

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

UNPUBLISHED

July 15, 1997

No. 188138

Washtenaw Circuit Court

LC No. 93-000535-FH;

93-000536-FH;

93-000609-FC;

93-001362-FC

GARY STEPHEN GREENWELL,

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY STEPHEN GREENWELL,

Defendant-Appellant.

No. 188140

Washtenaw Circuit Court

LC No. 93-000608-FC

Before: Markey, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

This is a consolidated appeal. The appeal in Docket No. 188138 arises from four separate lower court actions in which defendant pleaded nolo contendere to four counts of second-degree criminal sexual conduct [CSC-II], MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and one count of first-degree criminal sexual conduct [CSC-I], MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Defendant was sentenced to four terms of ten to fifteen years' imprisonment for the CSC-II convictions and

twenty-five to forty-five years' imprisonment on the CSC-I conviction. In Docket No. 188140, defendant was convicted by a jury of CSC-I and sentenced to twenty-five to forty-five years' imprisonment. Defendant's sentences are to be served concurrently. Defendant appeals as of right from the jury trial conviction and the sentences imposed. We affirm.

Docket No. 188140

With respect to his jury trial, defendant first argues that the trial court erred in denying his motion for directed verdict as to the CSC-I offense because there was insufficient evidence of penetration. We review this issue de novo, considering the evidence presented by the prosecutor up to the time the motion was made in a light most favorable to the prosecution to determine whether a rational factfinder could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). "Sexual penetration" is defined in MCL 750.520a(1); MSA 28.788(1)(1), to mean, in relevant part, "any . . . intrusion, however slight, of any part of a person's body . . . into the . . . anal opening[] of another person's body"

Having reviewed the evidence considered by the jury, we find that a rational factfinder could have concluded that penetration was proven beyond a reasonable doubt. Defendant recorded a videotape of the incident that was shown to the jury. That videotape could convince a rational factfinder that at least one penetration, however slight, of the victim's anal opening had occurred. Although defendant argues that the videotape was inconclusive in light of the victim's testimony that no penetration had occurred, the jury may well have concluded that the victim was influenced by embarrassment, an incorrect understanding of what constitutes penetration, or other factors. A rational factfinder could have disbelieved the victim's account and concluded from the videotape evidence that the penetration element of the charged offense was satisfied. Defendant's motion for a directed verdict of acquittal was properly denied.

Defendant also raises a number of arguments regarding a second videotape of the incident that was made by a fixed camera. All of defendant's arguments regarding this fixed videotape are premised on the notion that it was taken from a more conducive viewing angle and more clearly showed that there was no penetration than the videotape played for the jury. This Court has reviewed the fixed videotape and concludes that it was merely cumulative of the tape shown to the jury. The fixed videotape did not more clearly show there was no penetration or otherwise contradict the videotape that was shown to the jury.

Defendant claims that he was denied due process of law because the prosecutor failed to play the fixed videotape for the jury and that he was denied the effective assistance of counsel because his attorney failed to assure that the videotape would be shown. However, the record reveals that the prosecutor made the fixed videotape available to defense counsel and, no objection having been raised below regarding the manner in which the prosecutor handled this issue, we do not conclude that there was any miscarriage of justice. *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989). With respect to the ineffective assistance claim, our review of the fixed videotape indicates that had it been presented, it may not have benefited defendant but, rather, may have helped to prove his guilt. The decision not to show the fixed videotape was, therefore, a matter of sound trial strategy, and,

in any event, we do not conclude that defendant was prejudiced by the fact that the fixed videotape was not shown to the jury. *People v Daniel*, 207 Mich App, 47, 58; 523 NW2d 830 (1994).

Defendant next argues that the trial court improperly admitted “other acts” evidence, i.e., a videotape depicting a similar incident involving other victims. We disagree. MRE 404(b)(1) permits introduction of evidence of other acts “as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act . . . or absence of mistake or accident” This rule “permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory.” *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994) (emphasis in original). The videotaped incident with the other victims was remarkably similar to that at issue in defendant’s jury trial, and we conclude that it was admissible to show defendant’s motive, intent, scheme, plan, or system with respect to the charged incident, all of which are relevant to elements of the charged crime that the prosecutor had to prove.¹ *People v Mills*, 450 Mich 61, 67-68; 537 NW2d 909 (1995), modified and remanded on other grounds 450 Mich 1212 (1995).

With respect to the penetration issue, the jury may well have concluded that defendant’s conduct in this remarkably similar incident was probative of his *modus operandi* and thus, was of assistance in determining whether penetration occurred in the present case. Although defendant claims that the videotape involving other victims did not show penetration, that was a factual question for the jury to decide. *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). We further conclude that there was no abuse of discretion in the trial court’s determination, under MRE 403, that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice to defendant. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Finally, the court appropriately provided a limiting instruction to the jury regarding the use of this evidence. MRE 105; *VanderVliet*, *supra* at 75.

Defendant contends that he is entitled to resentencing because the trial court improperly assessed five points under PRV 5 of the sentencing guidelines as a result of three prior misdemeanor convictions. However, because defendant’s sentence is proportionate to the circumstances surrounding this offense and offender and because the guidelines do not have the force of law, defendant does not state a cognizable claim on appeal. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997).

Docket No. 188138

With respect to his plea-based convictions, defendant first raises the resentencing argument that we have just concluded is without merit under *Mitchell*. For the same reasons, we conclude it is without merit here. Defendant further argues that he is entitled to resentencing on the plea-based convictions because they may have been affected by the trial court’s consideration of the invalid jury trial conviction imposed in Docket No. 188140. Because we have concluded that the conviction imposed in Docket No. 188140 was not invalid, this argument is without merit.

Finally, defendant argues that the trial court erred in not awarding him sentence credit for the time that the prosecutor delayed in charging and arresting him on one of the offenses.² Defendant

argues that the prosecutor's delay defeated the purpose of the "normal concurrent sentencing policy." However, the concurrent sentence rule "is simply irrelevant" and has "no

application” with regard to whether sentence credit should be awarded. *People v Adkins*, 433 Mich 732, 749; 449 NW2d 400 (1989); *People v Prieskorn*, 424 Mich 327, 342-343; 381 NW2d 646 (1985).

We affirm.

/s/ Jane E. Markey

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

¹ Although defendant claims that he only contested whether penetration occurred, the jury was appropriately instructed that the prosecutor had the burden of proof as to every element of the charged offense.

² To the extent that defendant also advances a double jeopardy argument, this claim is unpreserved as it was not set forth in the statement of the issues presented. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).