

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORTLAND C. KING,

Defendant-Appellant.

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UNPUBLISHED  
February 24, 2004

No. 244060  
Wayne Circuit Court  
LC No. 01-010115

Before: Neff, P.J., and Wilder and Kelly, JJ.

PER CURIAM.

Defendant appeals by right his conviction of one count of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a), following a bench trial.<sup>1</sup> We affirm.

I. Facts and Proceedings

Tanya Hebert, the victim's mother, testified that defendant, Hebert's cousin, babysat Hebert's children at his home on numerous occasions from 1999 until February 2001. The children frequently spent the night at defendant's home, particularly if Hebert needed defendant to babysit them during their school vacations. Hebert testified that in February 2001 she ended the babysitting arrangement after she and defendant argued about the disciplinary techniques defendant was using.

Hebert further stated that a few months later, in May 2001, Hebert's nine-year-old daughter, the victim in this case, told Hebert that when she was at defendant's house, defendant made her kiss him. When Hebert asked the victim if that was all that happened, the victim responded, "No." Hebert did not ask the victim specifically what happened, but told her that she would handle the situation. She later called a counselor who instructed her to make a report to the police. Hebert also testified that the victim informed her that defendant engaged in inappropriate behavior with her the last time she stayed with him, which was in February 2001.

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<sup>1</sup> Defendant was charged with three counts of second-degree CSC. The trial court found defendant not guilty of two of the three counts charged.

The victim testified that during several overnight visits to defendant's house, she and her sister slept in defendant's bed with defendant. She stated that on certain occasions, defendant made her move next to him and rub his penis. The victim's sister did not awaken during these incidents. According to the victim, defendant made her engage in this behavior at least twice, but probably three times. The victim stated that defendant told her that if she told anyone, he would get in trouble. She also testified that one of these incidents occurred the last time she was at defendant's house.

Kevin Kulyk, defendant's stepfather, testified that he and defendant's mother lived next door to defendant and that the victim and her sister frequently visited their home. He further testified that around the time Hebert ended the babysitting arrangement with defendant, the victim's father was looking for Hebert so that he might obtain parenting time with the victim. Mr. Kulyk gave the victim's father information on locating Hebert, and Mr. Kulyk believed that his family's relationship with Hebert deteriorated for this reason. Mr. Kulyk testified that Hebert had retaliated against him for providing the victim's father with this information by falsely alleging that Mr. Kulyk had molested his foster daughter, and that Hebert also made reports to the state concerning his wife's care of their foster child. Mr. Kulyk opined that because Hebert did not succeed at harming him and his wife through these allegations, she made false allegations against defendant.

Cheryl Kulyk, defendant's mother, also testified that she and her husband had a dispute with Hebert concerning the victim's father's parenting time. Mrs. Kulyk learned about the allegations against defendant after this dispute occurred. She admitted that she did not actually know who made a report to protective services about her care for her foster child, but she assumed that Hebert made the report.

Defendant testified that he did not ask the victim to fondle him. He stated that the victim and her sister occasionally asked to sleep in his room, claiming they were scared, but that he stayed on his bed with them only until they fell asleep. He stated that he slept the rest of the night on the couch.

Defendant also testified that he ended the babysitting arrangement after he and Hebert argued about him asking the victim to perform household tasks. When Hebert accused defendant's mother of wanting foster children only for help with housework, defendant said he would not babysit for Hebert again. According to defendant, Hebert then threatened to call defendant's ex-wife and tell her that he had molested his daughter. Defendant further testified that the next day, he argued with Hebert about providing the victim's father with Hebert's phone number. He also stated that the police first informed him of the allegations against him approximately one to two weeks after the victim's father obtained the right to parenting time.

After receiving the testimony and hearing closing arguments, the trial court found, in part:

On February 13, 2001, [Hebert] and the defendant had a disagreement over the defendant's disciplining beliefs, so the defendant never babysat again since that date.

Around mid-May, 2001, [the victim] told her mother that the defendant made her do something to him.

This [c]ourt believes that the defendant made [the victim] rub his penis on or about February 13, 2001. This [c]ourt finds that the prosecutor has proven, beyond a reasonable doubt, that the defendant did engage in sexual contact with another person; to wit: [the victim], said person being under 13 years of age.

Therefore, this [c]ourt finds the defendant guilty of count one and not guilty of counts two and three.

The trial court subsequently sentenced defendant to one to fifteen years' imprisonment. This appeal followed.

## II. Standards of Review

We review a trial court's factual findings for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

Because defendant did not raise his claim of ineffective assistance of counsel in a motion for new trial or request a hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

## III. Analysis

Defendant first argues that the trial court's guilty verdict on one count of second-degree CSC is inconsistent with its verdict of not guilty on the other two counts of second-degree CSC and that reversal is required. We disagree.

“While juries are not held to rules of logic, or required to explain their decisions, a judge sitting without a jury is not afforded the same lenience.” *People v Ellis*, 468 Mich 25, 26; 658 NW2d 142 (2003), quoting *People v Walker*, 461 Mich 908; 603 NW2d 784 (1999), quoting *People v Vaughn*, 409 Mich 463; 295 NW2d 354 (1980). Accordingly, a trial court cannot permissibly render inconsistent verdicts. *Ellis, supra*, citing *Walker, supra*.

Defendant relies on *People v Fairbanks*, 165 Mich App 551; 419 NW2d 13 (1987), to support his assertion that the trial court's verdicts were inconsistent and require reversal. His reliance is misplaced, however, because *Fairbanks* is distinguishable. Although this Court in *Fairbanks* questioned the trial court's disbelief of portions of the victim's testimony, *id.* at 557, the perplexing nature of the trial court's findings did not form the basis of this Court's decision to reverse. Rather, this Court reversed because the trial court's verdict of guilty of assault with the intent to commit second-degree CSC was inconsistent with the trial court's factual finding that the defendant did not possess a firearm—the only aggravating circumstance that could have supported the trial court's verdict. *Id.*

In the present case, however, the trial court's legal conclusions are not inconsistent with its factual findings. The trial court's verdict reflects its decision that the prosecution proved beyond a reasonable doubt that defendant committed second-degree CSC on one occasion, but that it did not prove the remaining two charges beyond a reasonable doubt. Although defendant argues that the victim's testimony rendered distinguishing between the alleged incidents impossible, the record reflects that the victim testified that the incidents occurred under varying circumstances.

Defendant next argues that the trial court cited facts not in evidence in its conclusions of fact. Specifically, defendant asserts that because the victim did not reference a specific date, the trial court incorrectly found that the crime was committed on or about February 13, 2001. We disagree. Although the victim did not testify to a specific date of the incidents, the victim stated that defendant engaged in this behavior the last time defendant babysat her, which, according to Hebert's testimony, was around February 13, 2001. Accordingly, the trial court's finding was not clearly erroneous.

Finally, in a supplemental brief filed pursuant to administrative order 1981-7, defendant asserts that he was denied the effective assistance of trial counsel because his trial counsel failed to file a "rape shield notice" and did not call several witnesses to testify at trial. For the reasons that follow, we conclude that defendant has not established that he was denied the effective assistance of counsel.

We presume that trial counsel rendered effective assistance to the defendant, and the defendant bears a heavy burden of demonstrating that his counsel was ineffective. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). To meet this burden, a defendant must demonstrate that his counsel "made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defense," to the extent that the defendant was deprived of a fair trial with a reliable result. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002), quoting *People v Mitchell*, 454 Mich 145, 155-156; 560 NW2d 600 (1997), quoting *Strickland v Washington*, 466 US 668; 104 S Ct 2052, 80 L Ed 2d 674 (1984).

Defendant's claim arises primarily from his assertion that the victim had previously made false allegations of sexual assault against another individual. Defendant contends that his trial counsel should have filed a request pursuant to MCL 750.520j(2), the rape shield statute, to permit admission of evidence concerning this purportedly false allegation. The rape shield statute, however, does not exclude evidence concerning prior false accusations. *People v Williams*, 191 Mich App 269, 272-273; 477 NW2d 877 (1991), citing *People v Hackett*, 421 Mich 338, 348-349; 365 NW2d 120 (1984). Accordingly, defense counsel did not err by refraining from requesting admission of this evidence pursuant to the procedures outlined in MCL 750.520j(2). Moreover, the record reflects that the prosecution asserted that the prior accusation was not false and that defendant's prior trial counsel unsuccessfully moved for admission of the subject evidence.

Defendant also contends that his trial counsel should have called witnesses who would have (1) testified that the complainant and her mother had made prior false accusations of sexual assault and (2) impeached Hebert's testimony concerning the custody dispute with the victim's father and her children's level of knowledge of sexual matters. What witnesses to call and what

evidence to admit are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). This Court will not substitute its judgment for that of trial counsel concerning matters of trial strategy. *Id.* Failing to call witnesses amounts to ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Moreover, trial counsel does not have an obligation to interview every possible witness a defendant suggests. *People v Beard*, 459 Mich 918; 589 NW2d 774 (1998), citing *Strickland, supra* at 690-691. Although defendant asserts that these witnesses would have testified in his favor, he cannot demonstrate that his trial counsel did not have strategic reasons for declining to call them, such as the possibility that these witnesses would have provided testimony unfavorable to defendant. He also has failed to show that his trial counsel did not investigate these witnesses.

We also conclude that defendant has failed to establish that these alleged errors adversely affected the outcome of his trial.

Affirmed.

/s/ Janet T. Neff  
/s/ Kurtis T. Wilder  
/s/ Kirsten Frank Kelly