STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 17, 2014
v	No. 311453 Kent Circuit Court
GEOFFREY VINCENT KABASA, Defendant-Appellant.	LC No. 11-011634-FH

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial of fourth-degree criminal sexual conduct. MCL 750.520e. He was sentenced to four months in jail and thirty months' probation. He now appeals and we affirm.

On September 18, 2011, at Florentine's Bar in Belmont, defendant was out for drinks and pizza with three other men: Mark Vandermolen, Kevin Marsiglia, and Jeremy Atwood. Around 1:45 a.m, the victim, an employee at Florentine's, announced last call. Defendant summoned the victim to the table to order drinks. He asked the victim if he could give her a hug to make up for some of the issues that evening at their table. The victim testified that during this embrace, defendant began to fondle her buttocks and vaginal area, as she tried to resist and get away from him. After breaking free, she told the table of men that they were cutoff and had to leave. A fight broke out between defendant and Atwood that resulted in defendant being knocked unconscious and the police being called to the bar. No arrests were made and defendant returned home with friends. Later, he was arrested and charged with fourth-degree criminal sexual conduct.

Defendant's first trial resulted in a mistrial. The second trial resulted in his conviction.

The primary issue on appeal is whether defendant was denied the effective assistance of counsel. Defendant argues several different theories, most of which concern tactical and strategic trial decisions by defendant's trial counsel.

This Court applies a mixed standard of review when evaluating a claim of ineffective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Whether a person has been denied the effective assistance of counsel is a mixed question of law and fact. Where the issue is raised in the trial court, the factual findings of the court are reviewed for clear error, while the ultimate application of the law is reviewed de novo. Our Supreme Court held the

test for ineffective assistance of counsel under the Michigan Constitution is the same as the United States Constitution. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). In *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2050; 80 L Ed 2d 674 (1984), the United States Supreme Court set forth the test to determine whether a defendant was deprived of effective assistance of counsel under the Sixth Amendment:

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The Court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the Court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the Court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

The Court further held that an error by counsel, "even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 US at 691. That is, we will not reverse unless there is a reasonable probability that, absent the error, a different result would have occurred. *People v Dendel*, 481 Mich 114, 132; 784 NW2d 859 (2008). Furthermore, in any claim of ineffective assistance of counsel, the defendant must overcome the presumption that his counsel's actions constituted sound trial strategy under the circumstances. *People v Carbin*, 463 Mich 590, 601; 623 NW2d 884 (2001). This Court will not second guess tactical decisions made by defendant's defense counsel simply because those tactics did not end up being successful. *People v Grant*, 470 Mich 477; 684 NW2d 686 (1994).

Defendant argues that it was ineffective assistance for defense counsel to concede that the victim was credible. However, defense counsel only conceded that the victim had been accurate in describing that she had been assaulted. Defense counsel presented the theory that the victim was, in fact, a victim of sexual assault, but that the victim had simply mistaken which of the men at the table had assaulted her. Challenging the victim's testimony and saying that it did not happen at all, at least without evidence of a motive to lie, would most likely not play well to a jury. Defense counsel then argued that it was Atwood, and not defendant, who sexually assaulted the victim. This tactical trial decision was reasonable in the face of such specific testimony from the victim.

Defendant next argues that defense counsel should have called VanderMolen as a witness because he would have testified that defendant did not sexually assault the victim. But, according to his affidavit, VanderMolen would have stated only that he saw defendant hugging the victim and that Atwood then punched defendant. If he would have taken the stand, this evidence would do nothing other than show that defendant hugged the victim, which is not a disputed fact, and that Atwood punched defendant, another undisputed fact. That is, what he saw is not of consequence, and the fact that he did not see the assault on the victim does nothing to establish that it did not happen. VanderMolen not being called as a witness during the trial had no effect on the outcome. There is no reasonable probability that, absent error, a different outcome would occur. *Dendel*, at 125.

In defendant's standard 4 brief, defendant claims he had difficulty hearing during the trial and that nothing was done to address his hearing issues and his attorney was ineffective for not getting him any accommodations. Other than his claim that there were times he could not hear testimony, defendant does not outline anything from the record that is surprising to him, or how anything that was a surprise could help his case. As far as defendant's remaining claims of ineffective assistance of counsel; they all suffer from these same shortcomings: they lack factual support, represent tactical decisions, or, even if counsel had followed defendant's wishes, there is no reasonable likelihood of a different result occurring.

Ultimately, what defense counsel did do with what little she had to work with, was to present an argument that it was actually Atwood that sexually assaulted the victim. The failure of this strategy does not mean there was ineffective assistance of counsel.

Defendant next argues that, he was denied a fair trial through prosecutorial misconduct by late delivery discovery material and shifting the burden of proof during closing argument. This Court reviews issues of prosecutorial misconduct de novo to determine if defendant was denied a fair and impartial trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). Turning to the first argument, defendant claims that the prosecution was 26 days late in turning over information to the defense that Atwood was to receive consideration for his testimony against defendant. However, in order to prevail, defendant must show that there is a reasonable probability of a different outcome. *Pickens*, 446 Mich at 303. Because defendant did receive information in time to use it at trial and he cannot show that a different outcome would have been achieved by receiving the information sooner, defendant has not met his burden. *Id* at 304.

Defendant's next claim is that the prosecutor shifted the burden of proof by suggesting that the defense could or should have called VanderMolen as a witness. After objection by defense counsel, the court instructed the jury that the prosecutor had the burden of proof and defendant did not have to prove anything. Thus, this issue was resolved immediately, and any error was harmless. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999).

Defendant's next claim is that the trial court incorrectly modified the instructions on CSC-IV and an adverse inference instruction was appropriate and necessary regarding the unreadable statement of defendant. However, defense counsel failed to object so this issue is waived. *People v Stanaway*, 446 Mich 643; 521 NW2d 557.

Regarding defendant's next claim that an adverse inference instruction of defendant's statement should have been given because the original and complete statement was lost, the lack of an adverse inference instruction from the trial counsel does not indicate ineffective assistance of counsel or inadequate jury instructions. Even when requested, an adverse inference instruction need not be given where the defendant has not shown that the prosecutor acted in bad faith in failing to produce the evidence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). However, if any claim is not preserved, then the claim is reviewed using the standard of plain error. *People v Castaneda*, 81 Mich App 453; 265 NW2d 367 (1978). There are three elements of the plain error standard: error must have occurred, the error was plain, and the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To show that a person's substantial rights have been affected, the error generally has to affect the outcome of the proceeding. *Id.* The goal of an adverse jury instruction is to create an adverse

inference against the other party. The defense could have argued to the jury that the failure of the police to keep defendant's complete statement should compel the jury to listen to the police testimony skeptically. The outcome of this case would not have changed even with this instruction. And, defendant was not entitled to receive an imprimatur from the trial court on that question.[1]

We conclude that the prosecutor did not shift the burden of proof in his closing argument and that adverse jury instructions did not need to be given. We further conclude that defendant had effective assistance of counsel in his trial. Even if defense counsel's performance was to be concluded to be deficient, defendant still cannot show the prejudice prong of both *Strickland* and *Pickens.* We are not persuaded that defendant is entitled to a new trial.

Affirmed.

/s/ David H. Sawyer
/s/ Douglas B. Shapiro

[1] Defendant argued as a separate issue that the cumulative effect of the different errors deprived him of a fair trial. However, we do not find there were errors, so they have not been addressed as a separate issue.

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BECKERING, J. (*concurring*).

I concur in result only.

/s/ Jane M. Beckering