STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2010
v	No. 290489 Delta Circuit Court
CHRISTOPHER GLENN SMITH-GOUIN, Defendant-Appellant.	LC No. 08-007973-FH

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Defendant Christopher Glenn Smith-Gouin appeals by right his conviction and sentence for criminal sexual conduct in the third degree.[1] We affirm.

I. Basic Facts And Procedural History

According to the 14-year-old complainant, Smith-Gouin sexually assaulted her at his father's house while the two were in the basement of the home, ostensibly waiting for open swim to begin at the YMCA. The complainant testified that Smith-Gouin first kissed her, rubbed her over her clothing, and finally penetrated her vagina despite her continued resistance. According to the complainant, Smith-Gouin was not wearing a condom and ejaculated on her leg. The complainant said that Smith-Gouin was going to have sex with her again, but stopped when his father called from upstairs to tell him that someone had arrived. The complainant testified that she was afraid to call for help because she was unsure how Smith-Gouin's father would react. She later left the home with Smith-Gouin and went with him to Wal-Mart and the YMCA where they swam, sat in the sauna, and used the hot tub. Thereafter, according to the complainant, Smith-Gouin took her home, where she showered and went to bed.

The complainant testified that she did not tell either her parents or her step-parents what had happened because she did not know how they would react. However, she claimed that she told one of her friends the next day that she had had sex with "someone that was overage." She also testified that she subsequently called complainant a number of times, intending to tell him

[1] MCL 750.520d.

that she did not want to talk to him anymore. However, according to the complainant, she "chickened out" and simply exchanged small talk with him. She testified that she later explained what had happened to a teacher, apparently after rumors began to circulate that she was pregnant and she had an outburst in school. However, the complainant admitted that she subsequently denied that anything had happened between her and Smith-Gouin when the guidance counselor asked her. She also testified that she talked about the incident with her step-sister on the phone while babysitting and began crying and related the incident to the couple when they arrived home. She testified that she later told one of Smith-Gouin's friends in an e-mail that Smith-Gouin had raped her.

At trial, Smith-Gouin admitted that he was with complainant on that day, but denied having sex with her.

II. Ineffective Assistance Of Counsel

A. Standard Of Review

Smith-Gouin argues that trial counsel rendered ineffective assistance by failing to object to the introduction of the complainant's testimony that she informed others that he had sex with her. Smith-Gouin contends that this was inadmissible hearsay and was highly prejudicial to his defense because the case came down to a credibility contest. Because no *Ginther*[2] hearing was held, our review of Smith-Gouin's claim is limited to mistakes apparent on the record.[3]

B. Legal Standards

> Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different.[4]

C. Applying The Standards

We conclude that Smith-Gouin cannot show that his counsel rendered ineffective assistance. Even if, as Smith-Gouin argues, the statements would not have been admitted under MRE 801(d)(1)(B) had counsel objected, counsel chose to utilize the complainant's previous statements, and the incompatibilities in her actions after the alleged attack, to discredit her. This

---

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[3] *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

[4] *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004) (internal citations omitted).

was obviously a matter of trial strategy. Counsel used the statements in closing argument to paint the complainant as a young girl who was attracted to Smith-Gouin and, lying, bragged about having sex with him to initially gain attention from her friends. Counsel argued that, when the attempt backfired and the complainant was faced with negative attention, she tried to tell the truth that nothing had occurred, but had to continue lying about the encounter once the police became involved. Counsel also pointed out the inconsistency of the complainant's bragging about sex with her claim of forcible rape. Counsel used the fact that the complainant's teacher and counselor did not take further action after the complainant made her denial to the counselor to argue that, not only did Smith-Gouin not attack the complainant, he did not have sex with her at all.

Given the record, we agree with the prosecutor's assertion that defense counsel decided to use the inconsistent statements, even those unfavorable to Smith-Gouin, to undermine the complainant's credibility. We will not second-guess matters of trial strategy on appeal, even if the strategy is ultimately unsuccessful.[5]

III. Sentencing

A. Standards Of Review

Smith-Gouin argues that the trial court erred when it scored his prior record variables (PRV), presumably PRV 2, 3, and 5, using his 1997 juvenile convictions, because he was not afforded counsel during those proceedings. While Smith-Gouin acknowledges that his mother signed a waiver of counsel form on his behalf, he argues that the trial court erred when it refused to hold a *Tucker*[6] hearing where he raised a question regarding the validity of the waiver. We review for clear error the sentencing court's findings of fact; however, we review de novo questions of law.[7]

B. Legal Standards

The federal and state Constitutions guarantee a criminal defendant the right to the assistance of counsel.[8] Earlier convictions obtained in violation of this right may not be used to enhance a criminal sentence.[9] However, "a defendant who collaterally challenges an antecedent conviction allegedly procured in violation of *Gideon*[*v Wainwright*,[10]] bears the initial burden of

---

[5] *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004); *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

[6] *United States v Tucker*, 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972).

[7] *People v Alexander*, 234 Mich App 665, 670; 599 NW2d 749 (1999).

[8] US Const, Ams VI and XIV; Const 1963, art 1, § 20.

[9] *Tucker*, 404 US at 449.

[10] *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

establishing that the conviction was obtained without counsel or without a proper waiver of counsel."[11]

C. Applying The Standards

Smith-Gouin's presentence investigation report (PSIR) reflects that as a juvenile he was adjudicated on charges of second-degree home invasion, breaking and entering a building, and malicious destruction of property over $100. The Delta County Probate Court Judge ordered him placed on "[p]robation for [an] indefinite amount of time," to pay a crime victim's rights fee, to write an apology letter, to have no contact with an apparent victim in the case, to be under adult control at all times, and to attend counseling. Given this, Smith-Gouin cannot show that he was denied his constitutional right to counsel in this earlier proceeding. Where a juvenile adjudication does not result in incarceration, there is no deprivation of the constitutional right to counsel.[12] We find that the trial court's decision not to hold a *Tucker* hearing was correct and that the trial court did not err when it used Smith-Gouin's prior juvenile adjudication in scoring his guidelines.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck

[11] *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994).

[12] *Alexander*, 234 Mich App at 671, citing *People v Daoust*, 228 Mich App 1, 19; 577 NW2d 179 (1998), overruled in part on other grds in *People v Miller*, 482 Mich 540, 561; 759 NW2d 850 (2008).