

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT H. ROSECRANTS,

Defendant-Appellant.

UNPUBLISHED

April 27, 1999

No. 205325

Oakland Circuit Court

LC No. 95-142956 FH

Before: Hood, P.J., and Holbrook, Jr., and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of one count of third-degree criminal sexual conduct (digital penetration) and one count of attempted third-degree criminal sexual conduct (penile penetration), MCL 750.92; MSA 28.287. The trial court sentenced defendant to four to fifteen years' imprisonment for the third-degree criminal sexual conduct conviction and two to five years' imprisonment for the attempted third-degree criminal sexual conduct conviction, the sentences to be served concurrently. Defendant now appeals as of right. We affirm.

I. Basic Facts And Procedural History

On the evening of Monday, September 11, 1995,¹ the thirteen-year-old complainant was at home, along with her mother, Patricia Harrison ("Harrison"), her "stepfather," Frank Schullar ("Schullar"),² and her three younger siblings. Complainant testified that two of her parents' friends, Jerry Esslick ("Esslick") and defendant, had come over to watch television. At approximately 10:00 or 10:30 p.m, complainant went to bed. Schullar and the other children had already gone to bed, but Harrison, Esslick, and defendant were still in the living room.

Complainant testified that, rather than going to the room in the basement which she shared with another sibling, she decided to sleep in an "extra room" in the basement. Complainant testified that she was sleeping on her side when she "felt something go inside of [her] lips in [her] vagina." She rolled over onto her back and saw defendant on top of her. She could see his face, because the laundry room light was on and was shining into the bedroom. According to complainant, defendant continued "[g]oing inside the rest of [her] vagina" with his fingers. Complainant stated that she did not immediately

tell him to stop because she was afraid and “didn’t know what to do.” After approximately one minute, complainant told defendant to stop, and he “got up with an attitude” and went upstairs.

Complainant testified that she then tried to go back to sleep, but she had a headache. After the passage of a half-hour, at approximately 3:00 a.m., she went upstairs. Harrison and defendant were sitting in the living room, talking. Complainant asked Harrison for some aspirin and told her about a “personal problem” that she was having, which did not involve defendant. Complainant testified that she did not tell Harrison what defendant had done because she was “scared” and afraid that she would “probably get in trouble.” She then went back to the “extra room” and fell asleep.

Complainant testified that she again woke up when she felt something soft brush against her legs, and thought at first that it was her sister coming into the bed with her. However, according to complainant, she then felt something in-between her legs, on the inside of her vagina. She rolled onto her back and saw that it was defendant. Complainant testified that she told defendant to stop, but that he grabbed her underwear and began pulling them down. Complainant further testified that she struggled to pull them back up and began screaming, but that defendant put his hand over her mouth and placed both of her hands over her head. According to complainant, she screamed again, and was able to push defendant off of her, but he then put his hand over her mouth and told her that she “knew he wouldn’t hurt” her. Complainant testified that defendant then inserted his fingers into her vagina.

Complainant further testified that she was on her back and defendant was on top of her when she felt his penis touching her “by the hole in [her] vagina.” Complainant stated that she thought that defendant’s penis went inside her vagina because it started to hurt, but it was not inserted all the way. According to complainant, defendant’s penis remained in her vaginal area for several minutes until she was able to push him away. On cross-examination, defense counsel asked complainant what defendant used for this second penetration; complainant replied, “I think his penis.” Complainant further stated that she did not see defendant’s penis, but that she felt it. She further testified that she knew what an erect penis is, but she was not sure whether defendant’s penis was erect.

According to complainant, defendant then got up from the bed and put his pants back on, telling complainant that “this didn’t happen.” Complainant testified that defendant then sat on the bed and began trying to kiss her, saying that he was not going to hurt her and that “we can do this the hard way or the easy way.” Complainant further testified that she told defendant to stop and that she “wasn’t ready,” and she screamed for her sister but that defendant put his hand over her mouth and pulled her hair. According to complainant, defendant then went upstairs, saying, “I guess I’m going to come back and blow this house up.”

According to complainant, she waited a few minutes, then went upstairs as defendant was telling Harrison that he was going to leave. Complainant went to the bathroom; when she came out, defendant was gone. Complainant stated that she went into the living room and told Harrison that she had had a nightmare that she was raped, but did not tell her what defendant had done because she was afraid that she and defendant would “[get] in trouble.”

Complainant testified that she went to school that day, but did not tell anyone what had happened. The following day, however, she told a friend who, in turn, told a Miss Finkelstein, a school guidance counselor, what complainant had told her. Ms. Finkelstein, in the presence of Harrison and a police officer, then questioned complainant about the incident, asking her specific questions regarding where defendant's hand and penis went. Complainant testified that Ms. Finkelstein asked whether defendant had "fully penetrated" her and that she had replied "yes" despite not knowing what this meant.³

Dr. Robert Aranosian, of the Pontiac Osteopathic Hospital Emergency Trauma Center, testified that he performed a physical examination on complainant in early October 1995. Dr. Aranosian was assisted as he testified by a report that he had prepared following the examination:

The patient states that on September 12th, 1995 she was and I put in quotes 'raped' by a male friend of the family. The patient was sleeping in her room in the basement of their house and the assailant awakened her at approximately 4:00 a.m. He had been drinking alcohol.

The assailant fondled the patient and inserted and [sic] his finger in her vagina. She fought him off and he left. A few minutes later he returned and was not wearing pants or underwear. He forcefully removed her panties, physically restrained her and initiated sexual intercourse by inserting his penis in her vagina. He was on top of her for approximately five minutes.

She recalls that penile penetration may have lasted two minutes. She is unsure whether full penetration occurred or if the assailant ejaculated. However, she felt something quote 'wet' end of quote, in her panties. She continued to scream and frightened the assailant. He stopped, and threatened he would quote 'blow up the house' end of quote, if she told anyone and left.

The rest of the family was sleeping and not aware of the assault or her attempts to fight off the assailant. The assailant is well known to the patient and her family.

The patient denied sexual activity, intercourse prior to or since the assault. She denied oral or rectal penetration or other episodes or physical or emotional assault and abuse.

Dr. Aranosian further testified that his examination revealed no vaginal tears or discharge, nor any signs of trauma. However, he noted that such trauma would normally be indicative of an "acute rape," where the patient was perhaps raped one hour prior to the examination. Dr. Aranosian indicated that complainant's hymenal membrane was consistent with an attempted penetration, with a "dent" noted. He testified that full penetration will render the hymen "obliterated," but that incomplete penetration or digital fondling can leave these small dents in the hymen. Dr. Aranosian further noted that many other things can cause these dents, such as athletic activities, and that the examination was "normal" in that a patient without a history of sexual assault might have a similar hymenal "dent."

Defendant testified that on the day of the alleged incident, he left work at approximately 3:00 p.m. and stopped at a couple of friends' homes to see if anyone wanted to watch television. He stated that he arrived at Schullar's house between 4:00 and 5:00 p.m., and he and Schullar decided to pick up some beer and watch television. According to defendant, when he arrived at the house, Harrison, Schullar, Esslick, another man whom defendant had never met, and the four children were present.

Defendant testified that Schullar went to bed before the children did, at approximately 11:00 p.m. Defendant stated that he left the house between 1:00 and 2:00 a.m. At this time, Harrison was the only one who was still awake; she was in the living room. Defendant denied that he had, at any time over the course of the evening and early morning hours, hugged or kissed complainant, or attempted to penetrate her in her vaginal area with his finger or penis. He further denied that he had been in the basement of the home during this time.

Following his conviction, defendant moved for a new trial, arguing, among other things, that the verdict was against the great weight of the evidence. The trial court denied the motion, stating:

. . . [T]here are various standards that are laid out and the Defendant claims that the verdict was against the great weight of the evidence, but basically those are questions of credibility and those credibility issues were for the trier of fact. I personally found her quite credible and I don't see that the verdict was against the great weight of the evidence.

II. Standard Of Review

This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998). "An abuse of discretion will be found only where the trial court's denial of the motion was manifestly against the clear weight of the evidence." *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). When reviewing a trial court's decision regarding a motion for a new trial based on the great weight of the evidence, this Court may not attempt to resolve credibility questions anew. *People v Gadomski*, 232 Mich App 24, 28; ___ NW2d ___ (1998); *Daoust*, *supra* at 17.

III. Motion For New Trial

Defendant argues that he is entitled to reversal of his conviction because the trial court abused its discretion in denying his motion for a new trial. We disagree. A person is guilty of third-degree criminal sexual conduct if he engages in sexual penetration with another person and that person is at least thirteen years of age and under sixteen years of age. MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). Any penetration or intrusion, no matter how slight, is sufficient to satisfy the "penetration" element of third-degree criminal sexual conduct. MCL 750.520d; MSA 28.788(4); MCL 750.520a(l); MSA 28.788(1)(l); *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

The prosecution presented evidence tending to prove each of the elements of third-degree criminal sexual conduct. It is undisputed that complainant was thirteen-years-old at the time of the

alleged crimes. Complainant testified that, during one incident, defendant used his fingers to “go inside the lips of [her] vagina.” She further testified that, during a second incident, defendant came into bed with her, and she again felt something “on the inside of the lips of [her] vagina.” After a struggle, defendant inserted his fingers into her vagina; she then felt his penis being “partially inserted” into her vagina. From this testimony, the jury could reasonably have found that the prosecutor had established the elements of third-degree criminal sexual conduct (digital penetration), and of attempted third-degree criminal sexual conduct (penile penetration).

“A new trial may be granted when the verdict is against the great weight of the evidence.” *Plummer, supra* at 306. Michigan case law previously provided that the trial court could act as a “thirteenth juror” in deciding motions for a new trial. See *People v Herbert*, 444 Mich 466, 476; 511 NW2d 654 (1993); *Plummer, supra*. However, the Michigan Supreme Court recently rejected this standard and held that a trial court may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); see also *Gadomski, supra* at 28.

Defendant’s argument that the jury’s verdict is against the great weight of the evidence is based solely on his contention that complainant’s testimony was unbelievable. However, the credibility of witnesses’ testimony is a matter for the trier of fact to ascertain, and will not be resolved anew on appeal. *Lemmon, supra* at 637. Although defendant’s version of the facts was in direct conflict with complainant’s version,

[t]he question being one of credibility posed by diametrically opposed versions of the events in question, the trial court was obligated, “despite any misgivings or inclinations to disagree,” to leave the test of credibility where statute, case law, common law, and the constitution repose it [sic] “in the trier of fact.” [*Id.* at 646-647 (citation omitted).]

Accordingly, we hold the trial court did not abuse its discretion, under either the *Herbert* or *Lemmon* standard, in ruling that, because the credibility of witnesses is a matter for the jury to ascertain, a new trial was not warranted.

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck

¹ At trial, the attorneys consistently referred to this date as Monday, September 12, 1995. However, according to the calendar, this date was a Tuesday. The incidents of alleged criminal sexual conduct in this matter occurred after midnight on Tuesday, September 12, 1995.

² Although complainant referred to Schullar as her “stepdad,” he was not married to her mother. However, Schullar, Harrison, and Harrison’s four children—the two youngest of which Schullar had fathered—had lived together as a family from 1986 through January 1996.

³ At trial, defense counsel noted that complainant had testified at the preliminary examination that she had answered “no” to Ms. Finkelstein’s question regarding whether defendant had fully penetrated her; complainant indicated that she had been mistaken at that time. Complainant also testified that Harrison had asked her questions about whether defendant had penetrated her, and that she had told her “no.” On September 25, 1997, complainant was interviewed by police officers and social workers; she could not remember what she had told them. However, she later apparently told Schullar that defendant did not “fully” penetrate her.