

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER P. McELRATH,

Defendant-Appellant.

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UNPUBLISHED

April 25, 2000

No. 212112

Wayne Circuit Court

Criminal Division

LC No. 97-006641

Before: Kelly, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

At the conclusion of a nonjury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(d); MSA 28.788(2)(1)(d), for which he was sentenced to two concurrent terms of twenty-five to fifty years in prison. He appeals as of right. We affirm.

Defendant first contends that the admission of his nontestifying codefendant's statement in their joint bench trial deprived him of his constitutional right of confrontation under *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). We disagree. The codefendant's statement was not facially incriminating, and the *Bruton* rule does not apply to the introduction of a nontestifying codefendant's statement in a joint bench trial *People v Butler*, 193 Mich App 63, 65-66; 483 NW2d 430 (1992).

Defendant next challenges the sufficiency of the evidence. Although he admits the evidence was sufficient to establish each element of the crimes beyond a reasonable doubt, he contends that the witnesses' identification testimony was so inconsistent that the court erred in concluding he committed the crimes. We disagree. The complainant positively identified defendant at trial. Other witnesses identified defendant at the scene, although their memories had faded to the extent they were unable to identify him at trial. Such evidence, if believed, was sufficient to establish beyond a reasonable doubt that defendant was one of the perpetrators. The discrepancies in the identification testimony simply created issues of fact and credibility for the trier of fact to resolve. *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972); *People v Price*, 17 Mich App 605, 606; 170 NW2d 275 (1969); *People v Richard L Smith*, 15 Mich App 505, 507; 166 NW2d 610 (1969).

Defendant next contends that the case should be remanded for an evidentiary hearing on his claim that counsel was ineffective for failing to move to suppress the complainant's in-court identification testimony. First, defendant failed to follow the proper procedure for requesting a remand, MCR 7.211(C)(1)(a). Second, he has failed to establish any basis for concluding the complainant's in-court testimony was inadmissible, given that she did not positively identify defendant at the pretrial photographic lineup. *People v Manuel Johnson*, 58 Mich App 347, 351-352; 227 NW2d 337 (1975).

Finally, defendant argues he was denied the effective assistance of counsel because he and the codefendant were represented by the same attorney at their joint trial. We disagree. At trial, the court followed the procedure outlined in MCR 6.005(F), the purpose of which is to prevent ineffective assistance of counsel from arising from joint representation. *People v Lafay*, 182 Mich App 528, 531; 452 NW2d 852 (1990). In addition, there were no inconsistencies in the defendants' theories of the case or any antagonism, real or theoretical, sufficient to create an actual conflict of interest because both defendants presented the same defense. See *People v Wakeford*, 418 Mich 95, 119; 341 NW2d 68 (1983). Although the codefendant's statement conflicted slightly with that of defendant, their statements were consistent regarding the crux of their defense. Moreover, the codefendant's statement was not admitted against defendant, was not considered by the trial court in its findings, and did not violate the *Bruton* rule as noted above. Therefore, defendant was not deprived of the effective assistance of counsel due to joint representation.

Affirmed.

/s/ Michael J. Kelly  
/s/ Donald E. Holbrook, Jr.  
/s/ Richard Allen Griffin