

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 22, 2014

v

DAVID DESHAWN ELLIOTT,

Defendant-Appellant.

No. 313816
Wayne Circuit Court
LC No. 12-007806-FH

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions on three counts of third-degree criminal sexual conduct, MCL 750.520d. For the reasons outlined below, we affirm.

The complainant testified that she met defendant when she was 14 years old, and defendant was 22 years old. She testified that she first met defendant while she was outside walking following an argument with her mother. She indicated she was crying at the time. She testified that defendant was driving by and asked if she was alright. Defendant asked what her name was and how old she was, and she testified that she responded truthfully. She testified that defendant asked for her phone number, which she gave him.

According to the complainant, after having spoken with defendant on the telephone, she went to his house, where she and defendant twice had sex in his basement. She further testified that she went over to defendant's home again on the day before Thanksgiving, and that they had sex for the third time. She saw defendant again on his birthday, but they did not have sex on that occasion, and that was the last time she saw him. The complainant's grandmother later took the complainant to the police precinct to give a statement after she learned of the relationship.

Following his sentencing, defendant filed a motion for a new trial on the basis of ineffective assistance of trial counsel. Defendant alleged that his trial counsel was ineffective for failing to call defendant's grandmother as a witness, advising defendant not to take the stand in his own defense, and for failing to advise defendant of the consequences of rejecting the prosecution's pretrial plea offer of one count of third-degree criminal sexual conduct and a prison term of 2 to 15 years. The trial court denied defendant's motion for a new trial, and this appeal followed.

Defendant argues that he was denied the effective assistance of counsel at trial. We review preserved claims of ineffective assistance of counsel where no *Ginther* hearing¹ was held for errors apparent in the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness and that there is a reasonable probability that the outcome of the trial would have been different if not for counsel's deficiency. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Defendant must overcome a presumption that the decisions made by counsel were legitimate trial strategy. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

Here, defendant claims that three errors on the part of his trial counsel rose to the level of ineffective assistance. First, defendant argues that his trial counsel was ineffective for failing to call his grandmother as a witness. On appeal, defendant has submitted an affidavit by his grandmother swearing that, had she been called as a witness, she would have testified that the complainant told her that she was 18 years old, and that she never witnessed any improper conduct in her house between defendant and the complainant. However, the complainant's claimed age is immaterial to the issue of criminal liability; only her actual age is of legal significance under MCL 750.520d(1)(a). Further, had defendant's grandmother testified to the fact that she questioned the complainant about her age, she may well have opened herself to damaging cross-examination as to why she had concerns. In any event, the complainant testified that she told defendant's father that she was 18, thus placing before the jury the fact that she had misrepresented her age to a member of defendant's family. It is doubtful that having an additional family member testify to same would have made a difference at trial. Further, the fact that defendant's grandmother did not witness any improper conduct does not mean that improper conduct could not have taken place out of her presence.

Given the contents of her proposed testimony, defense counsel's decision not to call defendant's grandmother as a witness was objectively reasonable.

Second, defendant argues that his trial counsel was ineffective for advising him not to take the stand in his own defense, where he swears by affidavit that he would have denied having sexual relations with the complainant, and testified that the complainant was angry at him for breaking off contact with her. However, the record reflects that defendant was advised by the trial court of his right to testify in his own defense, and that defendant explicitly waived that right at trial. Given this informed waiver, see *People v Carter*, 463 Mich 206, 215; 612 NW2d 144 (2000), defendant's claim that his failure to take the stand constituted ineffective assistance on the part of his trial counsel must fail.

Finally, defendant argues that his trial counsel was ineffective for failing to fully apprise him of the consequences of rejecting the prosecution's pretrial plea offer. Here, as in the case of defendant's decision not to testify, the record shows three separate instances where defendant was informed of the prosecution's plea offer, as well as the sentencing range he was subject to if

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

he were convicted at trial, and that on all three occasions defendant rejected the plea. Given this record evidence, defendant cannot show that he was prejudiced by any failure on the part of his trial counsel to inform defendant of the consequences of rejecting the offered plea agreements, as any possible informational deficit was adequately remedied by the prosecution and the trial court.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher