

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE WILLIAM-WATTS,

Defendant-Appellant.

UNPUBLISHED

November 19, 2002

No. 234935

Wayne Circuit Court

LC No. 00-013114

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right following a bench trial in which defendant was convicted of first-degree criminal sexual conduct (CSC I) involving penetration of a person under thirteen years of age, MCL 750.520b(1)(a). Defendant was sentenced to two to ten years' imprisonment. We affirm.

I

Defendant was babysitting his cousins, two brothers, aged five and three at the time. A few days later, the five-year-old, Javonte, told his mother that something had happened to his younger brother while defendant was babysitting, prompting the mother to take the three-year-old to the hospital for an examination. She then filed a police report alleging criminal sexual assault against defendant.

Defendant was taken into custody and subsequently took a polygraph test. Sergeant Grubbs, a Detroit police officer, conducted the polygraph testing and testified that, during a conversation after the polygraph test, defendant admitted that he had kissed the three-year-old and that the three-year-old had defendant's penis in his mouth. Defendant refused to put his confession in writing, but wrote a note stating that he did not wish to write out the information he gave to Sergeant Grubbs.

Javonte testified at trial that he witnessed defendant and his little brother together on a bed and that defendant was kissing his brother on the mouth. He stated that defendant sucked his little brother's penis and then defendant anally penetrated his little brother.

Defendant testified and denied any improper conduct with his cousin. Defendant stated that his admission to Sergeant Grubbs was a lie and that he made it out of fear and because the officer was “getting aggressive” toward him. He indicated that Grubbs kept asking him for the truth, telling him that something was wrong based on the results of the polygraph test.

II

Defendant first argues that the court erred in allowing Javonte, who was six¹ at the time of trial, to testify because he could not distinguish between the truth and a lie. Defendant did not object to Javonte’s testimony or raise the issue of his competency to testify before the trial court. Appellate review is therefore subject to the “plain error” standard. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under *Carines*, *id.*, defendant must show plain error that affected his substantial rights, i.e., the outcome of the lower proceedings. Further, reversal is warranted only when the plain error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.* Even though Javonte exhibited some confusion at trial over the difference between truth and lying, we find no error requiring reversal.

The question of a witness’s competency is a matter within the trial court’s discretion, *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998). Under MRE 601, every person is competent to testify unless a court finds that he or she does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably. *Id.*; *People v Kasben*, 158 Mich App 252, 256-257; 404 NW2d 723 (1987).

Defendant argues that the court erred in failing to exercise its discretion with regard to Javonte’s lack of competency because Javonte was unable to understand the concepts of truth and lies and was confused in responding to questions. When called to the witness stand, Javonte indicated that he would tell the truth; however, on cross-examination, he was asked if it was good to tell the truth, to which he responded, “No,” and was also asked if it was good to tell a lie, to which he responded, “Yes.”

Although it appears from the record that the trial court did not conduct an examination of Javonte’s competency to testify, that fact is not dispositive. Under MRE 601, all persons are presumed competent to testify. *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001); *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

It is clear from the record that the court found Javonte competent to testify and properly considered the nature of his answers as a matter of credibility rather than one of competency. See *Watson*, *supra* at 584 (confusion and contradiction in child witness’ answers do not negate competency). In rendering a verdict, the court noted that “Javonte was a little confused between the meaning of the words truth and lie,” but his testimony was credible, and he was not confused about the events.

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Before Javonte's direct examination, defense counsel acknowledged that Javonte had earlier testified in this case (at defendant's preliminary examination) and that the court had permitted counsel to stand close to the witness because his testimony was difficult to hear. Given the clear acknowledgement that Javonte had previously testified and the fact that no questions were raised concerning his competency to testify at trial, the trial court's failure to conduct an examination of Javonte's competency was not an abuse of discretion. MRE 601; see also *Kasben, supra* at 257 (determination of competency was implicit in the court's decision to allow child witness to testify).

Additionally, even if Javonte's testimony was discounted, the trial court considered the weight of other testimony and evidence in rendering its verdict, including defendant's admission to Grubbs of the alleged conduct. We find no error requiring reversal.

III

Next, defendant argues that there was insufficient evidence to convict him of CSC I because the trial court found merely that there was mouth to penile *contact* between defendant and the victim, which is insufficient to establish the required element of penetration under MCL 750.520b(1)(a). Defendant contends that penetration was not established by the testimony because 1) Javonte testified that defendant "sucked" the victim's penis, but sucking does not necessarily involve penetration, and 2) defendant's confession "should be given little weight because it was obtained by the classic trick of the polygraph operator who advises a defendant that he is failing and that he better say or do something to save himself." We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999). In rendering its verdict, the court stated:

The testimony of the witnesses, including the defendant, convinces this Court beyond a reasonable doubt that there was mouth to penis *contact* between the defendant and [the three year-old victim], and that [the victim] was under the age of 13. [Emphasis added]

Defendant is correct that "contact" and "penetration" are not necessarily synonymous for purposes of a CSC I conviction. To prove CSC I, the prosecution was required to show that the defendant engaged in sexual penetration with another person under the age of thirteen. MCL 750.520b(1)(a). Sexual penetration means, "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(1); see also, *People v Reid*, 233 Mich App 457, 480; 592 NW2d 767 (1999), ("fellatio" does *not* consist merely of 'any oral contact with the male genitals' but rather requires entry of a penis into another person's mouth").

Given the testimony in this case, the trial court's use of the word "contact" in rendering its ultimate decision does not defeat the required showing of penetration, which is supported by the trial court's explicit findings. The court stated that Javonte testified that he saw defendant kissing the victim "and then the defendant sucked [the victim's] penis for a long time."

Likewise, the court stated that defendant told Grubbs “that he had kissed [the victim] on the neck and then put his penis into [the victim’s] mouth.” Further, defendant admitted at trial that he told Grubbs “that he had kissed [the victim] on the neck and put his penis in [the victim’s] mouth,” but that it was not true. The court found Javonte’s testimony credible, and found that defendant gave no credible reason that he would make a false statement to Grubbs. The trial court’s findings convince us that the court did not use the word contact as a term of art to indicate a finding of mere contact as opposed to penetration because Javonte’s testimony and defendant’s statement to Grubbs, on which the court relied for its finding of guilt, do not indicate mere contact. Defendant has produced no evidentiary support for his argument to the contrary.

Viewing the evidence in a light most favorable to plaintiff, we find the evidence sufficient to sustain defendant’s conviction.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald