

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENYE ANTOINE STONE,

Defendant-Appellant.

UNPUBLISHED

July 22, 2008

No. 278829

Washtenaw Circuit Court

LC No. 06-001704-FC

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1). Defendant was sentenced to concurrent terms of 15 to 30 years in prison. Defendant appeals as of right. For the reasons set forth in this opinion we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant and defendant were patients being treated for depression at Chelsea Hospital. Complainant alleged that defendant came into her room during the night and sexually assaulted her. Defendant testified that the encounter was consensual.

Defendant first argues that he received ineffective assistance of counsel. He alleges that his attorney failed to effectively use critical preliminary examination testimony to impeach complainant. At the preliminary examination, complainant testified that on the evening preceding the assault, she was playing cards with defendant and others, and there was a lot of flirting or joking around. Defendant later said he would come into her room that night and get into bed with either her or her roommate. Complainant said she thought defendant was joking. She testified that she went to sleep, subsequently heard somebody come in the room, and then felt someone get into bed with her and kiss her neck. She indicated she was not fully awake and thought she was dreaming at first. She then opened her eyes, and asked defendant what he was doing. She described how he removed her pajama pants and underwear, and touched and digitally penetrated her vagina. Defendant then tried to put his penis inside her, and she testified that she “eventually” told defendant to stop. She said she told him to stop three times within a span of seconds. He then performed cunnilingus and stopped when he thought someone was coming.

At trial, complainant testified that she did *not* hear defendant come into the room, but felt him get into her bed and heard him tell her to move over. She testified that she first told him to

stop when he started to kiss her neck. On cross-examination, she acknowledged that she had previously said she *heard* defendant come into the room. Further, she acknowledged previous testimony that the three directives to stop were made within seconds of each other, but explained that they were in fact spread out, and that she had a better recollection at the time of trial. Counsel established that complainant did not recall using the word “eventually” in connection with telling defendant to stop.

Defendant contends that he was denied the right to effective assistance of counsel for failure to adequately cross-exam the complainant at trial between her preliminary examination testimony and her trial testimony. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Recently, our Supreme Court in *People v Dendel*, ___ Mich ___; ___ NW2d ___; (Case No.132042, issued May 28, 2008) emphasized that in order to prevail in a claim of ineffective assistance of counsel, defendant must demonstrate that counsel’s performance prejudiced the defense. *Id.* at 10.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court explained the test for determining whether a defendant has been denied the effective assistance of counsel:

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298,302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). *Dendel, supra* at 10-11.

Defendant has failed to demonstrate how defense counsel’s failure to bring out discrepancies in complainant’s statements demonstrated actual prejudice and also fails to demonstrate that but for counsel’s “error” the result of the proceeding would have been different. In this case, defense counsel did raise questions about the credibility of the complainant. Defendant’s argument on appeal is that defense counsel could have raised more questions about

her credibility. Given our Supreme Court's recent ruling in *Dendel, supra*, we conclude that defendant has failed to adequately demonstrate actual prejudice from counsel's alleged deficiencies, as well as to adequately demonstrate that but for these deficiencies, the result of this case would have been different. Our Supreme Court held that defense counsel in *Dendel* was not ineffective when the sole issue in the case was the cause of death of the alleged victim and defense counsel failed to call any expert witnesses to rebut the prosecution's theory of how that death occurred. If defense counsel's failure to call an expert witness in *Dendel* did not lead to a finding of ineffective assistance of counsel, then most assuredly the failure by defense counsel in this action to question the credibility of the complainant *enough* cannot lead this Court to conclude that defendant was deprived of effective assistance of counsel pursuant to the dictates set forth in *Dendel*. Accordingly, we cannot find that defense counsel in this matter was ineffective to the extent necessary to justify reversal of defendant's convictions. Similarly, we decline defendant's invitation for a hearing on this matter in light of our Supreme Court's decision in *Dendel*.

Defendant also argues that he should have been scored two points instead of five points for Prior Record Variable 5, MCL 777.55, because it was unknown whether he was represented by counsel with respect to a 1995 plea-based misdemeanor conviction for second-degree retail fraud. The presentence investigation report indicates that this fact was unknown, but that defendant was sentenced to nine days in jail. Although applied to a challenge to prior convictions based on lack of counsel where they were used in sentencing, but not in scoring guidelines variables, the Court in *People v Carpentier*, 446 Mich 19; 521 NW2d 195 (1994), indicated that the defendant bears the initial burden of establishing that the prior conviction was obtained without counsel or without a proper waiver of counsel

1) by presenting "prima facie proof that a previous conviction was violative of [*Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963)], such as a docket entry showing the absence of counsel or a transcript evidencing the same," or

2) by presenting evidence that the defendant requested such records from the sentencing court and that the court either (a) failed to reply to the request, or (b) refused to furnish copies of the records, within a reasonable time. [*People v Moore*, 391 Mich 426, 441; 216 NW2d 770 (1974)].

In the present case, defendant's attorney simply stated, "we don't know if [he] was represented." This assertion was insufficient to warrant a disregard of the misdemeanor conviction. Defendant is not entitled to relief on this issue.

Affirmed.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello