

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LEE HAM,

Defendant-Appellant.

UNPUBLISHED

August 1, 2000

No. 216867

Muskegon Circuit Court

LC No. 98-041558-FC

Before: Meter, P.J., and Fitzgerald and O’Connell, JJ.

PER CURIAM.

Defendant appeals by right from his conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). The trial court sentenced him to 7-1/2 to 30 years’ imprisonment. We affirm.

Defendant first argues that the trial court erred when it failed to instruct the jury using CJI2d 20.1, the standard jury instruction for CSC I. We review jury instructions as a whole. *People v Federico*, 146 Mich App 776, 790; 381 NW2d 819 (1985). As long as the instructions fairly presented the issues to the jury and protected the defendant’s rights, imperfections do not constitute error. *People v Brown*, 179 Mich App 131, 135; 445 NW2d 801 (1989).

In this case, after careful consideration, the trial court declined to use the standard jury instruction, which indicates that “[a]ny entry, no matter how slight” into the victim’s “vagina” constitutes penetration for purposes of CSC I. Instead, the trial court gave the following instruction:

“Penetration” is defined as any entry, no matter how slight, into a genital opening. In this case, “penetration” is defined as any entry, no matter how slight, of the labia majora of [the victim] by Defendant’s finger or fingers.

As stated in *People v Gadomski*, 232 Mich App 24, 32, n 2; 592 NW2d 75 (1998), quoting *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), use of the standard jury instructions is not required, and trial judges are encouraged to examine standard instructions carefully to determine if they are accurate and appropriate to the given case. See also *People v Peach*, 174 Mich App 419, 430;

437 NW2d 9 (1989). Here, the trial court gave an instruction that was more precisely tailored to the case than the standard jury instruction. Indeed, the instruction given by the trial court accurately stated the law, see MCL 750.520a(1); MSA 28.788(1)(l) and *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1982), and it was more precise than the standard jury instruction. This case hinged on whether defendant penetrated the victim's labia majora, and the given instruction correctly informed the jury that penetration is defined as any "entry, no matter how slight, into a genital opening," see MCL 750.520a(1); MSA 28.788(1)(l), and that the victim's labia majora was the genital opening at issue. See *Bristol*, *supra* at 238. Because the trial court's instruction accurately stated the law, fairly presented the issues to be tried, and sufficiently protected defendant's rights, no error requiring reversal occurred. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Next, defendant argues that his trial counsel rendered ineffective assistance by failing to request instructions on third-degree criminal sexual conduct (CSC III), MCL 750.520d; MSA 28.788(4), or fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e; MSA 28.788(5). To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's unprofessional error or errors, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 676-688; 521 NW2d 557 (1994). Here, because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to mistakes that are apparent from the record. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

Because the victim in this case was clearly under the age of thirteen, because no one disputed this at trial, and because none of the factors in MCL 750.520d(1); MSA 28.788(4)(1) or MCL 750.520e(1); MSA 28.788(5)(1) were alleged, instructions on CSC III or IV would not have been appropriate. See *People v Favors*, 121 Mich App 98, 111-112; 328 NW2d 585 (1982). Accordingly, defendant cannot show that his counsel's failure to request these instructions fell below an objective standard of reasonableness under prevailing professional norms. Reversal is therefore unwarranted. *Stanaway*, *supra* at 676-688.

Defendant additionally argues that his counsel was ineffective for failing to attempt to remove a particular juror, who indicated that she was related to the victim and her mother. However, since the later portion of jury voir dire was not transcribed, we cannot determine from the available record (1) whether the juror at issue actually deliberated upon this case,¹ or (2) whether defense counsel did indeed fail to challenge this juror. Accordingly, defendant has failed to make the requisite showing under *Stanaway*, *supra* at 676-688.²

¹ Indeed, the only indication of the makeup of the jury pool in this case is a handwritten document – which appears to be a checklist used to keep track of the makeup of the jury box during voir dire – in the lower court file. Swanson's name does not appear on this document.

² We additionally note that the juror, when asked if her association with the victim would affect her ability to sit as a juror, answered "no."

Finally, defendant argues that there was insufficient evidence to support his conviction. When reviewing the sufficiency of the evidence in a criminal case, we “must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Further, this Court should not interfere with the jury’s role of determining the weight of the evidence or the credibility of witnesses. *Id.*; *Wolfe, supra* at 514-515.

Defendant essentially requests that this Court usurp the jury’s role and determine that he was more credible than the victim. We decline to do so. *Wolfe, supra* at 514-515; *Terry, supra* at 452. Viewed in the light most favorable to the prosecution, there was sufficient evidence to support a conviction for CSC I, which involves the penetration of a person under the age of thirteen. First, it was not disputed that the victim was eight years old at the time of the crime. Second, there was ample evidence of penetration. Indeed, the victim testified that her genitalia was wet on the inside and dry on the outside, and she testified that when defendant touched her, his finger got wet. Additionally, she testified that it hurt when defendant touched her, and a physician, Dr. Robert Hoogstra, testified that the victim complained of pain on urination after the assault. Hoogstra further testified that manual manipulation of the urethra tissue, which is inside the genital opening, can cause irritation that would cause pain on urination. Hoogstra determined that there was nothing else, other than manual manipulation of the urethra tissue, to explain the pain felt by the victim. He also confirmed that the structures inside the genital openings of a female child are wet just as they are in an adult. Finally, he testified that the mere separating of the labia majora, which was what defendant claimed to have done, was not painful but that touching the inside structures could cause pain. The reasonable inference to be drawn from the testimony of Hoogstra and the victim is that defendant penetrated the victim, resulting in pain and irritation of her urethra. A rational trier of fact could therefore find that the essential elements of CSC I were proved beyond a reasonable doubt.

Affirmed.

/s/ Patrick M. Meter

/s/ E. Thomas Fitzgerald

/s/ Peter D. O’Connell