STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2005
v	No. 257984 Ottawa Circuit Court
JAVIER GERARDO ALVAREZ, Defendant-Appellant.	LC No. 03-027018 – FC

Before: Whitbeck, C.J., and Bandstra and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant appeals by right. We affirm.

Defendant first argues that the prosecutor failed to introduce sufficient evidence of the sexual penetration requirement of first-degree criminal sexual conduct. We disagree.

Defendant was charged with first-degree criminal sexual conduct for engaging in cunnilingus with the female victim who was under the age of thirteen. A person commits first-degree criminal sexual conduct when "he or she engages in sexual penetration with another person and . . . that other person is under 13 years of age." MCL 750.520b(1)(a). Sexual penetration is a necessary element of first-degree criminal sexual conduct. *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). The Legislature has defined sexual penetration 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(o).

This Court in *People v Harris*, 158 Mich App 463, 469-470; 404 NW2d 779 (1987) concluded, after looking at common, medical, and legal dictionaries, that "it is evident that cunnilingus 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." *Id.* at 470. The Court went on to state that additional penetration is not necessary for cunnilingus to occur. *Id.* Thus, when a person has engaged in cunnilingus, placing his or her mouth on the external genitalia of a female, no further penetration is required to prove sexual penetration. *Id.* See also *Lemons*, *supra* at 254-255. Therefore, if the prosecution presented sufficient evidence that defendant

placed his mouth on the victim's external genital organs, then the prosecution has provided sufficient evidence of the sexual penetration requirement.

When reviewing a claim that the evidence is not sufficient to sustain a conviction, this Court "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolf*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The victim testified that defendant's tongue and mouth touched her vagina. Defendant argues the victim's testimony is unreliable because the victim testified that the drink defendant had given her prohibited her from feeling anything. But this simply presented an issue of credibility for the jury to resolve. *Id*. at 514-515. When viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that defendant touched his mouth and tongue to the victim's vagina.

Because there is sufficient evidence to find that defendant engaged in cunnilingus with the victim, defendant's conviction for first-degree criminal sexual conduct is supported by sufficient evidence.

Defendant also argues that the trial court failed to properly instruct the jury on the sexual penetration requirement of first-degree criminal sexual conduct. We disagree.

Defendant failed to object to the trial court's instruction. This Court reviews unpreserved claims of instructional error for plain error affecting defendant's substantial rights. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003). A jury must be instructed on all elements of a charged offense. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Because sexual penetration is a necessary element of first-degree criminal sexual conduct, *Lemons, supra* at 253, the jury needed be instructed that an element of first-degree criminal sexual conduct was that defendant sexually penetrated the victim.

The trial court used the following to instruct the jury on the sexual penetration requirement: "[T]he elements are that the defendant engaged in a sexual act that involved touching [the victim's] genital opening by defendant's tongue or mouth. It requires merely touching. It does not require penetration there." This instruction required the jury to find that defendant engaged in cunnilingus with the victim. Because the jury was instructed that it had to find that defendant engaged cunnilingus, which is itself an act of sexual penetration, *Harris, supra* at 158, the trial court properly instructed the jury on the element of sexual penetration.

Defendant also argues he received ineffective assistance of counsel because trial counsel failed to object to the trial court's instruction. An attorney is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Because the trial court properly instructed the jury on the sexual penetration requirement, any objection would have been futile. Defendant was not denied ineffective assistance of counsel.

Defendant finally argues that he was denied a fair trial when the prosecutor improperly vouched for defendant's guilt and when the prosecutor in his closing argument referred to facts within his own personal knowledge and elicited the sympathy of the jury. We disagree. Because defendant failed to object to either of the prosecutor's statements, this Court reviews them for

plain error affecting defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003).

Defendant argues the prosecutor improperly vouched for his guilt when the prosecutor asked the investigating officer if he eventually asked the prosecutor's office to bring charges against defendant. A prosecutor may not use the prestige of his office to inject his personal opinion into the case. *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995). But, a review of the prosecutor's examination of the investigating officer reveals that the prosecutor's question was not made in an attempt to inject his personal opinion that defendant was guilty; instead, it was an attempt to establish the timeline of the case's history. The prosecutor's question was not improper.

Defendant also argues that the prosecutor improperly testified to facts within his knowledge and elicited sympathy from the jury when the prosecutor made the following statement:

> [I]t all makes sense, the way that it was disclosed, the timing of it, [the victim's] lack of any reason to fabricate the story. [Defendant] was out of the house. Her acting out, I suggest, is consistent with a child who something traumatic had happened to, who was struggling with what had happened. She told you she didn't go to her mom right away. She hadn't seen her mom in a couple of years and she didn't know how her mom would react. And when you look at the whole story from start to finish, it all makes an awful lot of sense.

A prosecutor may argue the evidence and all reasonable inferences that may arise from the evidence. *Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). A prosecutor's comments must also be evaluated in light of defense arguments. *Id*. at 452. In this comment, the prosecutor was arguing the evidence to explain why the victim did not tell anybody, especially her mother, about the incidents with defendant until several months after they had occurred. The prosecutor was also attempting to refute defendant's theory that the victim made up the incidents to deflect attention from her by arguing the timing of her disclosure makes sense when considering all the evidence. Because the prosecutor was arguing the evidence, his comment was not improper.

We affirm.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Jane E. Markey