STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2001
v	No. 222566 Calhoun Circuit Court
MICHAEL THOMAS GREEN, Defendant-Appellant.	LC No. 97-001935-FH

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

PER CURIAM.

Defendant was convicted of one count of criminal sexual conduct in the first degree, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Defendant was sentenced to four to ten years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant first argues that there is insufficient evidence to support his conviction. We disagree.

In reviewing the sufficiency of the evidence, we must view the evidence in a 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 Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Such review is de novo.

Defendant was charged and convicted of criminal sexual conduct in the first degree. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) states:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

"Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(l); MSA 28.788(1)(l).

Defendant was accused of engaging in cunnilingus with the child victim. Defendant contends there was insufficient evidence because the victim did not testify that defendant placed his mouth on her bare genitalia. Our Supreme Court has recognized that cunnilingus does not require an act of physical intrusion. *People v Lemons*, 454 Mich 234, 255; 562 NW2d 447 (1997). See also *People v Dimitris*, 115 Mich App 228, 233-234; 320 NW2d 226 (1981). Cunnilingus simply requires 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." *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987).

The child victim, although reluctant to orally testify to where defendant had touched her, pointed to the area between her legs. The child victim testified that defendant touched her there with his mouth. The child victim explained that defendant had not touched her nightgown or her underwear, but had touched her skin with his mouth. Defense counsel, on cross-examination, even questioned the child victim about her interview with police. The child victim remembered that she had told police that defendant had "licked her private areas." Given the longstanding rule that "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime," *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993), we find that there was sufficient evidence to support the jury verdict.

Furthermore, to the extent that defendant argues the child victim was unbelievable and her allegations were incredible, this argument has no merit. "[Q]uestions of intent and the honesty of belief inherently involve weighing the evidence and assessing the credibility of witnesses, which is a task for the jury." *People v Cain*, 238 Mich App 95, 119; 605 NW2d 28 (1999). Furthermore, when reviewing an appeal based on the sufficiency of evidence, we must not interfere with the role of the jury. *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992):

> "[An appellate court] must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact . . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony." [*Id.* at 514-515, quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974).]

Here, the jurors were instructed on the elements of first-degree criminal sexual conduct. The jurors found defendant guilty. This verdict provides every indication that the jurors found the child victim's testimony truthful and persuasive. Thus, we will not disturb this determination.

Next, defendant argues that the trial court abused its discretion when it denied defendant's motion for a new trial because the jury verdict was against the great weight of the evidence. We review the trial court's grant or denial of a motion for a new trial for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Motions for a new trial that argue the jury verdict was against the great weight of the evidence are not favored and should be granted only when the evidence preponderates heavily

against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998). However, if there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *Id* at 642-643.

We have thoroughly reviewed the record and for the same reason that we found sufficient evidence, we conclude the jury verdict was not against the great weight of the evidence. Therefore, we hold the trial court did not abuse its discretion when it denied defendant's motion for a new trial.

Defendant also argues that a written statement he gave to police was inadmissible evidence under MRE 404(b). However, we decline to address this argument, given defendant's failure to object at trial to the admission of this evidence under MRE 404(b). Indeed, "[a] party opposing the admission of evidence must timely object and specify the same ground for objection which it asserts on appeal." *In re Weiss,* 224 Mich App 37, 39; 568 NW2d 336 (1997).

Finally, defendant argues that evidence of the child victim's prior molestation by a different individual was improperly excluded under the rape-shield law. We review the trial court's exclusion of evidence under the rape-shield law for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996).

The rape-shield law, MCL 750.520j(1); MSA 28.788(10)(1), states as follows:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the child victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
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> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

In this case, defendant sought admission of the child victim's prior molestation by another person by arguing that it explained to the jury how the child victim could have knowledge of sexual matters if she had not learned such things from defendant. Defendant also stated this evidence supported defendant's argument that the child victim had fabricated these charges to get defendant, her mother's boyfriend, out of the house so that her mother and father could get back together.

Our Supreme Court in *People v Arenda*, 416 Mich 1; 330 NW2d 814 (1982), specifically addressed this issue. The defendant in *Arenda* argued that he should be permitted to inquire about the eight-year-old child victim's prior sexual activity, stating that it explained the child victim's "ability to describe vividly and accurately the sexual acts that allegedly occurred." *Id.* at 6. The defendant argued that this inquiry would dispel any inference that his ability to describe

these sexual acts, in such detail, was a result of experiences with defendant. *Id.* at 12. Our Supreme Court upheld the trial court's refusal to allow the evidence, explaining:

> In most cases, the relevancy, if any, of such evidence will be minimal. A jury is unlikely to consider a witness's ability to describe sexual conduct as an independent factor supporting a conviction. This ability . . . need not be acquired solely through sexual conduct.
>
> In contrast, the potential prejudice from the admission of this evidence is great. First, in order for it to have miniscule probative value, it would have to refer not only to the existence of sexual conduct but also to the details of such conduct. To demonstrate a source of knowledge the details of such conduct would have to be compared to the details as presented at trial. There would be a real danger of misleading the jury. There would be an obvious invasion of the victim's privacy.
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> Furthermore, the only cases in which such evidence can arguably have more than a *de minimis* probative value are ones involving young or apparently inexperienced victims. These children and others are the ones who are most likely to be adversely affected by unwarranted and unreasonable cross-examination into these areas. They are among the persons whom the statute was designed to protect.
>
> Finally, in most of the cases in which the source of the victim's ability to describe a sexual act may be relevant, there are other means by which one can inquire into that source of knowledge without necessarily producing evidence of sexual conduct with others. Counsel could inquire whether the victim had any experiences (*e.g.*, reading a book, seeing a movie, conversing with others, schoolwork, or witnessing others engaged in such activity) which aided him or her in describing the conduct that is alleged. [*Id.* at 12-13; emphasis omitted.]

Our Supreme Court pointed out that the defendant had no specific knowledge or evidence that the child victim had engaged in any conduct with another person. *Id.* at 6. It was also mentioned that the defendant was not prevented from inquiring about the child victim's other sources of knowledge about sexual activity. *Id.* Thus, our Supreme Court concluded that such evidence was not admissible in that case, but did not foreclose the possibility that such evidence might be admissible in another case. *Id*. at 13-14.

This Court in *People v Morse*, 231 Mich App 424; 586 NW2d 555 (1998),was faced with a similar situation. The defendant in *Morse* claimed that the eight-year-old and nine-year-old child victims had fabricated the charges against him and were relying on details from a prior incident of molestation by the child victim's mother's boyfriend. *Id.* at 427. This Court, relying on *Arenda*, stated that our Supreme Court did not deny that the "probative value of a young child's previous sexual abuse can be very significant." *Id.* at 433. This Court also commented that "a defendant's allegations that a victim is biased or has a motive to make false charges may

shift the balance in favor of permitting the proffered evidence." *Id.* Thus, this Court stated that such evidence may be admissible provided certain safeguards are met. *Id.* at 436. Specifically, this Court stated that a defendant's proffered evidence must be relevant; the defendant must be able to establish that another individual was convicted of criminal sexual conduct involving the child victim; and the facts underlying that conviction must be "significantly similar." *Id.* at 437.

In this case, it is undisputed that the other individual was convicted of third-degree criminal sexual conduct arising out of the prior incident of molestation of the child victim. In addition, this evidence satisfies the relevancy requirement. This Court has recognized that demonstrating that the child victim acquired the sexual knowledge from a source other than defendant is relevant. *Morse, supra* at 433. This Court has also remarked that demonstrating the child victim's bias or motive to lie is also relevant. *Arenda, supra* at 14. However, the evidence was properly excluded because the two incidents involved different sexual acts. The incident with the other individual involved the child victim being forced to engage in fellatio. In contrast, this case involved defendant engaging in cunnilingus. Thus, the "significantly similar" requirement is not met and the evidence was properly excluded.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Harold Hood
/s/ Richard Allen Griffin