

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GORDON ANDREW HAMMETT,

Defendant-Appellant.

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UNPUBLISHED

August 26, 2008

No. 278837

Oakland Circuit Court

LC No. 2007-212464-FH

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion), for which he was sentenced to 2 to 15 years in prison. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the evidence was insufficient to support the jury's verdict. We disagree. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of third-degree CSC as charged in this case are (1) that the defendant engaged in sexual penetration with another person, and (2) that the defendant used force or coercion to accomplish the sexual penetration. MCL 750.520d(1)(b). Defendant challenges only the second element.

Force or coercion includes, but is not limited to, overcoming the victim through the application of actual physical force or violence.<sup>1</sup> MCL 750.520b(1)(f)(i); MCL 750.520d(1)(b). Force or coercion includes the exertion of strength or power on another person to compel an act against that person's will. *People v Premo*, 213 Mich App 406, 409-411; 540 NW2d 715 (1995). As explained in *People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002), the force need not be so great as to overcome the complainant. It is sufficient that the actor "seize[s] control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes." *Id.* The force is that which allows the accomplishment of sexual penetration when absent that force the penetration would not have occurred. *Id.*

The complainant testified that after she sat on the bed, defendant stood in front of her. Defendant then climbed on top of her and she leaned back "[f]rom the weight of another body." Even though she was crying and telling him no, he pulled down her pants and had intercourse with her. She stated that she "tried to get away" by scooting up toward the headboard, but defendant moved up too while remaining on top of her. This evidence showed that defendant was able to achieve sexual penetration by keeping his body on top of the complainant to prevent her from getting away and thus, if believed, was sufficient to establish the element of force or coercion. Although defendant contends there was no evidence to corroborate the complainant's account of the incident, it was not necessary for her testimony to be corroborated. MCL 750.520h. Further, while defendant testified that the complainant consented to the sexual activity, "[w]itness credibility and the weight accorded to evidence is a question for the jury, and any conflict in the evidence must be resolved in the prosecution's favor." *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005). Thus, in deciding whether the evidence at trial was sufficient to sustain a conviction, this Court "will not interfere with the role of the trier of fact of determining the weight of the evidence or the credibility of witnesses." *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003).

Defendant also argues that the jury's verdict was against the great weight of the evidence. A motion for a new trial may be granted where the verdict was manifestly against the clear weight of the evidence, i.e., the evidence so clearly weighed in the defendant's favor 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); *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). The trial court's ruling on a motion for a new trial based on the great weight of the evidence is reviewed for an abuse of discretion, *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001), but this Court gives substantial deference to a trial court's determination that a verdict is not against the great weight of the evidence. *Arrington v Detroit Osteopathic Hosp Corp (On Remand)*, 196 Mich App 544, 560; 493 NW2d 492 (1992). "An abuse of discretion

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<sup>1</sup> Force or coercion can be made out by other circumstances enumerated in the statute, MCL 750.520b(1)(f)(ii)-(v), but again, those circumstances are not exclusive. Thus, this Court has held that coercion is established where the defendant's actions created in the victim a reasonable fear of dangerous consequences. *People v McGill*, 131 Mich App 465, 472; 346 NW2d 572 (1984). This shows only that evidence that the complainant was placed in reasonable fear of dangerous consequences is sufficient, but not necessary, to establish the force or coercion element.

will be found only where the trial court's denial of the motion is manifestly against the clear weight of the evidence." *People v Ross*, 145 Mich App 483, 494; 378 NW2d 517 (1985).

The crux of defendant's argument is that his version of events conflicted with the complainant's, and that her version should not be believed because it was not corroborated by anyone. The resolution of credibility questions is within the exclusive province of the jury, *DeLisle, supra* at 662, and this Court may not resolve them anew. *Gadomski, supra*. Thus, "unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998) (internal quotation marks and citation omitted). Because no exceptional circumstances are present here, the trial court properly deferred to the jury's determination and did not abuse its discretion in denying defendant's motion.

Defendant next argues that trial counsel was ineffective. Because defendant failed to raise this claim below in his motion for a new trial or request for an evidentiary hearing, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

"To establish his claim, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." *People v Horn*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2008), slip op at 4 n 2 (citations omitted), lv pending.

Defendant contends that counsel was ineffective for failing to object to certain testimony offered by detectives Eric Amenson and Timothy Larion. The decision whether to object to evidence is a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The failure to object to evidence can constitute ineffective assistance of counsel where the evidence was inadmissible and its introduction was so prejudicial that it could have affected the outcome of the case. *People v Ullah*, 216 Mich App 669, 685-686; 550 NW2d 568 (1996).

The nurse who physically examined the complainant was not available to testify. Detective Amenson testified that he spoke with the nurse and read her report, which indicated an absence of evidence of trauma. He opined that the absence of such evidence did not mean that a sexual assault did not occur. Even if Amenson's testimony regarding the contents of the nurse's report was inadmissible hearsay, defense counsel had a strategic reason for not objecting to it, because he used the evidence of absence of trauma to argue that the element of force or coercion had not been proven. Further, even if Amenson's opinion was inadmissible because he was not qualified as an expert and that counsel had no strategic reason for not objecting, defendant was not prejudiced by the evidence. Amenson's opinion was that a sexual act could have occurred despite the lack of any abnormal physical findings. Defendant admitted that sexual penetration had taken place. Whether the act was criminal depended on whether it was accomplished through the use of force or coercion and Amenson offered no opinion on that point.

Defendant does not take issue with the substance of Detective Larion's testimony. Rather, he contends that counsel should have objected when the prosecutor elicited testimony that Larion "specialize[d] in interviewing defendants." Defendant has not explained why such testimony, if true, was not admissible. He contends that it somehow laid the groundwork for an argument that Larion was skilled in determining the credibility of the persons he interviews. While it is improper for the prosecutor to ask a witness to comment on the credibility of another witness because credibility is a determination for the trier of fact, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), the prosecutor never asked Larion to comment on defendant's credibility. Larion simply testified to defendant's own statements to him, statements that turned out to be inconsistent with statements that defendant had given to Amenson, and defendant admitted that he had given inconsistent statements to the two officers. Further, contrary to defendant's assertions, the prosecutor never argued that Larion had "specialized knowledge in detecting the truth," that his specialized knowledge enabled him to determine that defendant's statement was untrue, or that "the Jury should only believe the Detectives because they are much more credible" or tell "the Jury to give the officers' testimony more weight." Accordingly, defense counsel was not ineffective for failing to object.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Kirsten Frank Kelly