STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANARD ESTERS,

Defendant-Appellant.

UNPUBLISHED
November 22, 1996

No. 188618
LC No. 94-013167

Before: Hoekstra, P.J., and Sawyer and T.P. Pickard,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of one count of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). He was sentenced to five to ten years' imprisonment. He appeals as of right and we affirm.

Defendant first contends that the evidence was insufficient to support his conviction. We disagree. In reviewing a claim of insufficient evidence, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Contrary to defendant's argument, we believe that defendant's actions of forcing the victim to remove her clothes, ordering her to perform fellatio on him, and attempting to vaginally and anally penetrate her are actions which constitute an assault on the victim. See *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979); *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Moreover, with regard to the "credibility contest" between the victim and defendant, the trial court obviously did not believe defendant's claims that he did not assault the victim or that he desired consensual sex. Determinations based on the weight and credibility of evidence should not be disturbed on appeal. *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989). Finally, because an actual touching is not required for a defendant to be convicted of assault with intent to commit criminal sexual conduct involving penetration, the fact that the medical examination report in this case did not support the conclusion that the victim had been vaginally or anally penetrated is not conclusive on the

* Circuit judge, sitting on the Court of Appeals by assignment.

issue of defendant's guilt. *People v Snell*, 118 Mich App 750, 755; 325 NW2d 563 (1982). In sum, we find that sufficient evidence exists to support defendant's conviction.

Defendant next argues that he was denied the effective assistance of counsel because trial counsel failed to move to suppress the post-arrest statement defendant gave to the police. We disagree. An attorney for a defendant is not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Here, defendant's only basis for justifying the suppression of his statement is the claim that defendant was on medication at the time he gave the statement, however, we find no record evidence to support defendant's claim. Rather, after carefully reviewing the lower court record, we believe that defendant was read his Constitutional Rights and gave a voluntary statement. Therefore, trial counsel cannot be deemed ineffective for failing to make a motion to suppress defendant's statement.

Defendant next argues that the trial court failed to consider the defense of consent with regard to the crime of assault with intent to commit criminal sexual conduct. In a non-jury criminal case, the trial court's findings of fact will not be reversed unless this Court finds them to be clearly erroneous. MCR 2.613. Factual findings are sufficient as long as it appears that the trial court was aware of the issues in the case and correctly applied the law. *People v Legg*, 197 Mich App 131, 134-135; 494 NW2d 797 (1992). The court need not make specific findings of fact regarding each element of the crime. Moreover, a court's failure to find the facts does not require remand where it is manifest that the court was aware of the factual issue and resolved it, and further explication would not facilitate appellate review. *Id*.

Defendant is correct in his assertion that consent is a defense to the crime of assault with intent to commit criminal sexual conduct with a minor, even though it is not a defense to the crime of first-degree criminal sexual conduct with a minor. *People v Worrell*, 417 Mich 617, 621-623; 340 NW2d 612 (1983). In this case, it is apparent that the trial court found that the victim did not consent to any sexual contact with defendant for purposes of his first-degree criminal sexual conduct charge. However, the trial the court did not discuss in its findings of fact whether the victim consented to an assault by defendant. We believe that when the trial court stated in its findings of fact that consent was not a defense in this case, the trial court was not only disposing of consent as a meritorious defense for first-degree criminal sexual conduct, but also disposing of consent as a defense for all lesser included offenses, including assault with intent to commit criminal sexual conduct. Furthermore, our review of the lower court record reveals no evidence from which a reasonable trier of fact could conclude that the victim consented to an assault by defendant. Remand for additional fact finding is unnecessary. Accordingly, we find that a remand for further fact finding is not warranted in this case.

Lastly, defendant argues that the trial court misapplied the sentencing guidelines in this case. We disagree. Apparently, defendant is contending that the trial court should have given him a sentence of two to five years' imprisonment, which would have coincided with the revised recommended guidelines' range of two to five years. However, the guidelines' range only applies to a defendant's minimum sentence, and here we note that defendant's five year minimum sentence still fell within the corrected minimum guidelines range, and defendant does not challenge the proportionality of this sentence.

Furthermore, the record does not support defendant's contention that the trial court's sentence was based on incorrect guidelines. Accordingly, defendant's request for resentencing on this basis is denied.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Timothy P. Pickard