

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH E. COLTON,

Defendant-Appellant.

UNPUBLISHED

June 1, 2001

No. 220540

Wayne Circuit Court

LC No. 97-010403

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c; MSA 28.788(3), and one count of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e, MSA 28.788(5), involving his former girlfriend's fifteen-year-old daughter. Defendant was sentenced to two to fifteen years' imprisonment for the CSC II conviction and to two years' probation for the CSC IV conviction. We affirm.

Defendant first argues that the trial court abused its discretion when it denied defendant's motion for new trial after finding that the jury's verdict was not against the great weight of the evidence. We disagree. A trial court may grant a new trial motion based on the great weight of the evidence "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). "We review for an abuse of discretion a trial court's determination that a verdict was not against the great weight of the evidence. An abuse of discretion will be found only where the trial court's denial of the motion was manifestly against the clear weight of the evidence." *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000) (citation omitted); *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Defendant cites *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993), overruled in part on other grounds in *Lemmon*, *supra* at 627, for the proposition that the trial court acts as a thirteenth juror when deciding a new trial motion based on the credibility of witnesses. However, in *Lemmon*, *supra*, our Supreme Court explicitly overruled *Herbert* in so far as *Herbert* stated that a trial court is empowered to act as a thirteenth juror in deciding a new trial motion based on the credibility of witnesses. Rather, the *Lemmon* Court held that a trial court may grant a new trial motion based on the great weight of evidence only when the evidence

preponderates so heavily against the verdict that a serious miscarriage of justice would result. *Lemmon*, *supra* at 642. The *Lemmon* Court explained that a trial court may not grant a new trial motion based on the great weight of the evidence because it disbelieves the testimony of the witnesses. The Court stated that

when testimony is in direct conflict and testimony supporting the verdict has been impeached, if “it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,” the credibility of witnesses is for the jury. [*Lemmon*, *supra* at 643, quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942).]

In this case, defendant’s denial of any type of sexual relationship with the victim directly conflicted with the victim’s testimony that she and defendant had engaged in a sexual relationship consisting of both sexual contacts and vaginal penetration. Defendant’s trial counsel vigorously cross-examined the victim and highlighted various inconsistencies between her preliminary examination testimony and her trial testimony. Defendant testified on his own behalf and presented the testimony of two alibi witnesses to establish that he was elsewhere on one of the nights the victim claimed that she and defendant had engaged in a sexual relationship. The jury had the opportunity to see and to hear the victim and defendant as they testified and to evaluate the credibility of their testimony. The victim’s testimony, although contradictory at points, did not contradict “indisputable physical facts or law.” *Lemmon*, *supra* at 647. As such, because the credibility of the victim and defendant were central to this case and the trial court was obligated to leave the resolution of this credibility contest to the jury, the trial court did not abuse its discretion when it denied defendant’s motion for a new trial.

Defendant next maintains that the trial court erroneously denied his motion for a directed verdict because insufficient evidence was presented from which a rational trier of fact could conclude that defendant was guilty beyond a reasonable doubt of CSC II. We disagree.

Due process requires the prosecution to present sufficient evidence to justify a rational trier of fact’s conclusion that defendant was guilty beyond a reasonable doubt of the charged crime. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). We resolve a sufficiency of the evidence challenge by reviewing de novo the evidence presented up until the time the motion for directed verdict is made in the light most favorable to the prosecution to determine whether the prosecution presented sufficient evidence to justify a rational trier of fact’s conclusion that the defendant was guilty beyond a reasonable doubt of each of the essential elements of the crime. *Johnson*, *supra*; *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

To establish that defendant was guilty of CSC II, the prosecutor had to prove the following elements beyond a reasonable doubt: (1) defendant intentionally touched the victim’s breasts or the clothing covering the victim’s breasts; (2) defendant touched the victim’s breasts for sexual purposes or could reasonably be construed as having done so for sexual purposes; (3) the victim was thirteen, fourteen, or fifteen years old at the time of the sexual contact; and (4) the victim and defendant were living in the same household. MCL 750.520c(1)(b)(i); MSA 28.788(3)(b)(i). Defendant only challenges the sufficiency of the evidence supporting the household element.

In *People v Garrison*, 128 Mich App 640, 646-647; 341 NW2d 170 (1983) (footnote omitted), this Court stated:

We believe the term “household” has a fixed meaning in our society not readily susceptible of different interpretation. The length of residency or the permanency of residence has little to do with the meaning of the word as it is used in the statute. Rather, the term denotes more of what the Legislature intended as an all-inclusive word for a family unit residing under one roof for any time other than a brief or chance visit. The “same household” provision of the statute assumes a close and ongoing subordinating relationship that a child experiences with a member of his or her family or with a coercive authority figure.

In this case, the evidence that had been presented at the time defendant moved for a directed verdict, viewed in the light most favorable to the prosecution, was sufficient to prove that the victim and defendant resided in the same household at the time of the sexual contacts. Testimony by the victim and her mother established that the victim’s mother was hospitalized for almost an entire month following her second and third suicide attempts and that defendant stayed with the victim and the victim’s younger siblings during this time. The victim claimed that defendant was the only adult who stayed with them and that defendant cooked meals and washed clothes for her and her siblings while he was staying with them. Additional testimony was presented that defendant admitted that he had been staying at the house and caring for the victim and her siblings for at least ten days while their mother was hospitalized. Accordingly, the trial court properly denied defendant’s motion for a directed verdict.

Defendant next contends that he was denied a fair trial because he received ineffective assistance of counsel. We disagree. Because defendant failed to move for an evidentiary hearing or a new trial based on the ineffective assistance of counsel, our review is limited to errors apparent from the record. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). To demonstrate that he was denied the effective assistance of counsel, a defendant must show that (1) his trial counsel’s performance was objectively unreasonable, and (2) he was prejudiced by trial counsel’s deficient performance to the extent that he was denied a fair trial, and but for this deficient performance, there would have been a different outcome at trial. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant must also overcome the strong presumption that the challenged actions of defense counsel were trial strategy. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant contends that the jury found him guilty of CSC II because of the sexual contact incident that allegedly occurred the night the victim’s mother attempted suicide at the lake. Defendant claims that he was deprived of the effective assistance of counsel because his attorney failed to obtain a copy of the police report concerning the suicide attempt at the lake and documentation of the victim’s mother’s hospital admission and release. Defendant argues that this documentation would have established that defendant could not have been at the victim’s house on the date of one of the sexual contacts and no rational jury would have convicted him.

Based upon our review of the record, defendant has failed to demonstrate that his trial counsel’s performance was objectively unreasonable. Defendant’s attorney presented two alibi

witnesses to testify that defendant was not present at the victim's house on the night of her mother's suicide attempt and therefore could not have engaged in a sexual relationship with the victim on that night. Further, trial counsel vigorously cross-examined the victim about the date of her mother's suicide attempt at the lake and the date of her mother's release from the hospital following this suicide attempt. Finally, nothing in the record establishes that the documentation defendant claims should have been presented even exists. We are satisfied that defendant received the effective assistance of counsel at trial.

Lastly, defendant argues in his supplemental brief filed in propria persona that the trial court improperly instructed the jury on the household element of the CSC offenses. We disagree. Defendant failed to object to what he characterizes as the trial court's improper instruction on the household element. Accordingly, our review is limited to whether the improper instruction constituted plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

A criminal defendant has the right to have a properly instructed jury consider the evidence presented against him. *People v Mills*, 450 Mich 61, 80; 37 NW2d 909, modified 450 Mich 1212 (1995). To determine if the jury was erroneously instructed, the instructions should be reviewed in their entirety. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions must include all the essential elements of the charged offense and all material issues, defenses, or theories that are supported by the evidence. *Id.* Even if the jury was imperfectly instructed, reversal is not required provided the instructions fairly presented the issues to be tried and adequately protected the defendant's rights. *Id.*

In its instructions to the jury, the trial court defined "household" as follows:

The term household applies to a family unit residing under one roof for any time other than a brief or chance visit and assumes a close and ongoing subordinating relationship with a member of his or her family or with a coercive authority figure.

At the jury's request during its deliberations, the court repeated this definition. We are satisfied that the trial court's instruction on the household element of criminal sexual conduct comported with the definition of household as defined by caselaw. *Garrison, supra* at 646-647. Viewed in their entirety, the instructions fairly presented the issues to be tried and adequately protected defendant's rights. *Daniel, supra* at 53. As such, the trial court did not commit error requiring reversal when instructing the jury on the definition of household.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot