

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN M. PIATKOWSKI,

Defendant-Appellant.

UNPUBLISHED

June 23, 2000

No. 213414

Wayne Circuit Court

LC No. 96-503675

Before: Owens, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c), and sentenced to a term of 1-1/2 to 15 years' imprisonment. He appeals of right. We affirm.

Defendant argues that the prosecutor elicited insufficient evidence to establish his guilt beyond a reasonable doubt of third-degree criminal sexual conduct under MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Although the judgment of sentence indicates that defendant was convicted under statutory subdivision (1)(b) (sexual penetration accomplished by force or coercion), defendant was charged under subdivision (1)(c) (sexual penetration committed when the defendant is aware that the victim is physically helpless or incapacitated), and, when announcing its decision from the bench, the trial court clearly stated that it found defendant guilty of third-degree criminal sexual conduct on the basis of his act of sexually penetrating the victim while she was physically helpless. Thus, the judgment of sentence is inaccurate to the extent it indicates that defendant was convicted under subdivision (1)(b).¹

Turning to the necessary elements of MCL 750.520d(1)(c); MSA 28.788(4)(1)(c), the prosecutor was required to prove beyond a reasonable doubt that defendant sexually penetrated the victim while he knew she was physically helpless or incapacitated. See *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666(1996); *People v Hutner*, 209 Mich App 280, 283; 530 NW2d 174

¹ We remand for correction of this clerical error. MCR 7.216(A)(4).

(1995).² We find the evidence to be sufficient. The victim testified that she awoke in defendant's bed experiencing pain in her rectal area. Defendant was lying beside her with his hands on her shoulders, sexually penetrating her anally. Defendant was also aware that the victim was physically helpless due to a combination of alcohol and other drugs that she had ingested. Indeed, defendant and his codefendant had helped the victim into defendant's bedroom because she was too impaired to walk. When the victim awoke again in the morning, she was bleeding from her vagina and her anus and her underwear had been ripped during the night. Viewing the evidence in a light most favorable to the prosecutor, we find that the elements of third-degree criminal sexual conduct were established beyond a reasonable doubt.

Although defendant argues that the victim's testimony was inherently unreliable because of the alcohol and drugs she had ingested prior to the assault, we will not disturb the trial court's determination of credibility. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Further, defendant contends that the evidence was insufficient because DNA testing proved that body fluids found on the victim's person and clothing belonged to his codefendant and not defendant. However, the prosecutor was not required to disprove every theory consistent with defendant's innocence. Instead, he was obligated to prove his own theory of the case beyond a reasonable doubt, notwithstanding whatever contradictory evidence defendant presented. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996). Finally, defendant argues that the trial court failed to find the element of sexual penetration because it stated, "I find credible the testimony that [the victim] woke up and found [defendant] trying to penetrate her." Elsewhere, however, the trial court clearly found that "defendant did, in fact, engage in sexual penetration with [the victim]."

Accordingly, we reject defendant's argument that the prosecutor elicited insufficient evidence to establish his guilt of third-degree criminal sexual conduct beyond a reasonable doubt.

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald

² When we review the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecutor and 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).