# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 24, 2004 |
| v | No. 241570<br>Wayne Circuit Court |
| JAMES A. HEINLE,<br><br>Defendant-Appellant. | LC No. 00-012295 |

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(g), third-degree CSC, MCL 750.520d(1)(a), two counts of fourth-degree CSC, MCL 750.520e(1)(a), assault with intent to commit second-degree CSC, MCL 750.520g(2), two counts of furnishing alcohol to a minor, MCL 436.1701(1), and four counts of delivering marijuana to a minor, MCL 333.7401(2)(d) and MCL 333.7410(1). He was sentenced to concurrent prison terms of eleven years and three months to thirty years for the first-degree CSC conviction, four years and nine months to fifteen years for the third-degree CSC conviction, one year and four months to two years for each of the fourth-degree CSC convictions, one year and eleven months to five years for the assault conviction, sixty days for each of the furnishing alcohol to a minor convictions, and four to eight years for each of the delivery of marijuana convictions. He appeals as of right. We affirm.

We first address defendant's claim that trial counsel was ineffective for failing to call defendant's sister as a witness.

Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitutions.

*People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id*. at 312, 330. That is, defendant must show a reasonable probability that the error made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens, supra* at 312, 314. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *LaVearn, supra* at 217. Where counsel's conduct involves a choice between two sound strategies, it is not deficient. *Id.* at 216.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Marcus Davis (On Rehearing)*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To overcome the presumption, defendant must show that counsel's failure to call a witness may have deprived him of a substantial defense that would have affected the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Here, defense counsel explained that he recommended that defendant's sister not be called as a witness because he did not believe her testimony was necessary and because the jury would view her as being biased in defendant's favor.

The defense theory was that the charged crimes never occurred. At the *Ginther*[1] hearing, defendant's sister denied seeing the victim, CE, upset or crying on the morning after defendant allegedly had intercourse with her. Although defendant's sister would have undermined this aspect of CE's testimony, as defense counsel observed, it was likely that the jury would view her testimony as biased in favor of defendant. Additionally, based on her testimony at the *Ginther* hearing, defendant's sister would have corroborated other aspects of CE's testimony, for example, the date of defendant's party, and whether CE spent the night at defendant's apartment. Further, defendant's sister would have corroborated the other complainants' testimony that defendant's apartment was frequented by teenagers, and that defendant had a thirteen-year-old girlfriend. Additionally, another witness testified that defendant's sister supplied defendant with marijuana. In sum, defendant has not shown that counsel's failure to call his sister deprived him of a substantial defense, nor has defendant overcome the presumption that counsel's decision not to call the witness was sound trial strategy.

We also find no merit to defendant's remaining allegations of ineffectiveness. Although defendant contends that counsel was ineffective for failing to challenge a juror for cause, it is apparent that the juror clearly misspoke when responding to a general question about whether she could apply and follow the court's instructions. The questionable response was preceded by a series of questions to which the juror continuously responded that her various life experiences would not render her unable to sit as a fair and impartial juror. Considered in context, defense counsel did not commit a serious error in failing to challenge the juror for cause.

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Contrary to what defendant argues, the record discloses that defense counsel impeached each of the victims with inconsistencies in their prior police statements and testimony. We agree with the trial court that counsel's failure to identify every minute inconsistency did not render counsel's performance deficient, or affect the outcome of defendant's trial.

Defense counsel's decisions not to make an opening statement and to stipulate to allow the prosecutor to introduce a letter that defendant wrote to GD were both matters of trial strategy, and defendant has not overcome the presumption of sound strategy. Nor was defense counsel ineffective for referring to "sex parties" during closing argument. Considered in context, it is clear that counsel was not suggesting that defendant participated in the sex parties.

We agree with the trial court that defendant was not prejudiced by counsel's failure to object to references to another ten-year-old girl, considering that the references were isolated and that there were no allegations that defendant ever engaged in inappropriate conduct with the girl.

Because defendant was acquitted of the second count of first-degree CSC, he clearly was not prejudiced by counsel's alleged error in failing to interview and call alleged alibi witnesses for that offense.

Lastly, defendant argues that defense counsel was ineffective for failing to object to erroneous jury instructions and misconduct by the prosecutor. These substantive issues are addressed in detail later in this opinion, and we find, for the most part, no merit to either. Because defense counsel is not required to make futile objections, counsel's failure to object did not amount to ineffective assistance of counsel. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Further, with respect to any instances where counsel arguably should have objected, defendant has not shown a reasonable probability that any errors made a difference in the outcome of the trial. In conclusion, we reject all of defendant's claims predicated on ineffective assistance of counsel.

We now turn to defendant's claim that misconduct by the prosecutor denied him a fair trial.

Claims of prosecutorial misconduct are reviewed on a case by case basis, and the challenged remarks are evaluated in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Where a defendant fails to object to the prosecutor's conduct, he must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

As argued by defendant, the victim's age was not an element of the first-degree CSC charges filed against him. Rather, defendant was charged with penetrating the victim's vagina with his penis while she was "physically helpless," causing "personal injury." See MCL 750.520b(1)(g). Defendant correctly argues that consent is generally a defense to a CSC charge, at least when the victim is not mentally or physically incapacitated. *People v Charles Thompson*, 117 Mich App 522, 525-526, 528-529; 324 NW2d 22 (1982). However, consent is not a defense to CSC charges involving a minor under the age of sixteen, because such minors are legally incapable of consenting. See *People v Gengels*, 218 Mich 632, 641; 188 NW 398

(1922).[2] Thus, the prosecutor did not misstate the law. Further, the trial court instructed the jury that it must take the law as given by the court, and that if a lawyer said something differently, it must follow what the court said. The court's instruction was sufficient to cure any perceived error.

To the extent the prosecutor misrepresented the evidence when she argued that the victim pushed defendant away, the misstatement did not affect defendant's substantial rights. The statement did not affect the outcome of trial considering that it concerned a minor detail and that the court instructed the jury that the lawyers' statements and arguments are not evidence. Thus, this unpreserved issue does not require reversal.

As argued by defendant, a prosecutor may not appeal to the jury's sympathy, passions, or prejudices. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003); *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995). However, the prosecutor was free to argue the evidence and to draw reasonable inferences from it, and she was not required to state her arguments in the "blandest of all possible terms." *People v Kris Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001)(citation omitted). Here, the evidence at trial, including defendant's alleged comment to CE to the effect that everyone looses their virginity sometime, supported an inference that the victim was a virgin before defendant sexually assaulted her. Further, this fact was important to help eliminate other instances of intercourse as the possible cause of the notch found in her hymen. Additionally, the court cautioned the jury not to be influenced by passion or prejudice. Therefore, the prosecutor's comments did not amount to plain error.

As argued by defendant, "[a] prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). "A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *Id.* Here, a review of the challenged comments reveals that the prosecutor was factually describing the thoroughness of the police investigation. Viewed in context, the comments did not amount to improper bolstering or vouching. There was no plain error.

Defendant also correctly argues that a prosecutor may not knowingly use false testimony and that the prosecutor has a duty to report and correct false evidence presented by a government witness. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001); *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). However, the mere fact that certain testimony may be contradicted by other witnesses does not compel the prosecutor to disbelieve her own witnesses and correct their testimony. *Id.* at 278-279; *Herndon*, *supra* at 417-418. In the present case, the inconsistencies in testimony presented, at best, a question of fact and credibility. Defendant has failed to show that the prosecutor knowingly presented false testimony. There was no plain error.

[2] We also note that this principle is reflected in MCL 750.520d(1)(a), wherein a defendant is guilty of second-degree CSC for engaging in sexual penetration with a person at least thirteen years of age and under sixteen years of age without any regard to consent.

Defendant next argues that the prosecutor exceeded the scope of the information and thereby deprived him of notice and an opportunity to prepare a defense. We disagree. Constitutional claims of due process violations are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

It is well established that an accused shall not be called upon to defend himself against a charge of which he was not sufficiently apprised. *People v Higuera*, 244 Mich App 429, 442-443; 625 NW2d 444 (2001). Thus, an information must indicate the nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged. *Id.* at 443-444, quoting MCL 767.45(1)(a). Among the relevant purposes of this requirement is to enable the defendant to prepare a defense. *Higuera*, *supra* at 444. However, "[a]bsent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of . . . a variance between the information and proof regarding time, place, the manner in that the offense was committed, or other factual detail relating to the alleged offense." MCR 6.112(G).

As defendant argues, there was no evidence of mental anguish presented at his preliminary examination. However, for purposes of the charged first-degree CSC offense involving personal injury, the "personal injury" element is defined as including "*bodily injury*, disfigurement, *mental anguish*, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(l) (emphasis added). In the context of the requirement for jury unanimity, this Court has held that "bodily injury and mental anguish are not alternative theories upon which a jury is required to make independent findings[.]" *People v Asevedo*, 217 Mich App 393, 397; 551 NW2d 478 (1996). Rather, "[w]hen a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory." *Id.* "Because bodily injury, mental anguish, and the other conditions listed in MCL 750.520a[(l)] . . . are merely different ways of defining the single element of personal injury, . . . [they do not] represent alternative theories upon which jury unanimity is required." *Asevedo*, *supra* at 397. We therefore conclude that the prosecutor did not exceed the scope of the information by introducing evidence of mental anguish. There was no plain error.

Furthermore, defendant's trial strategy was to show that the charged events never happened. Defendant fails to explain how his strategy would have been different had he known that the victim was going to testify to both bodily injury and mental anguish in order to establish the personal injury element. Thus, defendant has failed to show that, in presenting evidence of mental anguish, the prosecutor deprived him of notice and an opportunity to prepare a defense.

Next, defendant argues that the trial court erred in its instructions to the jury. We again disagree.

Claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions are reviewed as a whole rather than piecemeal. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). The reviewing court must balance the meaning of the instructions as a whole against the potentially misleading effect of an isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Even if somewhat imperfect, jury instructions are not grounds for reversal if

they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). In this case, because defendant did not object to the trial court's jury instructions, we review defendant's claims of instructional error for plain error affecting his substantial rights. See *Aldrich*, *supra* at 124-125.[3]

The trial court's instructions addressing mental anguish are based on our Supreme Court Court's decision in *People v Petrella*, 424 Mich 221, 257, 270-271; 380 NW2d 11 (1985), which explained the degree of distress necessary to satisfy the statute. Thus, the instruction was not plainly erroneous. Although defendant contends that there was no evidence of disfigurement, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ, which were also covered in the trial court's instructions, these are merely alternative bases for finding personal injury, not an independent theory of the case. See *Asevedo*, *supra* at 397. We conclude that the instruction given fairly presented the issues to be tried and sufficiently protected defendant's rights. Defendant has failed to show error, plain or otherwise, requiring reversal.

There were two charges of assault with intent to commit second-degree CSC, involving different victims. The elements of assault with intent to commit second-degree CSC are: "an assault, involving force or coercion, with the specific intent to touch the victim's genital area, groin, inner thigh, buttock, breast, or clothing covering those areas, for the purpose of sexual arousal or gratification." *People v Evans*, 173 Mich App 631, 634; 434 NW2d 452 (1988); MCL 750.520c; MCL 750.520g(2). An assault is an attempt to commit a battery, or an unlawful act which places another in reasonable apprehension of an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). A battery is the wilful touching of another. *People v Lakeman*, 135 Mich App 235, 239; 353 NW2d 493 (1984).

One of the aggravating circumstances that can be used to prove second-degree CSC is that sexual contact be accomplished by force or coercion, and that personal injury result. MCL 750.520c(f). As argued by defendant, those were the only aggravating circumstances that seemed applicable in this case. Where there has not been a completed CSC offense, "[d]epending upon the particular aggravating circumstances involved, it may be sufficient to establish that the accused *intended* to do some act which would have given rise to an aggravating circumstance." *People v Lasky*, 157 Mich App 265, 270-271; 403 NW2d 117 (1987) (emphasis in original). In the present case, as in *Lasky*, aggravating circumstances under subsection (f) "will be established if [defendant] intended to do an act which would have caused personal injury to the victim and the actor intended to use force and coercion to accomplish the sexual contact." *Id.* at 271. Thus, it was not necessary to find that defendant specifically intended to cause personal injury. *Id.* at 269, 271.

The instructions concerning the two counts of assault with intent to commit second-degree CSC given in this case were essentially identical to CJI2d 20.18, except that the court

[3] Defense counsel expressed satisfaction with the instructions as given by the trial court; therefore, it is arguable that instructional error issues were waived. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). However, because there are claims of ineffective assistance of counsel in regard to the instructions, we shall review and discuss the instructions.

failed to instruct the jury concerning the specific aggravating circumstances alleged. In other words, the court failed to instruct that the jury was required to find whether defendant intended to do an act which would have caused personal injury to the victim and intended to use force and coercion to accomplish the sexual contact. See *Lasky*, *supra* at 271. However, "an instructional error regarding one element of a crime, whether by misdescription or omission, is subject to a harmless error analysis" because "the jury still may be able to fulfill its intended function" of determining the defendant's guilt or innocence. *People v Duncan*, 462 Mich 47, 54; 610 NW2d 551 (2000).

As given, the instructions defined a battery as a "forceful or violent touching" and required a finding that defendant "intended either to injure" the complainant or make her "reasonably fear an immediate battery." The instructions also required the jury to find that defendant must have intended to touch the complainant's "genital area or the clothing covering those areas" for the purpose of sexual arousal or gratification. Thus, although the instructions given were not perfect, they fairly identified the issues to be tried and sufficiently protected defendant's rights. Defendant's substantial rights were not affected.

Concerning the delivery of marijuana charges, at the time of these offenses, the second sentence of MCL 333.7410(1) provided that "[a]n individual 18 years of age or over who violates section 7401 by delivering or distributing any other controlled substance listed in schedules 1 to 5 to an individual under 18 years of age who is at least 3 years the distributor's junior may be punished by the fine authorized by section 7401(2)(b), (c), or (d), or by a term of imprisonment not more than twice that authorized by section 7401(2)(b), (c), or (d), or both." Marijuana is a schedule 1 drug, MCL 333.7212(1)(c), and delivery of marijuana is a violation of § 7401(2)(d). Defendant does not argue that he did not know that the substance was marijuana.[4] Further, contrary to defendant's argument, the statute does not require a showing that defendant knew that marijuana was a controlled substance. Therefore, the trial court's instructions for this offense were not erroneous.

Defendant next argues that there was insufficient evidence to support some of his convictions or, alternatively, his convictions were against the great weight of the evidence. We disagree.

Although a sufficiency of the evidence issue may be raised for the first time on appeal, *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987), in order to raise an issue that the verdict is against the great weight of the evidence, a party must move for a new trial on that basis. See *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988). In this case, defendant did not move for a new trial based on the great weight of the evidence. Therefore, defendant's great weight argument is not preserved.

[4] Therefore, to the extent that the trial court did not specifically instruct the jury to determine whether defendant knew he was delivering marijuana, CJI2d 12.2, we find no need for reversal. *Duncan*, *supra* at 54.

The sufficiency of the evidence is to be evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime charged proven beyond a reasonable doubt. *Petrella, supra* at 268-270. Generally, the resolution of credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

A new trial may be granted where the verdict is against the great weight of the evidence but "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998)(citation omitted). Where 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 impeached testimony was deprived of all probative value or that the jury could not believe it, such as where it defied physical reality, the credibility of witnesses is for the jury, and a new trial is not warranted. *Id.* at 645-646. The court must find that there is a real concern that an innocent person may have been convicted, or that it would be a manifest injustice to allow the guilty verdict to stand. *Id.* at 647. Mere conflicting testimony, even when impeached to some extent, is an insufficient ground to remand for a new trial. *Id.*

Defendant correctly observes that evidence that a victim was "crying and upset," by itself, is insufficient to prove the mental anguish element required by MCL 750.520b(1)(g). See *Petrella*, *supra* at 274. In this case, however, a witness testified that the victim, CE, locked herself in the bathroom and cried for several hours.[5] Additionally, the personal injury element could be established by evidence of bodily injury. As discussed previously, "bodily injury, mental anguish, and the other conditions listed in MCL 750.520a[(l)] . . . are merely different ways of defining the single element of personal injury, . . . [they do not] represent alternative theories upon which jury unanimity is required." *Asevedo*, *supra* at 397. Here, the victim's testimony concerning her bleeding and pain after the offense, and a notched hymen, were sufficient to establish the personal injury element. Contrary to what defendant argues, evidence of bruises and chronic pain was not required.

Further, evidence that the victim consumed at least two alcoholic drinks that defendant gave her, fell asleep, and did not recall participating in any sexual activity with defendant, viewed most favorably to the prosecution, was sufficient to enable the jury to find that she was physically helpless. Defendant's argument that it is unbelievable that the victim did not wake up during the sexual activity goes solely to her credibility, which is within the exclusive province of the jury as the trier of fact.

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[5] Defendant's arguments regarding inconsistent testimony at the preliminary examination in regard to CE locking herself in the bathroom are unavailing. See *People v Hall*, 435 Mich 599, 600-601; 460 NW2d 520 (1990)(evidentiary deficiency at the preliminary examination is not ground for vacating a subsequent conviction where a defendant receives a fair trial and is not otherwise prejudiced).

The credibility issues raised by defendant in support of his great weight of the evidence argument do not rise to the level required by *Lemmon*. There was no plain error in this regard.

Concerning the assault conviction, there was sufficient evidence for a reasonable jury to find beyond a reasonable doubt that defendant forcefully and wilfully touched his victim, GD, without her consent, and attempted to coerce her to strip because he allegedly wanted to see her nude. Further, the circumstances supported an inference that defendant specifically intended to touch GD's genital area for the purpose of sexual arousal or gratification, causing personal injury. Therefore, defendant was properly convicted of assault with intent to commit second-degree CSC.

Concerning defendant's convictions of delivery of marijuana to a minor, the statute does not require a showing that the minors knew that the substance being furnished was marijuana. See MCL 333.7410(1). Nevertheless, we note that all four complainants unequivocally testified that defendant furnished them with marijuana. It is undisputed that defendant was over eighteen years old, and that the complainants were under the age of eighteen, and more than three years younger than defendant. See MCL 333.7410(1). Additionally, marijuana is a schedule 1 drug. See MCL 333.7212(1)(c). Therefore, there was sufficient evidence for the jury to find beyond a reasonable doubt that defendant delivered marijuana to the minor complainants.

Lastly, defendant argues that the district court violated the corpus delicti rule, and that the trial court erred in denying his motion to quash the information. We disagree.

"As a general matter, the district court's decision to bind over the defendant is subject to review for abuse of discretion." *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991). This Court "review[s] a circuit court's decision to grant or deny a motion to quash a felony information de novo to determine if the district court abused its discretion in ordering the bindover." *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998).

At the preliminary examination, the district court must bind a defendant over for trial if it finds "probable cause to believe that a crime was committed and probable cause to believe that the defendant committed it." *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). "Some evidence must be presented regarding each element of the crime or from which those elements may be inferred." *Id.* "[I]t is not, however, the function of the examining magistrate to discharge the accused when the evidence conflicts or raises a reasonable doubt of the defendant's guilt; that is the province of the jury." *Id.* at 469-470.

"In Michigan, it has long been the rule that proof of the corpus delicti is required before the prosecution is allowed to introduce the inculpatory statements of an accused." *People v McMahan*, 451 Mich 543, 548; 548 NW2d 199 (1996). The corpus delicti rule applies at the preliminary examination. *People v White*, 276 Mich 29, 31; 267 NW 777 (1936); *People v Randall*, 42 Mich App 187, 190; 201 NW2d 292 (1972); see also *People v Cotton*, 191 Mich App 377, 391-394; 478 NW2d 681 (1991).

"Specifically, the [corpus delicti] rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury (for example, death in cases of homicide)

and (2) some criminal agency as the source of the injury." *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995); see also *McMahan*, *supra* at 549. However, these elements "need not be proved beyond a reasonable doubt and courts may draw reasonable inferences and weigh the probabilities." *People v Mumford*, 171 Mich App 514, 517; 430 NW2d 770 (1988).

The purpose of the corpus delicti rule is to prevent a defendant from being convicted of a crime that did not occur, and to minimize the weight of a confession and require collateral evidence to support a conviction. *McMahan*, *supra* at 548-549; *Konrad*, *supra* at 269. "Once [the necessary] showing has been made, '[a] defendant's confession then may be used to elevate the crime to one of a higher degree or to establish aggravating circumstances.'" *People v Ish*, 252 Mich App 115, 117; 652 NW2d 257 (2002) (citation omitted). Thus, it is not necessary to present independent evidence on *all* the elements of the crime before the confession is admitted. *Id.*

For first-degree CSC, the corpus delicti would be the injury, i.e., sexual penetration, and some criminal agency. That the victim was physically helpless and suffered personal injury are aggravating circumstances. Therefore, they need not be established before a confession can be admitted. At defendant's preliminary examination, the victim, CE, testified that she was fourteen years old when she attended a party at defendant's house on March 4, 2000, and drank alcoholic beverages that defendant served her. The victim fell asleep in the living room and woke up in defendant's bed the next day. Defendant was laying next to her. Her jeans were undone and pulled down to between her knees and her waist. Her vagina hurt in a way that it had never hurt before; the pain continued for a week after the incident.

This testimony was sufficient for the district court to find, by a preponderance of the evidence, that someone sexually penetrated the complainant. Because the victim was a minor and because the victim testified that she had been asleep, any penetration would necessarily be the result of a criminal agency, thus establishing the corpus delicti of first-degree CSC. Only then did the victim testify that defendant admitted to having had sexual intercourse with her, and that he told her that she had consented. The district court did not err in admitting defendant's confession, nor did the trial court err in denying defendant's motion to quash.

We have reviewed all arguments presented in the two appellate briefs submitted by defendant, and we find no grounds requiring reversal of the convictions.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Jessica R. Cooper