STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT TAYLOR ALEXANDER,

Defendant-Appellant.

UNPUBLISHED
December 17, 1996

No. 184590

Isabella Circuit Court
LC No. 94-007089-FH

Before: Fitzgerald, P.J., and Holbrook, Jr., and E.R. Post,* JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(c); MSA 28.788(4)(1)(c), and four counts of furnishing alcohol to a minor, MCL 436.33; MSA 18.1004. Thereafter, he was convicted at a bench trial of habitual offender, second offense. MCL 769.10; MSA 28.1082. Defendant was sentenced to serve concurrent prison terms of 7 to 22-1/2 years on the CSC III/habitual second conviction and ninety days on each furnishing alcohol to a minor conviction. He appeals as of right and we affirm defendant's convictions and sentences, but remand for correction of the presentence report.

While the first issue raised by defendant is somewhat unclear, we understand his essential argument to be that there was insufficient evidence to support his CSC III conviction and/or that his conviction was contrary to the great weight of the evidence. In reviewing the sufficiency of evidence, we view the evidence presented in a light most favorable to the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1993). The charged offense was predicated on defendant penetrating the complainant while she was physically helpless. MCL 750.520d(1); MSA 28.788(4)(1). The complainant's testimony that she fell asleep and that when she awoke she felt defendant's penis inside her provided sufficient evidence to support the CSC III conviction. MCL 750.520a(i); MSA 28.788(1)(i) (person who is asleep is physically helpless). An objection regarding the weight of the evidence can only be raised by a motion for new trial. *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988). Because defendant did not raise the question of whether his conviction was against the great weight of the evidence in a motion for new trial

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

below, he is not entitled to appellate review of that claim or to a remand for consideration of this question.

Next, defendant, an African-American, has not preserved his challenge to the apparently all Caucasian composition of his jury and the underlying jury venire[1] because he did not object to the jury array below. *People v Hubbard*, 217 Mich App 459, 465; ___ NW2d ___ (1996). However, even if this issue were preserved, he has not established error requiring reversal. A defendant may obtain relief where members of any racial group were purposely or systematically excluded from serving on the defendant's jury, *Powers v Ohio*, 499 US 400, 410-416; 111 S Ct 1364; 113 L Ed 2d 411 (1991); *Hubbard*, *supra* at 472-473. However, "a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.'" *Batson v Kentucky*, 476 US 79, 85-86; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Defendant has not indicated how members of any racial group may have been, to any extent, purposely or systematically excluded from the jury venire. Indeed, defendant himself cites Census Bureau statistics showing that over ninety-four percent of Isabella County's population consists of Caucasians. Thus, it is facially reasonable that without purposeful or systematic exclusion of any racial group, a particular jury venire in this county would consist entirely of Caucasians. Defendant is not entitled to relief simply because his jury apparently consisted entirely of Caucasians.

Defendant objected to the trial court's scoring of twenty-five points under Offense Variable (OV) 12 of the sentencing guidelines based on a finding that he committed one criminal sexual penetration apart from the one penetration that formed the basis of his CSC III conviction and now challenges that scoring on appeal. This Court will uphold the scoring of the sentencing guidelines if there is evidence to support the score. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). Based on the trial court's comments, it determined that defendant penetrated the complainant with his penis and also committed a sexual penetration by performing oral sex on her. Contrary to defendant's position, cunnilingus constitutes a sexual penetration regardless of whether there was an actual intrusion into a body cavity. *People v Legg*, 197 Mich App 131, 132-133; 494 NW2d 797 (1992); *People v Sommerville*, 100 Mich App 470, 480-481; 299 NW2d 387 (1980). As stated above, the complainant testified that defendant penetrated her with his penis. Based on defendant's own testimony and the testimony of another witness regarding statements made by defendant on the night of the incident, there was evidence to support the conclusion that he committed cunnilingus on the complainant. Accordingly, we uphold the trial court's scoring of OV 12 because it was supported by evidence.

Defendant next asserts that trial counsel denied him effective assistance of counsel by failing (1) to move for a directed verdict on the CSC III charge; (2) to challenge the jury venire; and (3) to move for a new trial on the CSC III charge based on the great weight of the evidence. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 302-303, 314; 521 NW2d 797 (1994).

As discussed above, there was sufficient evidence to support the CSC III conviction. Thus, counsel did not act unreasonably by failing to move for a directed verdict on that charge. Defendant has

not made a significant showing that members of any racial group were purposefully or systematically excluded from the jury venire. Accordingly, he has not shown that counsel made a mistake by failing to challenge the venire. Based on comments by the trial court at the sentencing hearing that it disbelieved defendant's denials regarding the incident, there is no reasonable probability that it would have granted a motion for new trial based on the great weight of the evidence. Although trial counsel's failure to move for a new trial on this basis precluded appellate review of this question, we conclude that there is no reasonable probability that this Court would have found a denial of such a motion to be an abuse of discretion. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). There were serious reasons to question the account of the incident provided in defendant's testimony. Aspects of defendant's testimony contradicted testimony from a state police trooper who had questioned defendant and testimony from other witnesses besides the complainant. Accordingly, trial counsel was not ineffective in failing to move for a new trial based on the great weight of the evidence.

Finally, we agree with defendant that the presentence investigation report for this case should be corrected to include changes ordered by the trial court at the sentencing hearing. The trial court ruled that two corrections would be made to the "Investigator's Description of the Offense" section of the presentence report. The first correction would have changed a sentence on page three of the report that provided that defendant had "indicated to the victim" certain sexually oriented statements to provide that defendant had merely "said" these remarks (without specifying that they were directed at anyone in particular). The second correction directed that a sentence on page four that indicated that defendant had "yanked" a cord from a telephone be altered to provide that he "disconnected" the telephone cord. Apparently through some type of oversight, these corrections were not made. We remand to the trial court with instructions to have these corrections made to the presentence report and to forward a copy of the corrected report to the Department of Corrections. MCR 6.425(D)(3); *People v Martinez (After Remand)*, 210 Mich App 199, 202-203; 532 NW2d 863 (1995).

Defendant's convictions and sentences are affirmed, but we remand this matter to the trial court for correction of the presentence report in accordance with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Edward R. Post

[1] Although our analysis accepts arguendo defendant's assertion that the jury venire from which his jury was selected was composed entirely of Caucasians, he has provided no record evidence of this claim.