

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH MORALES,

Defendant-Appellant.

UNPUBLISHED

June 28, 2002

No. 230683

Oakland Circuit Court

LC No. 99-169490-FC

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

PER CURIAM.

After a second trial¹, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under thirteen years of age), and four counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under thirteen years of age). Defendant was sentenced to fourteen to fifty years' imprisonment for each of his first-degree criminal sexual conduct convictions and to five to fifteen years' imprisonment for each of his second-degree criminal sexual conduct convictions. We affirm.

Defendant first argues that the trial court erred in dismissing his motion to disqualify the prosecutor without first conducting a hearing. We disagree.

Defendant brought a motion to dismiss the charges, or alternatively, to disqualify the prosecutor's office based on alleged ex parte communications between the prosecutor and the jurors from the first trial. Defendant failed to request an evidentiary hearing at the trial court level; therefore, this issue is not properly preserved for appellate review. "As a general rule, issues not raised before and considered by the lower court are not properly preserved for appellate review." *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Accordingly, this issue will not be reviewed absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Defendant argues that the trial court should have held an evidentiary hearing to determine what, if anything, was said during the conversation between the prosecutor and the jurors from

¹ Defendant's first trial resulted in a hung jury.

the first trial, which defendant alleges was an improper ex parte communication under MRPC 3.5(b).² However, by defendant's own admission, the prosecutor was permitted by the trial court to speak to the first jury after the trial court declared a hung jury and dismissed the jurors. "Once the jury has been officially discharged . . . the jury's legal duties cease to exist; it no longer functions as a unit charged to perform a solemn task but rather as [twelve] unsworn members of the community; its relationship to the case has been terminated. . . ." *People v Henry*, 248 Mich App 313, 319; 639 NW2d 285 (2001), quoting *People v Rushin*, 37 Mich App 391; 194 NW2d 718 (1971). Therefore, by definition, the prosecutor did not speak to the jurors concerning a "pending matter" under the purview of MRPC 3.5(b).

Defendant seems to argue that the prosecutor received some sort of tactical advantage based on these communications with the jurors that participated the first trial, because the prosecutor brought a motion to limit the number of defense character witnesses at the second trial. At the second trial, defendant was permitted to present only five of the eight original character witnesses from the first trial. A review of the testimony of the three witnesses absent from the second trial reveals that the testimony of each witness was cumulative to the testimony of the five character witnesses who testified at the second trial. Thus, defendant fails to demonstrate a plain error affecting his substantial rights.

Defendant next argues that the trial court abused its discretion when it limited defendant to the presentation of five character witnesses. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v McCray*, 245 Mich App 631, 634-635; 630 NW2d 633 (2001), citing *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). This Court "will find an abuse of discretion only if an unprejudiced person, considering the facts upon which the trial court made its decision, would conclude that there was no justification for the ruling made." *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993).

Defendant agrees that the trial court had discretion to limit the number of character witnesses; however, defendant argues that the trial court failed to exercise its discretion in limiting the number of character witnesses. We disagree. In *People v Nemer*, 218 Mich 163, 167-168; 187 NW 315 (1922), the Michigan Supreme Court held that the trial court in that case did not abuse its discretion when it limited the number of defense character witnesses to six. In *Nemer*, the Court noted the following:

The members of this [C]ourt well remember that it has been the universal practice in the courts of this State to limit the number of character witnesses. The practice has been so universal and of such long standing that it has not been questioned until this case. An examination of the authorities discloses that the practice is

² MRPC 3.5(b) provides that "[a] lawyer shall not . . . communicate ex parte with [a judge, juror, prospective juror, or other official] concerning a pending matter, except as permitted by law" Defendant also relied upon MCJC 3(A)(4), which provides:

A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding"

general. The power to limit was in the trial judge. We do not think he abused it in the instant case. [*Id.* at 169.]

Here, the prosecution brought a motion in limine to limit the number of character witnesses defendant could present at trial. The prosecution argued that, at the first trial, defendant called sixteen witnesses who testified about defendant's character, and argued that the witnesses were cumulative, time consuming, and "not felt to be helpful by any of the jurors in the first trial." The prosecution also argued that the trial court had the discretion to exclude evidence, even if it was relevant, if the presentation of such evidence causes undue delay, wastes time, or is a needless presentation of cumulative evidence.

Considering the facts before the trial court when it made its decision, it cannot be said that an unprejudiced person would conclude that there was no justification for the trial court's ruling. The prosecution gave several reasons regarding why the trial court should limit the number of defense character witnesses, while defendant offered nothing substantively regarding why he should be allowed to present all eight of the character witnesses. Therefore, the trial court did not abuse its discretion in limiting the number of defense character witnesses.

Next, defendant contends that the evidence presented at trial was insufficient to sustain his convictions for first-degree criminal sexual conduct in relation to the charges based on acts of cunnilingus. Again, we disagree. "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999).

A defendant is guilty of first-degree criminal sexual conduct if the defendant engages in sexual penetration with another person and one of several circumstances exists. Relevant to the instant case is the circumstance requiring the sexual penetration of a person who is under thirteen years of age. MCL 750.520b(1)(a). Sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other 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." MCL 750.520a(m) (emphasis added).

Defendant maintains that kissing on the vagina without any intrusion into the opening constitutes "contact," but does not constitute "penetration" for purposes of first-degree criminal sexual conduct. However, an "act of cunnilingus, by definition, involves an act of sexual penetration." *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). The *Legg* Court noted that, in *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987), a panel of this Court concluded that "it is evident that cunnilingus requires the placing of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself [sic], or the mons pubes [sic]." *Legg, supra* at 133. Additionally, in *People v Lemons*, 454 Mich 234, 254-255; 562 NW2d 447 (1997), the Michigan Supreme Court determined that, while it is necessary to demonstrate actual penetration when attempting to establish an act of fellatio, cunnilingus, by definition, does not require penetration. We conclude that there was sufficient evidence to establish defendant performed acts of cunnilingus on the victim based on her testimony. When reviewing the evidence in a light most favorable to the prosecution, the victim's testimony that defendant kissed her on her "front private" with his tongue while moving

his tongue around was sufficient to establish the element of penetration necessary to sustain his convictions for first-degree criminal sexual conduct.

Finally, defendant argues that the trial court erred when it failed to instruct the jury on the statutory definition of penetration. We disagree. “A party must object or request a given jury instruction to preserve the error for review.” *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). After the trial court instructed the jury, defendant did not object or request an instruction on the statutory definition of penetration. Therefore, defendant has not properly preserved this issue for appellate review. Unpreserved allegations of error regarding issues involving jury instructions are reviewed for plain error. *Carines, supra* at 766-767; *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). In order to avoid forfeiture of unpreserved errors, a defendant must demonstrate that an error occurred, the error was plain, i.e., clear or obvious, and the error affected the defendant’s substantial rights, i.e., affected the outcome of the trial court proceedings. *Carines, supra* at 761-764.

The trial court instructed the jury as follows regarding the charges involving cunnilingus:

The Defendant is charged in Counts 5, 6 and 7 with the crime of First Degree Criminal Sexual Conduct.

To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant engaged in a sexual act that involved the touching of [the victim’s] genitals with the Defendant’s tongue.

Second, that [the victim] was less than thirteen (13) years old at the time of the alleged act.

The trial court’s instruction basically mirrors that of the standard criminal jury instruction. See CJI2d 20.1. The victim testified that defendant kissed her “front private” with his tongue, and that she felt his tongue move around. Although defendant claims the trial court erred in failing to provide further instruction on the element of penetration, such reasoning is unsupported by case law. As previously stated, this Court has held that an act of cunnilingus, by definition, involves an act of sexual penetration. *Legg, supra* at 132-133. Therefore, the trial court did not err in instructing the jury regarding the charges based on cunnilingus. Accordingly, defendant has failed to demonstrate a plain error affecting his substantial rights.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray