STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD WAYNE ARNOLD,

Defendant-Appellant.

UNPUBLISHED
July 26, 2005

No. 252484
Bay Circuit Court
LC No. 03-010439-FC

Before: Cooper, P.J., and Fort Hood and R.S. Gribbs*, JJ.

MEMORANDUM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct, MCL 750.520b(1)(a). Defendant was sentenced, as a habitual offender, to 360 to 720 months' imprisonment and appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant alleges that his counsel was ineffective for conceding that the trial court could consider facts underlying acquittals in sentencing. To establish ineffective assistance of counsel, a defendant must establish: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Based on *People v Granderson*, 212 Mich App 673, 678-679; 538 NW2d 471 (1995), the trial court properly considered the facts underlying two other criminal sexual conduct charges, of which the jury acquitted defendant, for purposes of scoring the offense variables.[1] Because defense counsel's concession was an accurate representation of the law, his performance did not fall below an objective standard of reasonableness for professional conduct. *Strickland, supra.* Therefore, defendant has not met his burden of establishing the first prong of his claim for ineffective assistance of counsel.

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[1] Defendant does not allege that *Blakely v Washington*, 524 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004) is implicated, and consequently, we do not address it.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant also alleges that the trial court abused its discretion by overruling his timely relevancy objection to Ms. Murphy's testimony regarding an argument over a tax return. To the extent this testimony revealed that defendant did not pay child support and voluntarily released his parental rights, the evidence was irrelevant. However, the testimony was not mentioned by the prosecutor in his closing or rebuttal arguments, and there is simply no indication that defendant was actually prejudiced by the admission of this testimony or that it affected the outcome of the trial. Reversible error did not occur because defendant failed to show that the outcome of the trial was affected. MCR 2.613(A); MCL 769.26; *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs

I concur in result only.

/s/ Jessica R. Cooper