

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES SHELTON UNDERWOOD,

Defendant-Appellant.

UNPUBLISHED

November 22, 2002

No. 233456

Washtenaw Circuit Court

LC No. 00-000672-FH

Before: Markey, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals by right his convictions of criminal sexual conduct in the second degree (CSC II), the victim being under thirteen years of age, MCL 750.520c(1)(a), and third-degree child abuse, MCL 750.136b(5), entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was alleged to have sexually abused and physically injured complainant when complainant visited his home. Complainant, who at the time of trial was nine years old, testified that on an occasion when he and his mother went to visit his grandmother and defendant, he slept in defendant's room with defendant. During the night, he woke to find defendant fondling his penis. Defendant also burned him with cigarettes. Complainant denied that he burned himself with a lighter and denied that he told anyone that his grandfather Robert had fondled his penis.

Carolyn Henison, complainant's mother, stated that on the morning after the night in question, she noticed small round burns on complainant's chest and back. The burns resembled cigarette burns. Tina Jones, Carolyn Henison's sister and complainant's aunt, testified that on one occasion, defendant stated that he did not want to be around when complainant remembered who had abused him. Jones indicated that defendant maintained that he was joking. The investigating officer testified that complainant mentioned his grandfather Robert in passing but did not respond to further questions about Robert. Defendant testified that complainant entered his bedroom without permission. He denied that he intentionally fondled complainant's penis or burned complainant with cigarettes.

The trial court found defendant guilty of CSC II and third-degree child abuse. The court acknowledged that complainant's testimony was inconsistent in some respects, but observed that some inconsistencies were to be expected from a young child. The court found that on the whole

complainant was credible and accepted complainant's testimony that defendant fondled his penis and burned him with cigarettes. The court acknowledged that some testimony indicated that complainant might have accused another man of molesting him, but noted that complainant specifically denied that anyone other than defendant molested him. The court rejected defendant's contention that he touched complainant by accident and that complainant was smoking a cigarette in the bedroom. At sentencing, defendant presented a report that indicated he passed a polygraph test. The court noted that a polygraph test was not admissible at trial and stated that notwithstanding the report, it was convinced beyond a reasonable doubt that defendant was guilty.

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). Determining whether a verdict is against the great weight of the evidence requires a review of the entire body of proofs. The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). If the evidence conflicts, the issue of credibility ordinarily should be left for the trier of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). A defendant convicted after a bench trial need not file a motion to remand to challenge the great weight of the evidence in order to preserve the issue for appellate review. MCR 7.211(C)(1)(c).

A person is guilty of CSC II if he engages in sexual contact with a person who is under thirteen years of age. MCL 750.520c(1)(a). "Sexual contact" is defined as touching that can "reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(k). A person is guilty of third-degree child abuse if he "knowingly or intentionally causes physical harm to a child." MCL 750.136b(5).

Defendant argues the verdict was against the great weight of the evidence, and he is entitled to a new trial. We disagree and affirm defendant's convictions. Defendant testified at trial, but the trial court found that his testimony was incredible. That he passed a polygraph test is irrelevant. *People v Barbara*, 400 Mich 352, 411; 255 NW2d 171 (1977). The fact that complainant's testimony was inconsistent in some respects does not support the granting of a new trial. Conflicting testimony, even when impeached to some extent, is an insufficient ground on which to grant a new trial. *Lemmon, supra*, 647. The trial court found that on the whole, complainant was credible. He consistently testified that defendant fondled his penis and burned him with cigarettes and denied that anyone else molested him. His testimony regarding cigarette burns was corroborated by his mother, who testified that she saw burns resembling cigarette burns on his chest and back. We conclude after reviewing the entire record, that the discrepancies in the evidence do not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Gadomski, supra*.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Michael R. Smolenski