

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER SCOTT WHITFORD,

Defendant-Appellant.

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UNPUBLISHED

June 29, 2006

No. 260595

Alcona Circuit Court

LC No. 04-000326-FH

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age). We affirm.

According to the complainant, who was nine years old at the time of the sexual assault, she was asleep one night on the couch when she was awakened by defendant, who was rubbing his hand on her genital area. He stopped and moved away when she woke up, and she went to her bedroom. She told her mother what happened several weeks later, after her mother asked her if anyone had touched her in her “private” area. Her mother did so after she had a dream that defendant, her live-in boyfriend, had touched her daughter inappropriately. Defendant initially denied doing anything to hurt the complainant, and at trial he denied ever touching her. In his second written statement to police, however, he said that he touched her accidentally when trying to roll her over.

Defendant’s first issue on appeal is that a police officer was improperly allowed to provide opinion testimony that defendant was guilty. We disagree. Because defendant failed to object to the testimony at trial, we review the admission of the challenged evidence for plain error affecting his substantial rights. See *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

It is a long-standing rule that a witness cannot express an opinion on the guilt or innocence of a defendant. See, e.g., *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). It is also improper for a witness to comment or provide an opinion on the credibility of another witness because matters of credibility are to be determined by the trier of fact. *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987).

Defendant argues that the police officer's testimony, that defendant did not firmly deny the allegation or react as angrily as someone who is wrongly accused typically does, amounted to improper opinion testimony from a respected authority figure that defendant was guilty which was prejudicial to his case. We disagree. The police officer offered permissible testimony on defendant's demeanor and statements. See *People v McReavy*, 436 Mich 197, 203; 462 NW2d 1 (1990). His testimony did not improperly interfere with the jury's duty to determine defendant's guilt or innocence. Further, defendant's claim that the police officer improperly bolstered the complainant's credibility is without merit. The officer's description of the forensic interview protocol was not linked to any statement about the credibility of the complainant's trial testimony or the content of her interview responses.

Defendant also raises several claims of ineffective assistance of counsel. Because defendant failed to raise this issue to the trial court by moving for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the existing record. See *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

To prove an ineffective assistance of counsel claim, a defendant must establish that his counsel's performance fell below an objective standard of reasonableness and that, but for his errors, there is a reasonable probability that the outcome of the proceedings would have been different. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). The defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy. *People v Pickens*, 446 Mich 298, 312, 314; 521 NW2d 797 (1994).

Here, defendant first claims that his counsel was ineffective when he failed to object to the previously discussed testimony from the police officer. Because the police officer's testimony was admissible, defendant's argument that his trial counsel was ineffective is without merit. Counsel is not ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Defendant also claims that his counsel was ineffective because he failed to request a "taint hearing" to determine whether the complainant's testimony was sufficiently reliable. He argues that the complainant's mother used overly suggestive and coercive interview techniques that distorted the complainant's memory and made it impossible for her to testify accurately. However, defendant does not present any Michigan cases requiring a pretrial taint hearing on the reliability of allegations of sexual abuse, and defense counsel cannot be deemed ineffective for failing to advance a novel legal argument. See *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996).

Further, although coercive or suggestive interrogation tactics may distort the memories of young children, there is no evidence that such tactics were used here. The complainant's mother did not use leading questions or pressure her into making the accusation. Additionally, the complainant was nine years old at the time of the incident, and she was able to testify clearly as to her memory of what happened. Indeed, the court specifically determined that the complainant was competent to testify. In light of these facts, any attempt to bar her testimony would likely have been futile, and defense counsel is not required to raise a motion that has no merit. See *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Defendant also argues that his trial counsel was ineffective when he failed to object to questions posed to defendant by the prosecutor during cross-examination regarding adult sexual contact. Under MCL 750.520a(n), the charged sexual contact must be intentional contact that can reasonably be construed as having a sexual purpose or being for the purpose of sexual gratification. This Court is wary of assessing counsel's competence with the benefit of hindsight and will, accordingly, not substitute its judgment for that of counsel regarding matters of trial strategy. See *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Here, counsel may have made the strategic decision, based on factors readily apparent at trial but not upon appellate review, that raising an objection to the testimony may have only served to draw attention to it. Further, defendant has not shown a reasonable probability that but for the failure to object to this testimony, the outcome of the trial would have been different. See *Ackerman, supra*. Even absent this testimony, there was sufficient evidence from which the jury could find that defendant touched the complainant and that the touching could be reasonably construed as having a sexual purpose. Specifically, the complainant testified and demonstrated on a doll that defendant was rubbing her in a back and forth motion. We believe that a reasonable juror could conclude that no "rubbing" would have occurred if the touching was truly accidental, and on that basis could find that the touching must have had a sexual purpose.

Finally, defendant claims that his counsel failed to request the appropriate character instruction. The decision to request a particular jury instruction is also a matter of trial strategy that we will not second-guess. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003). The jury in this case was instructed that the character evidence was to be considered along with the other evidence in determining how much weight to give defendant's testimony. It was also instructed on the elements of CSC II and told that the prosecution must prove each beyond a reasonable doubt. Taken as a whole, these instructions fairly presented the issue for trial and sufficiently protected defendant's rights. See *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003).

Defendant's final claim of error is that his written statement should have been suppressed because the interview preceding was not electronically recorded. In *People v Fike*, 228 Mich App 178, 184; 577 NW2d 903 (1998), however, this Court rejected this argument and held that the recording of confessions is not required under the state or federal constitutions. Thus, this argument is without merit.

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Mark J. Cavanagh  
/s/ Deborah A. Servitto