STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD EUGENE PITCHER,

Defendant-Appellant.

UNPUBLISHED
March 28, 2000

No. 210845
Eaton Circuit Court
LC No. 97-020277-FC

Before: Talbot, P.J., and Gribbs and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of three counts of first-degree criminal sexual conduct ("CSC I"), MCL 750.520b; MSA 28.788(2). The trial court, applying a third-offense habitual offender enhancement under MCL 769.11; MSA 28.1083, sentenced him to three concurrent terms of twenty-seven to fifty years' imprisonment. We affirm.

Defendant first argues that the trial court should have suppressed an oral statement he made to a police officer before being read his *Miranda*[1] rights. Defendant contends that suppression was necessary because he made the statement while subject to a custodial interrogation. The trial court found that defendant had not been in custody for purposes of *Miranda* when he gave the statement, and the court therefore denied defendant's motion to suppress. Whether a person was "in custody for purposes of *Miranda* is a mixed question of law and fact that must be answered independently after review de novo of the record." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). However, "[f]actual findings made in conjunction with a motion to suppress are reviewed for clear error." *Id*. at 445. Moreover,

> [t]o determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave. . . . The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. [*Id*. at 449; citations omitted.]

Here, the record shows that the questioning officer (1) merely asked, but did not compel, that defendant come to her office for an interview; (2) told defendant that he was not under arrest; (3) told defendant that he was free to leave; and (4) did not ask many questions because defendant freely provided the desired information. We conclude that under these circumstances, viewed objectively, the trial court did not err in determining that defendant was not in custody for purposes of *Miranda* when he made the statement at issue.

Defendant contends that he did not feel free to refuse the interview or to leave during the interview; however, his subjective feelings were irrelevant to the court's determination. *Id*. Defendant additionally contends that the questioning officer did not tell him that he was free to leave. The court, however, found that the officer did in fact tell defendant that he was free to leave. In light of the officer's testimony and giving proper deference to the court's assessment at the witnesses' credibility, this finding was not clearly erroneous. *Id*. at 445. Accordingly, we agree with the trial court that defendant was not in custody when he made the statement in question and that suppression based on the failure to give *Miranda* warnings was therefore unwarranted. *Id*. at 449.

Next, defendant argues that his statement to the police officer should have been suppressed because it was not made voluntarily. Specifically, defendant contends that his mental processes at the time he made the statement were impaired by painkillers and alcohol, thus rendering the statement involuntary. "When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination." *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). We must give deference, however, to the trial court's assessment of the credibility of the witnesses and the weight of the evidence, and we can reject the court's findings only for clear error. *Id*. Here, in light of the officer's testimony that defendant displayed no signs of impairment, the trial court dismissed as incredible defendant's assertion that his actions were rendered involuntary because of the painkillers and alcohol. We defer to this determination of witness credibility. *Id*. The trial court did not err by refusing to suppress defendant's statement on the grounds that it was involuntary.

Next, defendant argues that the trial court erred by failing to allow into evidence an excerpt from the Physician's Desk Reference that detailed the effects of the painkillers defendant allegedly ingested before his police interview. Defendant claims that the Physician's Desk Reference is a self-authenticating periodical under MRE 902 and that additional, extrinsic evidence of authenticity was therefore not needed. We conclude that this argument is moot, since the trial court did not exclude the evidence based on a lack of authenticity, but rather because defendant failed to overcome the prosecution's hearsay objection. See *People v Jenkins*, 450 Mich 249, 260; 537 NW2d 828 (1995) (a properly authenticated document must still overcome hearsay objections).

Next, defendant argues that the trial court erred by refusing to enforce an alleged plea agreement. Specifically, defendant argues that he waived a preliminary examination in exchange for being allowed to plead guilty to one count of CSC I and that the prosecution subsequently withdrew its plea offer. We generally review a trial court's decision regarding the enforcement of a plea agreement for clear error. See *People v Hannold*, 217 Mich App 382, 389; 551 NW2d 710 (1996). We disagree that the trial court clearly erred in the instant case, since (1) the transcript of the preliminary

examination waiver contains no evidence that the waiver was given in exchange for defendant's being allowed to plead guilty to one count of CSC I, and (2) independent of any allegation of a guilty plea "quid pro quo" for waiver of the examination, defendant did not accept the prosecutor's plea offer before it was withdrawn. Accordingly, this issue merits no relief. See *In re Robinson*, 180 Mich App 454, 458-459; 447 NW2d 765 (1989).

Next, defendant argues that the trial court erred by failing to instruct the jury on the lesser offense of fourth-degree criminal sexual conduct ("CSC IV"), MCL 750.520e; MSA 28.788(5). Because defendant did not request this instruction in the trial court, we review only for plain error. *People v Carines*, 460 Mich 750, 767-777; 597 NW2d 130 (1999). In other words,

> [t]he defendant must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Id.* at 774.]

We find no plain error in the court's failure to instruct the jury on CSC IV (sexual contact involving force, coercion, a mentally-incapacitated victim, or an imprisoned victim), since (1) defendant's attorney argued to the jury during his closing argument that defendant committed second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3); and (2) the facts of this case did not fit within the definition of CSC IV.

Finally, defendant claims that he was deprived of due process because the trial court failed to include the "requirement of penetration to convict of CSC 3." While defendant's statement of this issue suggests a challenge to the instruction for third-degree criminal sexual conduct, the substance of his argument is actually directed at the instruction on cunnilingus that was charged in Count 3 (the trial court instructed the jurors to consider whether "the defendant engaged in a sexual act that involved the touching of [the victim's] genital organs with the defendant's mouth or tongue"). We review claims of instructional error de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). The jury instructions, as a whole, must have fairly presented the issues to the jury and sufficiently protected the defendant's rights. *Id.* at 143-144.

Here, the trial court's instructions on Count 3 fairly presented the issues to the jury and sufficiently protected defendant's rights because (1) MCL 520.520(a)(l); MSA 28.788(1)(l) defines "penetration" for purposes of CSC I as including "cunnilingus," and (2) this Court defined "cunnilingus" in *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987) as "the placing of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself, or the mons pubes." Under *Harris, supra* at 466-470, the trial court's instruction in Count 3 was proper.

Affirmed.

/s/ Michael J. Talbot
/s/ Roman S. Gribbs
/s/ Patrick M. Meter

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 694 (1966), superseded by statute as applied to federal cases as stated in *US v Dickerson*, 166 F3d 667 (CA 4, 1999), cert granted in part 120 S Ct 578 (1999).