Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-313

MAY TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
	}	
Clifford Russin	}	DOCKET NO. 70-1-07 Frcr
		Trial Judge: Michael S. Kupersmith

In the above-entitled cause, the Clerk will enter:

Defendant appeals from his conviction of lewd and lascivious conduct with a child. He argues that the court erred in: (1) denying his motion for judgment of acquittal; and (2) denying his ineffective assistance of counsel claim. We affirm.

Defendant was charged with one count of lewd and lascivious conduct with a child based on an incident that occurred in October 2006. The following evidence was presented at trial. On the date in question, defendant drove his girlfriend's nine year old daughter, R.B., to a choral concert in Randolph, Vermont. The parties left early in the morning from Grand Isle and did not return until later that evening. On the drive home, R.B. decided to take a nap. She leaned her seat back and used her sweatshirt as a pillow. She closed her eyes and tried to sleep. Approximately ten minutes later, she felt tugging on the left side of her belt loop. She felt it stop and then felt her pants being unbuttoned and unzipped. She testified that defendant put his hand down her pants and felt her underwear. She indicated that he then took his hand out and put it back in again a few seconds later, and felt and rubbed her vagina underneath her underwear. R.B. stated that she moved her leg, hoping that defendant would stop, and defendant removed his hand. After about a minute, R.B. testified that she pretended to wake up. She looked down and saw that her pants were unzipped and unbuttoned. When she got home, she went into her room and checked again to see if her pants were unzipped and unbuttoned, and she observed that they were. This reinforced to her that the incident had actually occurred and that she had not imagined it.

R.B. reported the incident to her mother. R.B.'s mother confronted defendant, but defendant denied touching R.B. Defendant later told police that, during the car ride, he thought R.B. might be cold and he tried to cover her up by pushing a jacket underneath her seat belt. Defendant stated that he might have brushed against R.B.'s stomach, but he denied touching her vagina. Defendant testified at trial and denied that anything improper occurred. The jury found defendant guilty, and this appeal followed.

Defendant first argues that the court erred in denying his motion for judgment of acquittal because the evidence was insufficient to establish his guilt beyond a reasonable doubt. According to defendant, there was no evidence from which the jury could conclude or reasonably infer that he acted with the intent to gratify his sexual desires. He argues that there was no testimony "regarding words by any of the witnesses to indicate sexual desire," nor was there testimony as to any physical signs of sexual excitement on defendant's part. Defendant also identifies evidence that he believes supports his claim of innocence.*

On review of the trial court's denial of a motion for judgment of acquittal, we consider "whether the evidence, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt." State v. Couture, 169 Vt. 222, 226 (1999) (quotations omitted). We conclude that the evidence fairly and reasonably supports the jury's verdict here.

To establish defendant's guilt, the State needed to show that he willfully and lewdly committed a lewd or lascivious act upon the body of a child under sixteen with the intent of appealing to his sexual desires. 13 V.S.A. § 2602(a)(1). It is evident from the testimony cited above that the State met its burden of proof beyond a reasonable doubt. The victim was not required to use certain words to indicate that a defendant was acting out of sexual desire, nor was she required to describe any physical signs of sexual excitement on defendant's part. She testified that defendant unbuttoned and unzipped her clothing, reached his hand into her pants, and touched her vagina. It was certainly reasonable for the jury to infer from this testimony that defendant touched her with the intent of appealing to his own sexual desires. State v. Kerr, 143 Vt. 597, 603 (1983) ("[P]roof of facts includes reasonable inferences properly drawn therefrom."). Indeed, as the trial court stated, this is the only reasonable inference the jury could draw from R.B.'s testimony. The evidence cited by defendant in support of his claim of innocence is modifying evidence, which we do not consider here. The trial court did not err in denying defendant's motion for judgment of acquittal.

Defendant next argues his trial counsel was ineffective because he failed to cross-examine the victim about certain aspects of her deposition testimony. Defendant's attorney raised the issue of his own incompetency for the first time in a post-trial motion. "We have held that the proper avenue of raising the issue of ineffective assistance of counsel is through a motion for post-conviction relief, and not through a direct appeal of a conviction." State v. Gabaree, 149 Vt. 229, 232-33 (1988). As we stated in Gabaree, this approach allows the facts to be "explored and reported, with a review in this Court based on a developed record and a full evaluation of all relevant issues, rather than on the inadequate inferences of a trial transcript." Id. at 233 (quotation omitted). It also "leaves the original appellate process free to conduct its review based on the record of the trial in the customary fashion, according to settled law." Id. While defendant argued in support of his ineffective assistance claim in his post-verdict motion, it does not appear that the record has been fully developed on this issue. See State v. Judkins, 161 Vt.

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* Defendant also suggests that the fact that the Legislature amended the statutory penalty for this crime in 2006 "militates in favor of requiring clear evidentiary proof of such specific prurient intent," citing State v. Rideout, 2007 VT 59A, 182 Vt. 113. Defendant provides no pinpoint citation, and we find nothing in Rideout to support this contention.

593, 594-95 (1993) (mem.) (recognizing that, generally, questions of ineffective assistance of counsel are limited to PCR petitions and stating that "[u]nless the question of effective representation is raised at trial and ruled on by the court—an unlikely scenario where there is no substitution of counsel during trial—there are no findings on the question and no record on which this Court can determine if a trial judge erred in weighing the competence of counsel in the context of specific errors asserted"). Indeed, we note that counsel submitted only his own affidavit in support of this claim, and he did not present any expert testimony. See In re Grega, 2003 VT 77, ¶ 16, 175 Vt. 631 ("Only in rare situations will ineffective assistance of counsel be presumed without expert testimony."). This issue can be addressed more completely through post-conviction review proceedings should defendant choose to pursue them, and we decline to address the issue here. See Gabaree, 149 Vt. at 233 (explaining that the practice of reviewing ineffective assistance of counsel claims though petitions for post-conviction relief, rather than on direct appeal, "is in accord with the usual method" of ruling on such claims in federal and state courts).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice