STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ALAN SWEITZER, JR.,

Defendant-Appellant.

UNPUBLISHED
June 19, 1998

No. 200657
Washtenaw Circuit Court
LC No. 96-006072-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of criminal sexual conduct in the fourth degree, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a). He was sentenced to one year of probation and was ordered to pay $320 in court costs, $500 in attorney fees, $360 in supervision fees, and a $40 victim's rights fee. He appeals as of right and we affirm.

Defendant first argues that the trial court abused its discretion in refusing his request to instruct the jury on the lesser included offense of assault and battery. We disagree.

There is a five-part test to determine whether an instruction should be given regarding a lesser included misdemeanor; as stated by this Court:

> A court must instruct concerning a lesser included misdemeanor where (1) the defendant makes a proper request; (2) there is an "inherent relationship" between the greater and lesser offense; (3) the jury rationally could find the defendant innocent of the greater and guilty of the lesser offense; (4) the defendant has adequate notice; and (5) no undue confusion or other injustice would result. [*People v Rollins*, 207 Mich App 465, 468; 525 NW2d 484 (1994)].

Although the trial court in this case denied the instruction based on the evidence, we believe that failure to meet the second prong of the test would have been a more appropriate rationale for denying the request.

This Court recently addressed whether an instruction on assault was appropriate in a case in which the defendant was charged with criminal sexual conduct. In *People v Corbiere*, 220 Mich App 260, 262-264; 559 NW2d 666 (1996), this Court held that an instruction concerning the lesser charge of domestic assault was inappropriate where the defendant was charged with third-degree criminal sexual conduct, based on the "inherent relationship" requirement of the test for instructing on lesser misdemeanors. This Court, quoting an earlier decision by another panel, emphasized the intent of the Legislature as follows:

> "*The Legislature has gone to great lengths to carve out sexual assaults from other types of assaults.* Society views sexual assaults as particularly heinous and the Legislature has determined punishments for the various types of criminal sexual conduct. There is a specific 'assault' crime associated with criminal sexual conduct. [*Id.*, 264-265, quoting *People v Payne*, 90 Mich App 713, 720; 282 NW2d 456 (1979), emphasis in original.]

This Court further reasoned "that the societal interests furthered by the criminal sexual conduct statutes are distinct from the interests associated with statutes criminalizing assaults in general." *Id*. at 265.

Following the rule in *Corbiere, supra*, an instruction on assault and battery was not appropriate where defendant was charged with fourth-degree criminal sexual conduct. The trial court did not abuse its discretion in denying such an instruction.

Next, defendant argues that the evidence was insufficient to sustain his conviction. We disagree. When reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and decide whether the evidence is sufficient to justify a reasonable trier of fact in finding that the elements were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997).

In this case, evidence was presented that defendant came up from behind the complainant and grabbed and squeezed her buttocks to the extent of lifting her off of her heels. Testimony was also presented that defendant admitted that the touching was intentional. Although defendant argues that the complainant testified that she "did not know why" defendant grabbed her, the question of why he acted does not indicate that his actions were not intentional. Defendant's intent can be inferred from the circumstances. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Where evidence was presented that defendant previously commented on the complainant's negligee and that he grabbed her buttocks with enough force to lift her heels, the jury could reasonably infer that such a touching was intentional.

Next, defendant challenges whether the touching was for the purpose of sexual arousal or gratification. Defendant admits that the jury could infer from the evidence that the touching occurred after his comments regarding the complainant's negligee that the touching was for sexual arousal or gratification, but argues that his comments were inadmissible under MRE 404(b). Defendant's argument regarding the inadmissibility of evidence is waived, first because he did not object to the admission of evidence below, *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246

(1987), and second because he did not present the issue in his questions presented on appeal, *Lansing v Harstuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995).

Defendant also challenges the element of force or coercion. He argues that the force or coercion element had to have been proved by concealment or surprise, as indicated in MCL 750.520e(1)(b)(*v*); MSA 28.788(5)(1)(b)(*v*). Defendant argues that, "As all persons who are touched without their permission will likely be surprised, this cannot satisfy the 'force or coercion' element." However, the statute states that force or coercion can be shown where the actor "*achieves* the sexual contact through concealment or surprise." MCL 750e(1)(b)(*v*); MSA 28.788(5)(1)(b)(*v*) (emphasis added). That is what was shown in this case where the complainant testified that defendant came up behind her when she was not looking and grabbed her buttocks. In other words, defendant was only able to grab her buttocks because he caught her by surprise; therefore, the force or coercion element of the crime was satisfied by the complainant's testimony.

Further, the facts of this case are substantially similar to the facts in *People v Premo*, 213 Mich App 406; 540 NW2d 715 (1995), in which this Court held that the force or coercion element was satisfied without showing concealment or surprise. In *Premo*, the facts indicated that the defendant pinched the buttocks of three victims, but did not indicate whether the defendant approached the victims from behind or surprised them in some other way. *Id*. at 407. This Court held, under the current statutory section MCL 750.520e(1)(b)(*i*); MSA 28.788(5)(1)(b)(*i*), (previously MCL 750.520b(1)(f)(i); MSA 28.788(2)(1)(f)(i)) that the defendant's conduct of pinching the victims' buttocks satisfied the force element "because the act of pinching requires 'the actual application of physical force.'" *Premo, supra* at 408-409. In addition, as stated by this Court, "the definition of the term 'force' includes, among other things, 'strength or power exerted upon an object.'" *Id.*, at 409, quoting *The Random House College Dictionary: Revised Edition*, 515. Similarly, in the present case, where the complainant testified that defendant "grabbed" her buttocks and in the same motion lifted her up off of her heels, such grabbing and lifting could not have been accomplished without defendant asserting his strength upon the complainant's buttocks. Therefore, following the ruling in *Premo*, the force or coercion element was satisfied.

In sum, the evidence presented in this case, when taken in the light most favorable to the prosecution, was sufficient to prove all of the elements of fourth-degree criminal sexual conduct beyond a reasonable doubt.

Next, defendant argues that he was denied the effective assistance of counsel by his trial counsel's failure to adequately prepare for trial, failure to call corroborating witnesses, failure to prepare defendant for testifying, and failure to inform the court at sentencing that defendant suffered from seizures and stress from the death of a roommate. No evidentiary hearing was held regarding this issue, therefore, this Court's review is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). This Court must decide whether counsel's performance was deficient, measured against prevailing professional norms and whether there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's performance

with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvan*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

On the limited record available, there is nothing to indicate that defense counsel's performance fell below an objective standard of reasonableness. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *In re Oakland County Prosecutor*, 191 Mich App 113, 120; 477 NW2d 455 (1991).

Defendant next argues that the trial court violated proportionality in imposing his sentence of one year of probation plus court costs and fees. Because defendant has already served his sentence and no relief could be granted, we need not address this issue. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Finally, defendant argues that he was denied a fair trial as the result of prosecutorial misconduct. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). However, appellate review is precluded if the defendant fails to object, unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Issues of prosecutorial misconduct must be determined on a case by case basis, reviewing the prosecutor's comments in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

Defendant first argues that the prosecutor erred in closing argument by referring, against the court's orders, to defendant's employee termination proceeding. Defendant does not cite to the record and the only ruling regarding the termination proceeding found in the record was the court's instruction to defense counsel that questions regarding the termination proceeding were permissible as long as they did not involve matters of hearsay. There is no indication that the prosecutor went beyond the scope of evidence admitted regarding the termination proceeding.

Defendant next argues that the prosecutor committed error during jury voir dire when she used the word "rape." However, the prosecutor's statements must be read in context. *LeGrone*, *supra*, at 82. In this instance, the prosecutor's use of the term "rape" immediately followed a line of questions in which she asked whether any of the potential jurors had been personally accused or had a friend or family member who had been accused of a sex crime; one juror responded that two of his cousins "were raped." The prosecutor asked whether the juror had discussed the rapes with his cousins. The prosecutor's focus then turned to the issue of the victim and defendant previously being acquaintances through working together and whether the jurors' opinions would be affected by that situation. Read in this context, the prosecutor's reference to rape cases, while it may have been erroneous, does not appear to have prejudiced defendant.

Defendant next argues that the prosecutor erroneously vouched for the credibility of her witnesses during her closing argument. Defendant failed to object to the prosecutor's statements. Therefore, appellate review is precluded unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *Stanaway*, *supra* at 687.

Although a prosecutor may not vouch for the credibility of witnesses to the effect that he or she has some special knowledge that the witness is testifying truthfully, *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995), a prosecutor may argue from the facts whether the defendant or a witness is worthy of belief, *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In this case, the prosecutor was arguing that, because the prosecution's witnesses had no contact with the complainant and she was no longer employed at the same place, these witnesses had no reason to lie; conversely, because defendant was facing criminal charges, he may have had some motivation to lie. These statements did not reveal any elements of trustworthiness that were not already available to the jury and do not rise to the level of error requiring reversal.

Defendant also argues that the prosecutor erred by referencing matters not in the record. When a prosecutor states in opening argument that evidence will be presented, which later is not presented, reversal is not required if the prosecutor acted in good faith. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). After reviewing the record, there is no indication that the prosecutor acted in bad faith. The only statement of fact that the prosecutor made that was not later brought in as evidence was that the complainant was bending over just before defendant allegedly grabbed her buttocks. The complainant testified that she did not recall being bent over and the prosecutor did not repeat that statement throughout the rest of the trial. No miscarriage of justice occurred which necessitates our further review of this issue.

> Defendant's last complaint in this issue is that the prosecution in this case "illegally delegated the prosecutorial function to a non-attorney." His only argument that he was denied a fair trial as a result of the use of a student prosecutor is that it deprived him "of an opportunity to have a well-trained, experienced prosecuting attorney exercise the discretion that is inherent in the office," and thus deprived defendant of due process. MCR 8.120(C) governs the use of a student prosecuting attorney.

At the beginning of this case, the prosecutor informed the court that a student would be handling the case under the prosecutor's supervision, as required by MCR 8.120(A). Defendant indicated that he had no objection. The prosecutor was present throughout the case and there is no indication in the record, or argument by defendant on appeal, that the prosecutor or the student acted outside the scope of MCR 8.120. Although defendant argues that he was over-charged in this case, there is no indication that the student was the person responsible for charging defendant. Further, as indicated above, even if the prosecutor was heavy-handed in choosing to pursue criminal sexual conduct charges against defendant, the evidence presented was legally sufficient to support the crime charged.

Defendant also alleges that the student's inexperience deprived him of due process. However, he does not expand that argument. Based on the record, defendant fails to show how the use of a student prosecutor denied him a fair trial.

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey