that his trial counsel was ineffective for denying him the right to testify. A defendant has a constitutional right to testify at his own trial. *People v Boyd*, 470 Mich 363, 386; 682 NW2d 459 (2004). Trial counsel may, however, advise a defendant not to testify. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Whether a defendant testifies is a strategic decision best left to the defendant and his counsel, *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986), and we will not substitute our judgment for that of counsel regarding matters of trial strategy, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

In this case, there is no indication in the record that defendant ever expressed a desire or intent to testify during trial. Only at sentencing did defendant complain that he was denied the right to testify. Defendant, speaking on his own behalf, claimed that he had initially agreed not to testify due to his attorney's concern over his "gift to gabs." Defendant claimed that he changed his mind during trial and repeatedly requested that he be allowed to testify, but defense counsel denied his requests. Defense counsel stated in response that he had never denied defendant the right to testify, and that the decision not to testify was defendant's alone.

Defendant's self-serving statements at sentencing were not made under oath and are inadequate to support his claim that he was improperly denied the right to testify. There is no basis on which we can conclude that defense counsel's advice to defendant regarding whether he should testify was anything but sound trial strategy. *Matuszak, supra* at 58; *Martin, supra* at 640. Moreover, defendant has failed to establish how the admission of his own testimony would have supported a different outcome in the case. *Henry, supra* at 146.

Further, defendant argues that defense counsel was ineffective for failing to present exculpatory evidence and to call several potential witnesses, such as the motel clerk, the 911 dispatcher, a White Castle employee, and hospital personnel. Defense counsel's failure to present certain evidence and to call certain witnesses will only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 900 (1996). A substantial defense is one which might

have made a difference in the outcome of the trial. *Id.* Moreover, decisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy. *Dixon, supra* at 398.

Although defendant argues that he was denied the effective assistance of counsel because defense counsel failed to call several witnesses, he has not established the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has not identified the particular witnesses who would testify on his behalf or demonstrated that his trial counsel was aware of any potentially exculpatory witnesses. “Counsel cannot be found ineffective for failing to pursue information that his client neglected to tell him.” *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Furthermore, because defendant provided no information regarding the alleged witnesses, there is no basis on which to find that defense counsel’s failure to call them denied defendant a substantial defense. *Dixon, supra* at 398; *Hyland, supra* at 710.

Defendant further argues that defense counsel was ineffective for failing to introduce into evidence a recording of his statement to the police. We note, however, that a defendant’s own out-of-court statement constitutes inadmissible hearsay if it is offered by the defendant to prove the truth of the matter asserted. See MRE 801(c) and (d)(2). In fact, at the hearing on defendant’s motion for a new trial, defendant’s appellate counsel admitted that his statement to the police would have been inadmissible at trial. Therefore, defendant cannot establish that his trial counsel was ineffective for failing to move to admit the statement. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Moreover, defendant has failed to demonstrate how the admission of his statement would have affected the outcome of the case. *Dixon, supra* at 398; *Hyland, supra* at 710.

Additionally, defendant argues that defense counsel rendered ineffective assistance of counsel by failing to introduce into evidence the sheets, towels and washcloths recovered from the motel room. Defendant maintains that, while these items would not have exonerated him, the items would “have shown nothing to inculcate him.” Because defendant admits that the admission of these items did not support a different outcome in the case, he cannot establish that counsel was ineffective for failing to introduce them at trial. *Dixon, supra* at 398; *Hyland, supra* at 710.

Defendant also asks for a remand for further fact finding, but he has not presented evidence or an affidavit demonstrating that facts elicited during an evidentiary hearing would support his claim of ineffective assistance of counsel. See MCR 7.211(C)(1)(a)(ii). Thus, we decline to order a remand.

III.

Finally, defendant argues that he is entitled to resentencing. We disagree. The imposition of a sentence is reviewed for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). If the minimum sentence imposed was within the recommended minimum sentence range under the legislative guidelines, we must affirm, absent an error in the scoring of the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261;

666 NW2d 231 (2003). We review the trial court's factual findings at sentencing for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." See *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Defendant asserts that the trial court incorrectly scored offense variable ten (OV 10) at ten points. OV 10 takes into account the exploitation of a vulnerable victim. MCL 777.40. OV 10 may be scored at ten points if "the offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). The word "exploit" means to "manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b); *People v Wilkens*, 267 Mich App 728, 742; 705 NW2d 728 (2005). "Vulnerability" is defined as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c); *Wilkens*, *supra* at 742.

The victim was a 15-year-old female with a history of alcohol abuse and of running away from home. While the victim was stranded alone in the Detroit area, defendant befriended her. He provided her with cigarettes, drugs, and food, took her to a motel room, smoked crack cocaine with her, and offered to buy her a bus ticket home. Defendant told Hancock that the victim was a "freak" and that he was going to take her to the motel room to engage in sexual intercourse and steal her money. Based on this evidence, the trial court properly concluded that defendant "exploited" the victim's youth by manipulating her for unethical or selfish purposes. Accordingly, we find that OV 10 was properly scored at ten points.

Defendant also asserts that he was sentenced in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Contrary to defendant's argument, the trial court's reliance on facts at sentencing, which were not found by a jury, does not violate the United States Supreme Court's rulings in *Blakely*. In *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), our Supreme Court definitively ruled that Michigan's indeterminate sentencing scheme is not affected by the rulings in *Blakely*. Defendant is not entitled to resentencing.

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Jane M. Beckering