STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JAMES FRANKLIN ROBERSON,

Defendant-Appellant.

UNPUBLISHED
February 15, 2002

No. 223791
Midland Circuit Court
LC No. 99-009184-FH

Before: Bandstra, C.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Defendant challenges his jury convictions of first-degree home invasion, MCL 750.110a(2), second-degree criminal sexual conduct, MCL 750.520c(1)(e), and assault with intent to commit sexual penetration, MCL 750.520g(1). We affirm.

Defendant first contends that the trial court erred in allowing a witness to identify defendant's voice as unique, arguing that his being required to state his name, address, and date of birth was self-incriminatory and in violation of the Fifth Amendment. US Const, Am V. We disagree.

Generally, this Court reviews such matters of constitutional law de novo. See *People v Smith*, 243 Mich App 657, 681-682; 625 NW2d 46 (2000). However, defendant's failure to affirmatively raise the privilege against self-incrimination and his acknowledgement that the statement itself was not of a testimonial nature – thus raising no Fifth Amendment issues – constitutes waiver extinguishing any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *People v Hooks*, 101 Mich App 673, 680; 300 NW2d 677 (1980). Absent a demonstration of ineffective assistance of counsel, waiver may be effected by counsel, including decisions on "what evidentiary objection to raise, . . . and what agreements to conclude regarding the admission of evidence . . . ." *Carter*, *supra* at 218, quoting *New York v Hill*, 528 US 110, 114; 120 S Ct 659; 145 L Ed 2d 560 (2000).

Defendant does not argue that his counsel was ineffective in this regard and any such argument would be futile. Our courts have long recognized the distinction between compelled self-incrimination through a testimonial statement and the mere display of a defendant's person or unique identifying characteristic. *People v Placido*, 310 Mich 404, 408; 17 NW2d 230 (1945). See also *People v Collins*, 16 Mich App 667, 668-670; 168 NW2d 624 (1969); *People v Heading*, 39 Mich App 126, 131; 197 NW2d 325 (1972). Notwithstanding the fact that the Fifth

Amendment privilege is often said to provide a "right to remain silent," this distinction applies to allow compelled speaking for the sole purpose of voice identification such as occurred here. See *United States v Wade*, 388 US 218, 222-223; 87 S Ct 1926; 18 L Ed 2d 1149 (1967) (requiring a defendant to speak at a lineup "was not compulsion to other statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt."); see also *People v Schrader*, 10 Mich App 211, 214; 159 NW2d 147 (1968). Accordingly, defendant is entitled to no relief on this claimed error.

Defendant also challenges the sufficiency of the evidence to support his convictions of second-degree criminal sexual conduct and assault with intent to commit sexual penetration, arguing that there was insufficient evidence to support a finding that he was armed with a weapon, or that he committed the assault with the intent to penetrate. Again, we disagree.

When determining whether sufficient evidence has been presented to sustain a conviction, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

Defendant was convicted of second-degree criminal sexual conduct under MCL 750.520c(1)(e), which requires a showing that "the actor [was] armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon." Contrary to defendant's assertions, the victim need not actually view a weapon; it is sufficient, as the statute states, that the victim reasonably believe a weapon was used by an assailant because of the way an article was used during the crime. See *People v Hurst*, 155 Mich App 573, 576; 400 NW2d 685 (1986). Here, the victim testified that her assailant told her repeatedly that he had a knife and that he would cut her if she resisted. Consistent with that account, the victim felt "something metal" in her assailant's hand. The victim said that she never saw a knife but she believed that her assailant had a knife during the attack. When arrested, defendant was found in possession of a knife that was described as always in his possession. This evidence when viewed in the light most favorable to the prosecution was sufficient to allow a rational trier of fact to find beyond a reasonable doubt that defendant committed the charged crime while armed. *Herndon*, *supra* at 415.

The evidence in support of defendant's assault with intent to commit sexual penetration was similarly sufficient. Conviction of assault with the intent to penetrate requires that the defendant "must have intended an act involving some sexually improper intent or purpose." *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982). There is no requirement that the sexual act be started or completed. *Id*. at 755. Moreover, under MCL 750.520a(l), sexual penetration by "any part" of an assailant's body is criminal, including fingers. *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995).

As a general rule, intent is a question of fact that "may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows." *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974). An assailant's actions that include the touching of genitalia and an attempt to prepare the victim for a sexual act is sufficient to support an inference of intent to penetrate. See *People v McFall*, 224 Mich App 403, 406-407; 569 NW2d 828 (1997). Here, the victim testified that defendant

touched her genitalia and told her to "just lay here and like what's going on." This evidence, when viewed in the light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt that defendant committed the assault with the intent to penetrate. *Herndon*, *supra* at 415.

We affirm.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage

I concur in result only.

/s/ E. Thomas Fitzgerald