STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL KIT BOYCE,

Defendant-Appellant.

UNPUBLISHED
October 6, 1998

No. 198584
Ottawa Circuit Court
LC No. 96-019734 FC

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

PER CURIAM.

Defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and acquitted of the charge of assault with intent to commit sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). Defendant was sentenced to five to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that the trial court improperly denied his motion for a new trial because the verdict was against the great weight of the evidence. We disagree. In reviewing a claim that the verdict was against the great weight of the evidence, this Court reviews the record to determine if the trial court abused its discretion in denying defendant's motion for a new trial. *People v Nichols*, 69 Mich App 357, 362; 244 NW2d 335 (1976). A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990), aff'd 438 Mich 347; 475 NW2d 30 (1991). Such motions are not favored and should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). The jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 210; 457 NW2d 42 (1990). Further, if there is conflicting evidence presented at trial, the question of credibility ordinarily should be left for the factfinder. *Lemmon, supra* at 636-637.

In this case, defendant points to a number of inconsistencies in testimony that he claims result in a finding that the witnesses were patently incredible and that a reasonable jury could not believe them. However, each of the instances raised by defendant is a minor, immaterial instance of a mistake or mere inconsistency that was fully explored during defendant's cross-examination of these witnesses. Because it has always been and continues to be the rule that "[a]s the trier of fact, the jury is the final judge of credibility," *People v Johnson*, 397 Mich 686, 687; 246 NW2d 836 (1976), the trial court properly allowed the jury verdict to stand. Competent evidence existed to support the jury's verdict.

Next, defendant argues that the court erred in denying his motion for directed verdict with respect to the charge of assault with intent to commit sexual penetration. We disagree. When reviewing a trial court's ruling on a motion for directed verdict, this Court tests the validity of the motion by the same standard as the trial court. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). The trial court, when ruling on a motion for a directed verdict, must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *Daniels, supra*. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *Jolly, supra*. The court may not determine the weight of the evidence or the credibility of the witnesses, regardless of how inconsistent or vague the testimony was. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Rather, questions regarding the credibility of witnesses are to be left to the trier of fact. *Lemmon, supra* at 637; *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991).

Defendant argues solely that the evidence with respect to Count II, assault with intent to commit criminal sexual conduct involving penetration, was insufficient and that the court should have directed a verdict in his favor with respect to that count. The elements of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1); MSA 28.788(7)(1), are (1) that defendant committed an assault, (2) involving the use of force, coercion, or other aggravating circumstance, and (3) with the specific intent involving an act of penetration with some sexually improper purpose. *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982).

Defendant is correct in asserting that the only testimony from the victim regarding Count II was that after defendant penetrated her vaginally, he then forcefully turned her on her stomach and she felt his penis against the skin of her bottom. She stated that she did not feel a thrusting or movement, but she felt his penis and thought he would attempt to have anal sex with her. Defendant also concedes that, at most, this evidence might support a theory that he was attempting to penetrate her vaginally from a rear position.

First, this evidence, in the context of the evidence that defendant was in the process of brutally penetrating the victim from the front, is certainly sufficient to prove that there was an assault in that defendant forcefully turned the victim from her back to her stomach against her will. Second, in the context of the evidence, the evidence is also sufficient to create an inference that defendant intended to penetrate her a second time, either vaginally or anally. Because the statute and the information only

specify that the act involve some form of sexual penetration, either theory would be sufficient to withstand a directed verdict under these circumstances.

Defendant next contends that because the verdict was against the great weight of the evidence and because the court erred in denying defendant's motion for a directed verdict, there was a miscarriage of justice by the trial court's failure to grant a new trial. Defendant's argument is simply a reiteration of defendant's arguments herein, and given our conclusion that the trial court did not abuse its discretion in denying defendant's motion for a new trial because the verdict was against the great weight of the evidence or in denying defendant's motion for a directed verdict, there can be no miscarriage of justice.

The next issue raised by defendant is whether the trial court erred in failing to instruct the jury on the necessity of unanimity of the verdict with regard to the type of personal injury involved and by instructing the jury that the victim's testimony need not be corroborated. However, defendant failed to object to the jury instructions given at trial, and there being no manifest injustice, this issue is therefore waived. *People v Flowers*, 222 Mich App 732, 735; 565 NW2d 12 (1997). Further, this Court recently rejected both defendant's arguments. *People v McFall*, 224 Mich App 403, 412-414; 569 NW2d 828 (1997); *People v Asevedo*, 217 Mich App 393; 551 NW2d 478 (1996).

Next, defendant argues that the testimony from the victim's personal gynecologist that her examination led her to the opinion that force was used to accomplish this sexual penetration should have been excluded because this witness was not properly qualified as an expert and her testimony was based on the history given to her by the victim. However, defendant failed to object to this testimony or her qualification as an expert, and thus waived this issue for review. *People v Kilbourn*, 454 Mich 677, 684-685; 563 NW2d 669 (1997).

Finally, defendant argues that the testimony from the mental health counselor regarding the stages of grieving experienced by victims of trauma was error requiring reversal because it was actually testimony about rape trauma syndrome. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

The court did not abuse its discretion in admitting this evidence. The counselor testified that she counseled the victim at the request of the victim's mother and that the victim disclosed what happened to her and how she felt about it. The counselor described the victim's symptoms as difficulty sleeping, concentrating, and performing daily activities and feelings of shame and guilt. She testified that she recommended that the victim continue to see her and work through the stages of recovery, which were the grief stages, including shock, denial, depression (which was what the victim was experiencing as of their first meeting), anger, and resolution. When the prosecution asked the counselor whether she saw the victim exhibit those stages during their sessions, defendant objected and the objection was sustained.

None of this testimony rises to a level of impermissible expert testimony that the assault actually occurred. Our Supreme Court in *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995), amended 450 Mich 1212; 548 NW2d 625 (1995), held that an expert may testify regarding

typical and relevant symptoms of sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim and regarding the consistencies between the behavior of the victim and other sexually abused victims to rebut an attack on the victim's credibility. The counselor's testimony was nothing more than a description of the stages of grief that individuals undergo when recovering from a traumatic event, and there was no testimony that the victim even exhibited these stages, given defendant's timely objection. Thus, this testimony was within the limitations set forth in *Peterson, supra*, and was not improper. Moreover, her testimony was not even specific to any type of "syndrome" associated with criminal sexual conduct, as it was general information about grief recovery. Accordingly, the analysis need not even reach this stage of viewing it in the context of rape trauma testimony. The counselor did not tie any conclusions of whether this sexual assault actually occurred to her general, informational testimony, and the counselor followed her instructions from the prosecutor to avoid testifying about specific facts of the victim's background. Further, the testimony was presented for the purpose of demonstrating an element of the crime – personal injury, i.e. mental anguish. See MCL 750.520a(j); MSA 28.788(1)(j) and MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Consequently, defendant was not prejudiced by this testimony, and he is not entitled to a new trial based on this evidence.

We affirm.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Robert P. Young, Jr.