

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL DELAND WALLER,

Defendant-Appellant.

UNPUBLISHED

April 15, 1997

No. 193172

Recorder's Court

LC No. 94-000534

Before: Reilly, P.J., and Wahls and N.O. Holowka*, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial conviction of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). He was sentenced to five to ten years' imprisonment. We affirm.

Defendant first argues that the trial court's failure to issue ABA standard jury instruction 5.4 to the deadlocked jury led to reversible error. Because defendant did not request ABA standard jury instruction 5.4, defendant has waived appellate review of this issue. *People v Pollick*, 448 Mich 376, 386-388; 531 NW2d 159 (1995). Furthermore, the instruction given was not unduly coercive. *Id.* at 386. Thus, in addition to rejecting defendant's claim of instructional error, we likewise reject defendant's argument that defense counsel's failure to object constituted ineffective assistance of counsel. *Id.* at 388, n 16.

Defendant also argues that the trial court abused its discretion when it dismissed one of the jurors mid-trial. We disagree.

The trial court's decision on the removal of a juror is reviewed for a clear abuse of discretion. *People v Dry Land Marina*, 175 Mich App 322, 325; 437 NW2d 391 (1989). Where, after receiving an unsigned note from the jury concerning the conduct of one of the jurors and after

* Circuit judge, sitting on the Court of Appeals by assignment.

interviewing that juror, the court removed the juror in the interest of maintaining the appearance of justice, there was no abuse of discretion. *Dry Land Marina, supra* at 326.

Defendant next argues that there was insufficient evidence to support his conviction of assault with intent to commit criminal sexual conduct involving penetration. We disagree.

When reviewing a challenge to the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that all the elements of the crime charged were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). In this case, there was evidence that defendant struggled with the complainant, hit complainant in the face, breaking his partial bridge, pushed the complainant to the floor, held the complainant by his neck, pulled the complainant's pants down, and attempted to penetrate the complainant's anus with defendant's penis after telling the complainant defendant wanted sex. This is sufficient evidence to show that defendant assaulted the complainant for a sexual purpose. The credibility of the complainant was a matter for the trier of fact to decide. We will not resolve it anew. *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989).

We have reviewed defendant's allegations that the prosecutor knowingly presented false testimony by the complainant and found them to be without merit. We likewise reject defendant's contention that counsel's failure to object to the alleged perjured testimony by the complainant constituted ineffective assistance of counsel.

Finally, defendant contends that his sentence of five to ten years' imprisonment violated the principle of proportionality. We disagree.

Defendant's five year minimum sentence was within the recommended guidelines range of two to five years. As such, it was presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has failed to present unusual circumstances sufficient to overcome the presumption.

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Myron H. Wahls

/s/ Nick O. Holowka