

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DECAREO TYRE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

October 10, 2006

No. 263800

Montcalm Circuit Court

LC No. 04-001236-FH

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of third-degree criminal sexual conduct (CSC III) (force or coercion), MCL 750.520d(1)(b), and one count of fourth-degree criminal sexual conduct (CSC IV) (force or coercion), MCL 750.520e(1)(b). Defendant was sentenced to concurrent prison terms of 8 to 15 years for the CSC III convictions and 16 months to 2 years for the CSC IV conviction. We affirm. We decide this appeal without oral argument in accordance with MCR 7.214(E).

Defendant argues that his trial counsel was constitutionally ineffective in failing to object when the prosecutor asked defendant and another witness to comment on the credibility of the complainant and by failing to object to the trial court's scoring of the sentencing guidelines based on disputed facts that the prosecutor did not charge and prove beyond a reasonable doubt to a jury. To establish a claim of ineffective assistance of counsel, defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

We conclude that defense counsel did not render ineffective assistance when he failed to object to the prosecutor asking defendant and another witness, Kelvin Matthews, to comment on the credibility of the complainant.¹ It was improper for the prosecutor to ask Matthews whether

¹ Defense counsel did raise objections to the form in which the questions were posed to these two witnesses. For example, defense counsel objected to the prosecutor's comments that Matthews was lying and trying to mislead the prosecutor, as well as when the prosecutor answered a rhetorical question posed to defendant.

the complainant was telling the truth about going to Matthews's car to get a cigarette and to ask defendant why the complainant would have been concerned about being pregnant immediately after having sex, when such a concern would contradict the complainant's previous statement that she did not realize she had forgotten to take her pill until some time later that night. *People v Buckey* 424 Mich 1, 17; 378 NW2d 432 (1985) (stating that it is "improper for the prosecutor to ask defendant to comment on the credibility of prosecution witnesses"). However, defendant has failed to show that counsel's assistance was objectively unreasonable with respect to these circumstances. Our Supreme Court has recognized that "there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Here, defense counsel may have decided that defendant and Matthews were responding to the prosecutor's questions satisfactorily, *Buckey, supra* at 17, and that any objections beyond those already made would draw unwanted attention to the matter or lead the jury to suspect that defendant had something to hide.

Moreover, defendant fails to establish the requisite prejudice. To show prejudice, "a defendant must demonstrate 'a reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different.'" *Toma, supra* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). Here, defendant and Matthews handled the prosecutor's questions well. Both responded assertively and provided reasonable explanations and responses to the prosecutor's questions regarding the plausibility of their testimony as compared to that of the complainant.

We also conclude that defense counsel was not ineffective in failing to raise an objection based *Blakely v Washington*, 542 US 296; 124 S Ct 2531; L Ed 2d 403 (2004) to the trial court's scoring of the sentencing guidelines. As our Supreme Court has consistently held, *Blakely* does not apply to Michigan's sentencing scheme. *People v Drohan*, 475 Mich 140; 715 NW2d 778, 790 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). "Counsel is not ineffective for failing 'to advocate a meritless position.'" *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), quoting *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly