

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WILLARD MORRIS,

Defendant-Appellant.

UNPUBLISHED

March 10, 2000

No. 204529

Macomb Circuit Court

LC No. 95-001241-FC

Before: Holbrook, Jr., P. J., and Kelly and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b; MSA 28.788(2), two counts of second-degree CSC, MCL 750.520c; MSA 28.788(3), and one count of assault with intent to rob while armed, MCL 750.89; MSA 28.284. He was sentenced to concurrent prison terms of thirteen to twenty-five years each for the first-degree CSC and assault convictions and ten to fifteen years each for the second-degree CSC convictions. Defendant's motion for a new trial was denied. Defendant appeals as of right. We affirm.

Defendant first claims that the evidence was insufficient to support the CSC convictions and that the verdicts were against the weight of the plausible and credible evidence. The sufficiency of the evidence question involves an issue of law that we review de novo. *People v Medlyn*, 215 Mich App 338, 340-341; 544 NW2d 759 (1996). The evidence is viewed in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). By contrast, a trial court has discretion to grant a new trial on any ground that would support reversal on appeal, or because it believes that a verdict resulted in a miscarriage of justice. MCR 6.431(B). The trial court's denial of a motion for a new trial based on the weight of the evidence is reviewed for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). This Court does not attempt to review credibility issues de novo. *Id.*

Upon viewing the evidence in a light most favorable to the prosecution, we reject defendant's claim that the evidence of penile penetration with regard to count II was insufficient. The jury was free

to believe, in whole or in part, any of the evidence presented. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999); *People v Fuller*, 395 Mich 451, 453; 236 NW2d 58 (1975). A rational trier of fact could find beyond a reasonable doubt from the victim's testimony that two acts of penile sexual penetration, as defined in MCL 750.520a(1); MSA 28.788(1)(l), occurred, although defendant was only charged with one CSC count based on penile sexual penetration. Further, the evidence was sufficient to establish the force or coercion and personal injury elements for all four CSC convictions. MCL 750.520b(1)(f); MSA 28.788(2)(1)(f) and MCL 750.520c(1)(f); MSA 28.78(2)(1)(f). Viewed most favorably to the prosecution, the evidence describing the physical injuries suffered by the victim before the sexual acts were committed was sufficient to establish the personal injury element for each CSC count. *People v Martinez*, 190 Mich App 442, 445; 476 NW2d 641 (1991); *People v Hunt*, 170 Mich App 1, 8-9; 427 NW2d 907 (1988). Moreover, we are not persuaded that the trial court abused its discretion in denying defendant's motion for a new trial based on the credibility and physical impossibility arguments presented in that motion. *Gadomski, supra*; see also *People v Lemmon*, 456 Mich 625, 634-635; 576 NW2d 129 (1998).

Defendant next claims that his conviction for assault with intent to rob while armed must be reversed because the proofs, viewed in the most positive light, failed to establish the elements of that crime beyond a reasonable doubt. We disagree. Viewed most favorably to the prosecution, the victim's testimony describing defendant's use of the screwdriver was sufficient for a rational trier of fact to find that defendant was armed with an article "used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon." MCL 750.89; MSA 28.284; *People v Barkley*, 151 Mich App 234, 238; 390 NW2d 705 (1986). See also *People v Hayden*, 132 Mich App 273, 296; 348 NW2d 672 (1984).

Defendant's additional claim that the prosecution's use of a screwdriver exhibit warrants a new trial is not properly before us because it lacks citation to supporting facts in the record, *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990), and is not identified in the statement of the issue presented, *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992). In any event, the trial transcript reflects that the screwdriver exhibit was admitted into evidence during the testimony of Trooper Old, without any objection by defendant. Although the trial court mistakenly believed that the screwdriver exhibit had not been admitted when it denied defendant's motion for a new trial, we note that the trial court rendered its decision without the benefit of the trial transcript. In any event, defendant has not established any plain error affecting his substantial rights arising from the admission of the screwdriver exhibit. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Defendant's reliance on *Miller v Pate*, 386 US 1; 87 S Ct 785; 17 L Ed 2d 690 (1967), is misplaced. Unlike the petitioner in *Miller*, defendant has not shown that the prosecution provided false information to the jury about the nature of the screwdriver. Given defendant's failure to establish plain error affecting his substantial rights, we find no basis for disturbing the trial court's denial of his motion for a new trial. We will not reverse a trial court's decision on a motion when the right result is reached. See *People v Brake*, 208 Mich App 233, 242 n 2; 527 NW2d 56 (1994).

Defendant next claims that the case should be reversed because of the unnecessary mention of religion during trial. We disagree for the reason that defendant has not established plain error affecting

his substantial rights. *Carines, supra* at 774. Defendant has not shown that the prosecution violated the prohibition against questioning witnesses about religious beliefs or opinions MCL 600.1436; MSA 27A.1436; MRE 610. See also *People v Vasher*, 449 Mich 494, 499; 537 NW2d 168 (1995), *People v Leonard*, 224 Mich App 569, 594-595; 569 NW2d 663 (1997), and *People v Calloway (On Remand)*, 180 Mich App 295; 446 NW2d 870 (1989).

Finally, we reject defendant's claim that he was improperly charged. Decisions on whether to bring charges and what charges to bring are within the prosecutor's discretion. *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). Defendant has not established that the prosecution acted in contravention of the constitution or the law. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996); *People v Oxendine*, 201 Mich App 372, 377; 506 NW2d 885 (1993).

Affirmed

/s/ Donald E. Holbrook, Jr.

/s/ Michael J. Kelly

/s/ Jeffrey G. Collins.