STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE PERSON,

Defendant-Appellant.

UNPUBLISHED
June 7, 2002

No. 232243
Wayne Circuit Court
LC No. 00-004624

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

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (person under thirteen). The trial court sentenced him to eleven to twenty-five years' imprisonment. Defendant appeals as of right. We affirm.

I. Basic Facts and Procedural History

The incidents giving rise to defendant's prosecution for first-degree criminal sexual conduct began when the victim was four years old and continued until the victim was six years of age. The first incident occurred at the victim's aunt's home when defendant put his "wee wee between [her] butt . . . and little private." The victim stated that defendant repeated this conduct more than five times but less than ten. In addition, the victim also stated that defendant put his "wee wee" in "[her] private part" more than five times but less than ten. According to the victim, sometimes she had her underwear on and sometimes she had them off. However, on one occasion, the victim testified that defendant reached up her dress, pulled her underwear aside so that he could place his penis in between the victim's buttocks and vaginal area.

After defendant's conduct came to light, the victim had a physical examination which revealed no physical evidence of sexual assault, that being no trauma to the anal or vaginal opening. The physical examination also revealed that the victim's hymen was intact and that she did not have any sexually transmitted diseases. The jury found defendant guilty on all three counts of first-degree criminal sexual conduct.

II. Sufficiency of the Evidence

First, defendant argues that there was insufficient evidence of penetration to convict him of first-degree criminal sexual conduct because the victim's testimony was "uncertain." We

disagree. This Court reviews de novo claims pertaining to the sufficiency of the evidence. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In a criminal case, the test for determining the sufficiency of evidence is "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

According to MCL 705.520a(m), among other things, "sexual penetration" includes "any . . . intrusion, *however slight*, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." [Emphasis added.] In the instant case, the victim consistently testified that defendant placed his penis in between her buttocks and genitalia more than five times. For purposes of the statute, the labia are included in the "genital openings" of a female. *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992). Thus, even if defendant's penis only entered the victim's labia, that is an entry into the "genital openings" of the victim sufficient to establish penetration for purposes of first-degree criminal sexual conduct. See *Id*. Similarly, the act of placing one's penis in between another's buttocks in the area of the anal opening is indeed an act of sufficient physical invasiveness to constitute "sexual penetration." See *People v Hammons* 210 Mich App 554, 557; 534 NW2d 183 (1995) (stating that the defendant committed "an act of sufficient physical invasiveness to constitute `sexual penetration'" for purposes of criminal sexual conduct, first-degree where the victim's underwear covered the vaginal opening but where the defendant's finger forced her underwear "inward.")

This case turns on the victim's credibility. The jury accepted the victim's rendition of the facts and by doing so thus determined that defendant engaged in sexual penetration with the victim and that the victim was under the age of thirteen. MCL 750.520b(1)(a). Considering the evidence presented in a light most favorable to the prosecution, we find that the evidence set forth would warrant a reasonable juror in finding defendant's guilt beyond a reasonable doubt. We find no error in this regard.

III. Prosecutorial Misconduct

Next, defendant contends that the prosecutor mischaracterized the evidence during his closing argument by suggesting that defendant placed his penis between the victim's labia and masturbated where such a claim was not supported by any evidence submitted during trial. We disagree.

In closing argument, the prosecutor stated:

> I submit to you that what [defendant] was doing was placing his penis between the labia majora and masturbating. [Defendant] is a man who would know that if you stick your penis inside of the child the way that you have sex with a woman, that is going to leave evidence. She's going to bleed. She's going to cry. She's going to be injured. You cannot hide that. So what [defendant] did was he placed his penis in the opening and he just masturbated.

Defendant did not object. In rebuttal, and again without objection, the prosecutor revisited this theory and stated, "men who have had the opportunity to understand that bodies of women, understand that placing the penis between the labia, which are the lips, is not going to

cause any injury." The jury found defendant guilty on all three counts of first-degree criminal sexual conduct.

This Court reviews de novo claims for prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). We consider alleged prosecutorial misconduct on a case by case basis. Incumbent upon this Court is to examine the remarks in context and determine whether the prosecutor's commentary deprived defendant of a fair trial by an impartial decision maker. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). As an initial matter, we observe that defendant did not object to the statements which defendant now claims constitute prosecutorial impropriety. Thus, we review the issue for plain error. *People v Carines*, 460 Mich 750, 752-753, 764; 597 N.W.2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 N.W.2d 370 (2000). To avoid forfeiture, defendant must demonstrate plain error that affected the outcome of the proceedings. *Aldrich*, *supra* at 110.

Defendant argues that it was improper for the prosecutor to suggest that defendant was "a man who would know" that inserting his penis into a child's vagina would necessarily leave evidence of sexual trauma. And, to avoid leaving such evidence, defendant merely placed his penis in between the victim's labia and masturbated. Defendant takes exception to these comments because they assume facts not placed into evidence at any time during the course of the proceedings. Defendant therefore contends that the prosecutor distorted the record to secure defendant's conviction. We disagree.

A review of the prosecutor's statements reveals that the prosecutor was merely positing how defendant could have committed the act without leaving any signs of physical trauma. Toward that end, the prosecutor was attempting to reconcile all of the evidence presented. Moreover, the record reveals that not only did counsel for defendant fail to lodge an objection, counsel actually *responded* to the prosecutor's commentary. During defendant's closing argument, counsel pointed out that there was no evidence which would suggest that defendant ever masturbated and that the prosecutor's unsubstantiated comments in that regard did not constitute evidence.

Simply put, there is nothing in the record upon which to discern the requisite plain error that affected the outcome of defendant's trial necessary to invade the jury's province and overturn defendant's conviction. Similarly, there is nothing on the current record to suggest that a timely objection and an immediate curative instruction rendered by the trial court would not have purged any prejudicial effect cast by the prosecutor's statements. *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999).

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly