

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
February 22, 2011

v

CALVIN ANDRE DAVENPORT,  
  
Defendant-Appellant.

No. 295926  
Wayne Circuit Court  
LC No. 09-019102-FH

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Before: SAAD, P. J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of three counts of third-degree criminal sexual conduct (CSC 3), MCL 750.520d(1)(b) (force or coercion), and larceny from the person, MCL 750.357. Defendant was sentenced to 4 ½ to 15 years' imprisonment for each of his CSC 3 convictions and one to ten years' imprisonment for the larceny from the person conviction. Because we conclude there are no errors requiring relief, we affirm.

**I. BASIC FACTS**

This case arises from multiple nonconsensual sexual encounters between defendant, a Detroit police officer, and his wife (the victim) in June 2009. Defendant and the victim were married in September 2008. However, they had an unstable relationship. The victim described defendant as "controlling" and "abusive." In June 2009, they were separated and were seeking marital counseling.

On June 20, 2009, the victim went to a party at a friend's house. The victim arrived at the party around 10:00 p.m. At around 11:00 p.m., defendant called the victim. They spoke on the telephone for approximately 25 minutes until defendant arrived at the party. Upon arrival, defendant immediately approached the victim and accused her of having an affair. Defendant pushed the victim to the back of her truck and proceeded to undo the victim's belt and unbutton her blue jeans. He put his hands down her pants and stuck his fingers in her vagina to see if she was "wet." She repeatedly told him to stop.

At that time, the victim's friend, Dionna Cisero, approached defendant and the victim to see if everything was okay. Cisero witnessed defendant taking his hands out of the victim's pants. Defendant became angry with Cisero. He then told the victim to return home. As the victim was getting into her truck, defendant grabbed her purse from her shoulder. The purse,

which was worth approximately \$1,000, had been a birthday present given to the victim by defendant. Defendant emptied the purse into the victim's truck and left with the purse. The victim proceeded to drive home.

Later that same night, the victim was sleeping in her bed under the covers, when defendant used his spare key to enter her house. Defendant entered the bedroom and pulled the covers off of the victim. The victim asked defendant to leave and told defendant she did not want to have sex. Defendant grabbed the victim's legs, pushed them open, and stuck his finger in her vagina. The victim repeated that she did not want to have sex with defendant. Defendant asserted that they were going to have sex. Defendant proceeded to place one of his guns on the nightstand next to the bed and another gun on the bed itself. The victim felt threatened by defendant's placement of the guns. Defendant grabbed a bottle of lubricant. He was standing by the side of the bed and pulled the victim towards him. While the victim was on her back, defendant tried to penetrate the victim's vagina with his penis, but could not. He turned the victim over onto her stomach and penetrated her vagina with his penis from behind. The victim told defendant to stop because he was hurting her. After five minutes, defendant stopped penetrating the victim and proceeded to leave the house.

The following morning, on June 21, 2009, the victim called her sister, Kimberly Gaddis. Gaddis could tell that the victim was upset and decided to visit the victim at her house. After arriving at her house, the victim told Gaddis what happened with defendant the night before. Gaddis, who was also a Detroit police officer, notified internal affairs regarding the events of the previous night. While Gaddis was on the phone with internal affairs, defendant returned to the victim's house. He stated he was there to grab some personal belongings. While defendant was at the house, two police officers, Sergeant Torey and Officer Muhammad, arrived. They arrested defendant.

## II. SUFFICIENCY OF THE EVIDENCE

Defendant first contends there was insufficient evidence to support his convictions of larceny from the person and CSC 3. We disagree. We review de novo a challenge to the sufficiency of the evidence in a bench trial. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). We view the evidence in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

### A. LARCENY FROM THE PERSON

Larceny from the person requires that the prosecution prove “(1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person's immediate area of control or immediate presence.” *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004). The required intent to convict a person of larceny from the person is specific intent to permanently deprive the victim of the property. *People v Ainsworth*, 197 Mich App 321, 324; 495 NW2d 177 (1992). The person's state of mind may be inferred from all facts and circumstances. *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999). “Because of the difficulty of proving an actor's state of mind, minimal

circumstantial evidence is sufficient.” *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

In particular, defendant argues that there was insufficient evidence that defendant took the purse without the victim’s consent and that he intended to permanently deprive the victim of the purse. We disagree. Viewing the evidence in the light most favorable to the prosecution, we conclude that a reasonable trier of fact could find that the victim did not consent to defendant’s taking of the purse and that defendant had the specific intent to permanently deprive her of the purse. The victim testified that defendant “snatch[ed]” her purse from her shoulder. According to the victim, defendant said, “you not gon’ [sic] have this purse. You not gon’ [sic] have this - - you not gon’ [sic] be carrying this purse around with some other nigga [sic].” Defendant then emptied the purse throwing its contents into the victim’s truck. Subsequently, defendant, with the empty purse in hand, entered his vehicle and departed. According to the victim’s testimony, she never gave him permission to take her purse. Viewing this evidence in the light most favorable to the prosecution, a reasonable trier of fact could find that defendant did not have the victim’s consent to take the purse.

Additionally, a reasonable trier of fact can also infer from all the facts and circumstances that defendant intended to permanently deprive the victim of the purse. Specifically, the evidence showed that he took the purse and did not give it back to the victim. There was also evidence that defendant retrieved the sales receipt for the purse which could lead a rational trier of fact to conclude that defendant intended to return the purse to the store. In fact, defendant was still in possession of the purse at the time of trial. Thus, when viewed in the light most favorable to the prosecution, sufficient evidence existed to convict defendant of larceny from the person.

To the contrary, defendant testified that the victim threw the purse at him and stated that she did not care about the purse. He argues that his testimony is more credible than her testimony and that his testimony demonstrates that the victim consented to defendant taking the purse from her. However, the trial court found the victim’s testimony more credible than defendant’s testimony. We will not interfere with the trier of fact’s role in determining the credibility of the witnesses or the weight of the evidence. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Accordingly, defendant’s argument fails.

### B. CSC 3

The elements of CSC 3, as set forth in MCL 750.520d(1)(b) (force or coercion), require sexual penetration with another person and the use of force or coercion. *People v Phelps*, 288 Mich App 123, 132; 791 NW2d 732 (2010). Force or coercion is statutorily defined to include when a defendant uses actual physical force or violence or threatens “to use force or violence on the victim, and the victim believes that the [defendant] has the ability to execute those threats.” MCL 750.520b(1)(f)(i) and (ii); MCL 750.520d(1)(b). Also, “[t]he prohibited ‘force’ encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim’s wishes.” *People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002). “The existence of force or coercion is to be determined in light of all the circumstances[.]” *People v Crippen*, 242 Mich App 278, 282; 617 NW2d 760 (2000). Further,

in a prosecution for CSC 3, a victim need not resist the actor, and the testimony of a victim need not be corroborated. MCL 750.520i; MCL 750.520h.

Defendant contends that the prosecutor introduced insufficient evidence of force or coercion and, therefore, there was insufficient evidence for his CSC 3 convictions. We disagree. There was sufficient evidence that defendant, on three separate occasions, sexually penetrated the victim by “seiz[ing] control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim’s wishes.” *Carlson*, 466 Mich at 140. Specifically, the victim testified that, while they were standing on a public street, defendant undid her belt, forced his hand down her pants, and placed his finger inside her vagina even though she repeatedly told him to stop. The victim also testified that later that night defendant unexpectedly came into her bedroom. Despite the victim telling defendant she did not want to have sex, defendant pulled her legs up and again placed his finger in her vagina. After placing a gun on the nightstand and another on the bed, defendant attempted to penetrate the victim’s vagina with his penis while she lay on her back. When that failed he turned her over onto her stomach and penetrated her from behind for approximately five minutes. Again, throughout this encounter, the victim pleaded with defendant to stop. The victim further testified that she felt afraid of defendant because he had a look of rage on his face and the guns were within reach for him. This evidence is sufficient to establish that defendant disregarded the victim’s wishes and seized control of the victim in a manner to facilitate the accomplishment of the sexual penetration three times. As a result, sufficient evidence was presented to convict defendant of three counts of CSC 3.

### III. FINDINGS OF FACT

Defendant also posits that the lower court’s factual findings were clearly erroneous. A trial court’s factual findings are reviewed for clear error. *People v Gillam*, 479 Mich 253, 260; 734 NW2d 585 (2007). “Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake was made.” *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (internal quotation marks and citation omitted). In a bench trial, the lower court need not make specific findings of fact regarding each element of the crime as long as it appears that the lower court was aware of the issues in the case and correctly applied the law. MCR 2.517(A); *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995).

In finding defendant guilty of the larceny from the person offense, the lower court stated:

Well I think the evidence shows that he took her purse and he kept it, so I believe that’s all of the elements of larceny from [the] person. So he would be guilty of that was well[.]

Given the lower court’s recitation of the facts from the victim’s testimony and application of the law to the facts, it is clear that the lower court was aware of the issues in this case and correctly applied the law with regard to the charge of larceny from the person.

Also, in finding defendant guilty of three counts of CSC 3, the lower court made extensive findings. Specifically, the trial court found that “defendant put his hand down [the victim’s] pants and put his finger inside her vagina while she was at the party.” It further found

that “[the victim] continued to tell the defendant no and to stop what he was doing.” These findings were supported by the victim’s testimony, which was sufficient to convict defendant of the first count of CSC 3. The court also found that “defendant put[] his fingers into [the victim’s] vagina and then forc[ed] his penis into her vagina.” Again, these factual findings were supported by the victim’s testimony and were sufficient to convict defendant of the second and third counts of CSC 3. In sum, there was evidence to support the trial court’s factual findings, and we are not left with a definite and firm conviction that the trial court made a mistake. Thus, we hold that the lower court’s findings of fact were not clearly erroneous under MCR 2.517(A).

#### IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues on appeal is that he was denied the effective assistance of counsel by defense counsel’s failure to call a witness and elicit evidence to impeach Cisero’s testimony and, as a result, he is entitled to a new trial or remand to the lower court for an evidentiary hearing. We disagree. With regard to claims of ineffective assistance of counsel, we review the trial court’s factual findings for clear error and its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant has not established a testimonial record at a *Ginther*<sup>1</sup> hearing, review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms; (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, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). “A substantial defense is one which might have made a difference in the outcome of the trial.” *People v Chapo*, 283 Mich App 360, 372; 770 NW2d 68 (2009) (internal quotation marks and citation omitted).

Defense counsel’s assistance was not ineffective because the failure to call Sergeant Torey as a witness did not deprive defendant of a substantial defense. Defendant contends that Sergeant Torey would have testified that Cisero made a prior inconsistent statement and that this testimony would have impeached Cisero’s trial testimony that she saw defendant pull his hand out of the victim’s pants. Contrary to defendant’s contention, the record reveals that defense counsel did attempt to impeach Cisero’s testimony by questioning her about the prior

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

inconsistent statement during cross-examination. That is, defense counsel did bring to light the existence of Cisero's prior inconsistent statement. Defense counsel also attacked Cisero's credibility during closing argument, focusing on her close relationship with the victim and her motive to lie. In sum, defendant fails to meet his heavy burden to overcome the presumption that defense counsel's failure to call Sergeant Torey as a witness was a matter of trial strategy. Accordingly, defendant has failed to show that defense counsel's performance was deficient.

Further, even if defense counsel's performance was deficient, there is no reasonable probability that the outcome of the trial would have been different. Here, Cisero's testimony was not critical to the prosecution's case because the victim testified to all the elements of all of counts of CSC 3. Additionally, the trial court determined that the victim was more credible than defendant and that her story was more consistent. Given the trial court's assessment of credibility and the evidence on record, it is not likely that Sergeant Torey's testimony about Cisero's inconsistent statement would have undermined the findings of the trial court or created a reasonable probability of a different outcome. Accordingly, defendant has failed to demonstrate that he was denied the effective assistance of counsel and that he is entitled to a new trial or to remand for a hearing.<sup>2</sup>

Affirmed.

/s/ Henry William Saad  
/s/ Kirsten Frank Kelly  
/s/ Pat M. Donofrio

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<sup>2</sup> Defendant also requests remand before a different trial court judge. Because we conclude there are no errors requiring reversal, we need not address defendant's request for remand for a *Ginther* hearing before a different judge.