

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON MICHAEL OLLILA,

Defendant-Appellant.

UNPUBLISHED

May 13, 2008

No. 274541

Washtenaw Circuit Court

LC No. 05-000770-FC

Before: Wilder, P.J., and O’Connell and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f) (actor causes personal injury to the victim and force or coercion used to accomplish penetration), and third-degree criminal sexual conduct (CSC III), MCL 750.520d(b) (force or coercion used to accomplish penetration). Defendant was sentenced to concurrent prison terms of 51 months to 15 years in prison. We affirm.

This case arose when the complainant went out to a bar with Frances Cunningham and Samantha Baldwin. Defendant and the complainant had a mutual friend in one of the individuals working at the bar, Kelly Still, and defendant joined the complainant’s group at the bar. The complainant was not yet twenty-one years old, so she did not drink anything at the bar, but defendant was drinking a cocktail. After some difficulties arose about how the complainant would get home, defendant offered the complainant a ride home, and she accepted. Once in the car, defendant did not start the engine and, instead, forced himself upon the complainant, kissing her violently, pinning her against the inside of the door, and putting his hand up her skirt. He moved aside her underwear and forcibly penetrated her vagina with his finger. She repeatedly pushed his hands away and told him to stop. He eventually stopped, apologized, and drove her to her apartment. On the way, he hinted that he would like to see her apartment, but she made an excuse and told him he could not come up.

Defendant followed the complainant up to her apartment anyway and pushed his way inside. Once inside, the complainant sent Cunningham an instant message on her computer and sent her a text message, both of which asked Cunningham to come over. These messages were not retrieved at the time, but they were later discovered by Cunningham. The complainant then called Cunningham, but Cunningham did not detect any urgency in the complainant’s demeanor, and she did not come over. Defendant walked through the apartment and then returned to where the complainant was standing, wearing only his boxer shorts. He took her cell phone from her,

threw it, and then grabbed her arms and pushed her into her bedroom. The complainant told defendant not to touch her, to leave her apartment, and fought defendant's efforts to undress her. Eventually she began pleading with defendant, but he overpowered her, forced her onto a couch in her bedroom, forced her underwear off, and penetrated her vagina with his fingers and his penis. When defendant attempted to force the complainant to perform fellatio, she managed to get her legs under her and tried to get past him, but he again overpowered her and moved her onto the bed.

On the bed, defendant again tried to force fellatio, but the complainant made it difficult for him to maintain penetration, so he resumed penile penetration until he ejaculated. The defendant then rolled over and allowed the complainant to pull up her underwear and leave the room. He told her he would be there when she returned. Weeping profusely, complainant left the apartment and drove to Cunningham's dormitory. She telephoned for Cunningham to meet her downstairs, and Cunningham testified that she could tell the complainant was crying. Cunningham and Baldwin went down to meet her. The complainant then drove Cunningham and Baldwin to a residence where Still was staying. Baldwin testified that the complainant was a "mess" and clearly had been crying.

When they arrived at the residence, the women went into the bathroom, and the complainant asked about the definition of rape and complained of extreme pain in her groin area. The complainant testified that her vaginal area was sore and very swollen, and she could only relieve the soreness by bending over. Baldwin confirmed that the complainant bent over as she stood and that she was walking oddly. The complainant asked for someone to accompany her back to her apartment or over to another friend's house, but the other women declined, so she drove back to her apartment alone. When she saw that defendant's car was gone, she went up to her empty apartment and tried various methods to relieve the pain in her groin. The next day she went to the hospital and reported the rape. A swab of fluid was taken from deep within her vagina, and the results of subsequent DNA tests reflected that defendant ejaculated while his penis was in the complainant's vagina.

In his statement to police and at trial, defendant acknowledged a sexual encounter with the complainant, but he denied ejaculating or even maintaining any prolonged penile penetration of the complainant's vagina. He claimed that he attempted consensual penile penetration in the car, but it was not successful. He further testified that consensual sexual contact continued at the apartment, but the complainant broke off all sexual contact before any copulation occurred because she had to leave to go pick up a friend at the bar. The jury did not believe defendant's version of events and found him guilty of both counts.

Defendant first argues that he was denied the effective assistance of counsel by his trial counsel's failure to understand the law regarding subpoenas, which resulted in his failure to secure Still as a witness at trial. Defendant argues that Still would have testified, among other things, that after the complainant, Baldwin, and Cunningham arrived at the residence, the complainant indicated that she wanted to go find someone to have sex with. We disagree with defendant's arguments.

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's

performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), citations omitted.]

At the *Ginther*¹ hearing, Still confirmed that the complainant was heard complaining of pain in her groin area and saying, although not specifically to Still, that "it was burning and it hurt" According to Still, "she was rubbing her legs and her groin area." Still testified that the four women were discussing what might be causing the complainant to suffer that burning and pain, but the complainant did not say that the pain was from being raped and did not say that defendant raped her, even though Still stated that she had proffered alternative explanations for the pain. Most importantly, however, Still testified that she and the complainant had a more private discussion, during which Still stated that "she [the complainant] wanted to leave because she was bored and she wanted to leave to get some ass." Still said she was not sure if Cunningham and Baldwin heard this.

The gist of defendant's position is that trial counsel should have secured Still's testimony and was deficient in failing to do so. He argues that a statement by the complainant expressing that she wanted to have sex that night would contravene her claim that she had been violently raped within a few hours of the statement. However, Still's testimony was not critical to preserve the fairness of his trial, and, in light of all the circumstances, there is no reasonable probability that, but for counsel's failure to elicit her testimony, the verdict would have been different. See *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Cunningham testified that the complainant was distraught when she arrived at her dormitory. According to Cunningham, the complainant said that she did not want to return to her own apartment because "Aaron" was still there, indicating she had reason to avoid defendant. All the women agreed that the complainant said she had severe soreness in her groin and acted accordingly. The next day, a swab taken from the complainant's vagina indicated the presence of defendant's sperm. Still's testimony that the complainant said she was looking for sex after she left the residence was absolutely incongruous with all of this evidence, and the isolated statement, taken out of context and lacking any corroboration, does not convince us that the verdict would have been different if this testimony had been duly presented. *Id.*

Moreover, the evidence did not substantially corroborate defendant's trial testimony regarding the incident. Defendant portrayed the complainant as a willing and active participant in consensual sexual activity. Specifically, defendant testified that he never ejaculated during the incident and that he did "not believe intercourse was achieved" although he opined that while he did not feel it "something probably did come out of my penis." Not only was his testimony belied by the strong scientific evidence against him, Still's testimony tenuously indicates that the

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

complainant was looking elsewhere for sexual gratification, which would belie defendant's suggestion that the pair had already participated in some sexual activity and were anticipating its consummation. In contrast to the weakness of Still's supporting testimony, presenting Still at trial would have raised several hazards to defendant's case. Still would have testified that defendant was overbearing when under the influence of alcohol, and, specifically, that his assertiveness manifested itself in sexual aggression. Still would have testified that, after drinking, defendant would grab women's buttocks and otherwise infringe on the bodily dignity of women at the bar, and that he had gained a reputation for this type of behavior. She would also have to admit that she knew defendant as a friend. Under the circumstances, there is no reasonable probability that Still's testimony about a single, unsupported incongruous statement would have changed the entire outcome of the trial. *Id.*

Defendant also argues that he was subjected to constitutionally impermissible double jeopardy by his conviction of two crimes, subjecting him, at least potentially, to double punishment for the same offense. However, the two different charges were separately presented to the jury, and the evidence certainly supported more than one act of illicit sexual penetration, so the record does not suggest that defendant was punished twice for the same conduct. Instead, it appears from the record that defendant received separate punishment for separate crimes involving separate penetrations. See *People v Johnson*, 406 Mich 320, 324, 330-331; 279 NW2d 534 (1979). To the extent that defendant's issue involves the clarity of the jury instructions, defendant waived this issue by affirmatively approving the manner in which the trial court presented the jury instructions and the trial court's submission of both CSC I and CSC III to the jury. See *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). The prosecutor even courteously offered defendant the opportunity to present argument about why the charges should be presented alternatively, but defendant declined that invitation. *Id.* Under the circumstances, defendant has waived appellate review of this issue. *Id.*

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck