

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE EDWARDS,

Defendant-Appellant.

UNPUBLISHED

June 12, 1998

No. 195660

Oakland Circuit Court

LC No. 95-140389-FH

Before: Saad, P.J., and Wahls and Gage, JJ.

PER CURIAM.

The jury convicted defendant of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). Defendant subsequently pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant now appeals as of right, and we affirm.

I

First, defendant argues that in light of the complainant's alleged lack of credibility and the lack of corroborating evidence to support her testimony, the jury verdict was against the great weight of the evidence. We disagree.

We review a trial court's grant or denial of a motion for JNOV or new trial for an abuse of discretion. See *People v Lemmon*, ___ Mich ___, ___ n 27; ___NW2d___ (1998); *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993), overruled in part by *Lemmon*, ___ Mich ___; ___NW2d___ (1998). This Court will generally defer to the trial court's determination that a verdict is not against the great weight of the evidence because the trial court had the opportunity to hear the witnesses and assess credibility. *Id.* However, a determination of whether a verdict is against the great weight of the evidence requires a review of the entire body of proofs. *Id.* at 475.

In order for defendant to be found guilty of third-degree criminal sexual conduct, the prosecution must prove beyond a reasonable doubt that the accused engaged in sexual penetration with another person under certain circumstances, including where the sexual penetration was with a child

between the ages of 13 and 16 years old. MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). The testimony of a victim need not be corroborated in prosecutions for criminal sexual conduct. MCL 750.520h; MSA 28.788(8). Indeed, the testimony of a complainant, alone, may be sufficient to establish defendant's guilt. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

Here, the complainant provided a descriptive and detailed account of what transpired on the day of the incident. In addition, other witnesses verified her continuous contact with defendant over the stated period of time. Furthermore, we find that the trial court properly evaluated the credibility of the witnesses in reviewing defendant's motion, yet, agreed with the jury that the evidence established defendant's guilt beyond a reasonable doubt. Therefore, we find no merit in defendant's claim that the verdict was against the great weight of the evidence.

II

Next, defendant contends that the trial court abused its discretion in denying defendant's motion for a directed verdict of acquittal. Defendant insists that there was insufficient evidence presented at trial to establish penetration, focusing particularly on the credibility of the prosecution's witnesses.

We note that defendant failed to move for a directed verdict at the trial court. Defendant contends that his motion for JNOV and new trial implicitly included a directed verdict motion because it contained a challenge to the sufficiency of the evidence. We reject this claim for two reasons. First, directed verdict motions are made at the close of the prosecution's case in chief, (not at the end of trial or at sentencing) and this was not done in this case. Second, JNOV and new trial motions are reviewed by this Court for an abuse of discretion, whereas directed verdict motions are reviewed by this Court de novo. Therefore, the applicable standard of review is different and an entirely different analysis is necessary for the respective motions. Thus, the trial court did not rule on this matter and there is no lower court decision for us to review. Accordingly, this issue was not preserved for appeal.

However, even viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's convictions. In particular, the complainant's testimony that defendant penetrated her vagina with his tongue and his penis was sufficient evidence for the jury to infer that the offense occurred. See *People v Reinhardt*, 167 Mich App 584, 598; 423 NW2d 275 (1988), vacated on other grounds, 436 Mich 866 (1990), on remand 188 Mich App 80 (1991). Furthermore, the examining physician's evaluative report indicating that the complainant suffered from a yeast infection after sexual intercourse, as well as the treating physician's opinion that the lack of semen was likely the result of a time lapse and significant movement after the incident, support the jury's finding that defendant committed the offense for which he was charged.

III

Defendant next claims that he was denied the effective assistance of counsel, citing several alleged deficiencies in his trial counsel's performance. Defendant did not file a motion to remand

the case to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1983), and did not move for a new trial on this basis. We therefore review only to the extent that any alleged deficiencies in defense counsel's performance are apparent from the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Here, defense counsel's performance did not fall below the objective standard of reasonableness and defendant was not prejudiced by his representation.

The decision to impeach a witness at trial is generally a matter of trial strategy. Tactical decisions made by an attorney at trial rarely form the basis of an ineffective assistance of counsel claim because courts are not willing to second-guess a defense counsel's trial strategies. See *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Thus, counsel's failure to inquire as to the veracity of the statement made by the victim concerning her observance of defendant's car was not prejudicial and did not deprive defendant of his right to counsel.

Further, counsel's failure to request an instruction regarding the specific intent element of the offense was not deficient, primarily because the offense of third-degree criminal sexual conduct is a general intent crime, which does not require the prosecution to prove that defendant had a specific intent to commit the offense. In fact, criminal sexual conduct, where the accused engages in sexual penetration with a child between the ages of 13 and 16 years old, is a strict liability offense, which mandates punishment for the prohibited act regardless of the defendant's state of mind. See *People v Cash*, 419 Mich 230; 351 NW2d 822 (1984).

Lastly, defense counsel's failure to raise the "mere presence" defense in support of defendant's theory of the case did not constitute ineffective assistance of counsel or prejudice defendant's chances of acquittal. The "mere presence" defense essentially permits a defendant to assert that he is not guilty of the charged offense because he was merely present at the scene of the crime, but did not participate in the commission of the crime. See *People v Moldenhauer*, 210 Mich App 158, 160; 533 NW2d 9 (1995). Defendant's primary defense at trial was that he did not engage in sexual penetration with the complainant and was not even present at the motel when the incident allegedly occurred. Thus, the mere presence defense contradicts defendant's theory and would have been illogical to assert. In any event, had the jury determined that the complainant's testimony lacked credibility it would have acquitted defendant of the offense regardless of whether they believed he was merely present at the crime or not present at all. Therefore, we are not persuaded that defendant could have proffered a successful mere presence defense, nor that counsel was deficient in failing to raise the defense. For all of the above reasons, defendant was not denied constitutionally effective assistance of counsel.

IV

Finally, defendant says that the trial court clearly erred by failing to *sua sponte* instruct the jury on certain lesser included offenses. Defendant contends that the court should have instructed the jury on all the degrees of criminal sexual conduct because they are necessarily included lesser offenses of the charged offense. We disagree.

Defendant did not object to the jury instructions at trial; and thus, this issue was not preserved for appellate review. Accordingly, we will only review unpreserved alleged instructional error if failure to do so would cause manifest injustice to defendant. *People v VanDorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Failure to review this issue would not cause manifest injustice to defendant because a cursory review of his argument reveals that it has no merit. Third-degree criminal sexual conduct is a separate and distinct offense from the other degrees of CSC, and it contains different elements for the prosecution to prove. Furthermore, because the other degrees of CSC are not necessarily included lesser offenses of the charged offense, the jury instruction was proper. See *People v Mosko*, 441 Mich 496, 499-501; 495 NW2d 534 (1992). Hence, in light of the factual development of this case and the evidence presented at trial, an instruction on any of the other degrees of CSC was not warranted.

Affirmed.

/s/ Henry William Saad

/s/ Myron H. Wahls

/s/ Hilda R. Gage