

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN LEWIS,

Defendant-Appellant.

UNPUBLISHED

October 7, 1997

No. 197834

Recorder's Court

LC No. 95-003597

Before: Markman, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), assault with intent to commit criminal sexual conduct, MCL 750.520g; MSA 28.788(7), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to ten to twenty-five years' imprisonment for the criminal sexual conduct conviction, ten to twenty-five years' imprisonment for the assault with intent to commit criminal sexual conduct conviction, and two years' imprisonment for the felony-firearm conviction. After determining defendant had previous felony convictions, the trial court vacated his sentences for criminal sexual conduct and assault with intent to commit criminal sexual conduct and sentenced defendant, pursuant to MCL 769.10; MSA 28.1082, as an habitual offender to fifteen to thirty years' imprisonment. Defendant now appeals as of right, and we affirm.

This case arises from the sexual assault of a thirty-one year old woman. On appeal, defendant argues the trial court's findings of fact were clearly erroneous because the complainant was not a credible witness. The trial court's findings of fact will not be reversed on appeal unless they are clearly erroneous. MCR 2.613(C); *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). A finding is clearly erroneous if, after a review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Gistover*, *supra* at 46.

At trial, the complainant unequivocally testified that defendant forced her to perform oral sex at gunpoint. To the extent that the complainant's version of the incident was in conflict with the testimony of other witnesses, the trial court explicitly resolved the credibility issue in her favor. Appellate courts

should give special deference to the trial court's findings of fact when

they are based upon its assessment of the witnesses' credibility. MCR 2.613(C); *People v Shaw*, 188 Mich App 520, 524-525; 470 NW2d 90 (1991). Based on the record, we are not convinced a mistake has been made.

Next, defendant contends his enhanced sentence should be vacated because he was never convicted of being an habitual offender. Prior to its amendment in 1994, MCL 769.13; MSA 28.1085, provided a statutory right to a jury trial for those charged with being an habitual offender. *People v Zinn*, 217 Mich App 340, 344; 551 NW2d 704 (1996). However, after the legislature amended the statute in 1994, it now provides that the court shall determine whether a defendant has any prior convictions at sentencing or at a separate hearing before sentencing. MCL 769.13(5); MSA 28.1085(5). Defendant was properly sentenced as an habitual offender in conformity with this procedure. It is apparent from the record that the trial court determined defendant had three prior felony convictions after defense counsel conceded this point. Although defense counsel challenged a fourth conviction listed on the prosecutor's notice of intent to seek enhancement of defendant's sentence, he raised no objection to the other listed convictions. To the extent that defendant challenges the constitutionality of the 1994 amendment, that issue is also without merit. *Zinn, supra* at 345-347.

Affirmed.

/s/ Stephen J. Markman

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald