STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP MCCRARY, a/k/a
PHILLIP LAMAR MCCRARY

Defendant-Appellant.

UNPUBLISHED
November 13, 2008

No. 280085
Wayne Circuit Court
LC No. 07-007244-01

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of attempted first-degree criminal sexual conduct, MCL 750.520b(1)(a); MCL 750.92, and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant was sentenced to one to five years in prison for each conviction of attempted first-degree criminal sexual conduct, and 10 to 30 years in prison for the second-degree criminal sexual conduct conviction. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that the evidence is not competent, therefore it is insufficient to find him guilty beyond a reasonable doubt. We disagree. Sufficiency of the evidence is reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "[A] 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

Defendant argues that the evidence is not "competent," and thus, not sufficient, because complainant's mother, and therefore complainant, had a motive to lie, the complainant's testimony was coached, and the complainant's testimony was not credible. The complainant's testimony was not credible, according to defendant, because the children sleeping in the same room did not wake up during the alleged criminal sexual conduct, the complainant herself did not shout for help, and she made statements at trial that she did not make to the doctor. This "incompetent" evidence, defendant asserts, is therefore insufficient to find guilt.

It should first be noted that defendant is incorrect to say that the prosecution's evidence was "incompetent" and therefore insufficient. Competent evidence is admissible evidence.[1] Generally speaking, relevant evidence is admissible. *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). As defined in MRE 401, "'relevant evidence' is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). Complainant's testimony, on which defendant focuses his attack, is relevant because it enables the trier of fact to determine whether criminal sexual conduct occurred. Defendant has pointed to no rule that would exclude it. Therefore, the testimony is admissible evidence and it is for the trier of fact, not this Court, to determine its weight. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The main issue, then, is whether the prosecution presented sufficient evidence at trial to find defendant guilty beyond a reasonable doubt of one count of second-degree criminal sexual conduct and two counts of attempted first-degree criminal sexual conduct. As charged in this case, a person commits second-degree criminal sexual conduct if the person engages in sexual contact with another person under the age of 13. MCL 750.520c(1)(a); *People v Elston*, 462 Mich 751, 774; 614 NW2d 595 (2000). Under MCL 750.520a(o), "'sexual contact' includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner . . . ." See *People v Russell*, 266 Mich App 307, 311; 703 NW2d 107 (2005).

The complainant was 12 years old at the time of the alleged events. She testified, in detail, that defendant awakened her in the early morning hours of December 23, 2006, by first rubbing, then licking, her breasts. It does not matter, as the defense notes, that she did not mention the part about "licking" in her statement to Dr. Kunjummen, the attending emergency room physician at Children's Hospital. In fact, she did tell the doctor that defendant had been "messing with her chest." In addition, complainant both testified at trial and told Dr. Kunjummen that during the incident, defendant said that he "could teach [her] some stuff that [she] could use in the future." Complainant's testimony, as well as her statements to Dr. Kunjummen, if believed by a rational trier of fact, in this case, the trial court, demonstrate that defendant engaged in intentional touching of her intimate parts in a sexual manner and for sexual gratification. MCL 750.520a(o). Therefore, the prosecution presented sufficient evidence from which the trial court could find defendant guilty beyond a reasonable doubt of second-degree criminal sexual conduct under MCL 750.520c(1)(a).

Under MCL 750.520b(1)(a), a person is guilty of first-degree criminal sexual conduct, if he or she engages in sexual penetration with a person under 13 years of age. *Elston*, *supra* at 774. MCL 750.520a(p) defines "penetration" as "sexual 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

[1] Admissible evidence is, "Evidence that is relevant and is of such a character . . . that the court should receive it. Also termed competent evidence . . . ." Black's Law Dictionary (8th ed).

of another person's body . . . .'" *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Under Michigan law, "an 'attempt' consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense. [In other words,] 'an intent to do an act or to bring about certain consequences which would in law amount to a crime; and . . . an act in furtherance of that intent which . . . goes beyond mere preparation.'" *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001), quoting *People v Jone*s, 443 Mich 88, 100; 504 NW2d 158 (1993).

Complainant testified that defendant put his finger inside her "vagina area," to which she pointed and identified as the part of her body used to go to the bathroom. She further stated that defendant tried to put his private part into her vaginal area. When asked if defendant actually penetrated her, complainant first said, "almost." Later, she indicated that he "tried" to penetrate her. Her last remark on the subject was that defendant was moving his private part in and out, and she felt pain in her stomach and vaginal area as a result. Viewed in a light most favorable to the prosecution, a rational trier of fact who found complainant's testimony credible could certainly conclude that defendant did attempt to put both his finger and penis into her vagina. Each attempted "intrusion, however slight" of parts of defendant's body into the genital openings of the victim is therefore attempted "penetration" under MCL 750.520b(1)(a) and MCL 750.520a(p).

Moreover, a rational trier of fact could have found complainant's overall credibility enhanced by the fact that she told her mother what happened as soon as defendant left the house. Her mother then immediately reported the incident to police and took complainant to the hospital. While there, complainant made similar statements to Dr. Kunjummen and the police. Though defendant emphasizes complainant's lack of physical injury, it is the opinion of Dr. Kunjummen that it was "very clear that there was a genital contact." Regardless, "the testimony of a victim need not be corroborated . . . ." MCL 750.520h; *People v Lemmon*, 456 Mich 625, 632 n 6; 576 NW2d 129 (1998). Therefore, the prosecution presented sufficient evidence from which a rational trier of fact could find defendant guilty beyond a reasonable doubt of two counts of first-degree criminal sexual conduct.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis