

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA ALLEN ROACH,

Defendant-Appellant.

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UNPUBLISHED

January 15, 2004

No. 243845

Washtenaw Circuit Court

LC No. 02-000049-FC

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), sexual penetration of a person under thirteen years of age, MCL 750.520b(1)(a). The trial court sentenced defendant to three to fifteen years' imprisonment for the conviction. Defendant appeals as of right. We affirm.

**I. Facts and Procedure**

The four-year-old victim, J.H., attended a daycare service run by defendant's mother, Deborah Roach, out of her home. On one occasion when J.H. and her sister were at the Roach house, Deborah asked defendant, who lived at the house, to watch J.H. and her sister while she ran errands. When Deborah left, defendant and Clinton Jackson (who was hired to clean the house after the children) were home with J.H. and her sister. J.H. testified that at one point when Jackson was not around, defendant told J.H. to go into another room and gave her sister a quarter to stay where she was. J.H. testified that when she and defendant were alone together, she laid down and defendant pulled down her pants and panties, put his hands on her knees, and licked her. J.H. said that she did not have a name for where defendant licked her, but, when shown a picture of a young girl, J.H. circled the genital region as the place where defendant licked her. Defendant then gave J.H. a quarter. In contrast to J.H.'s testimony, defendant denied licking J.H.'s genitals and testified that J.H. and her sister got the quarters from him for "good kid Friday," when the daycare would give a toy or money to kids who were well-behaved during the week. Jackson testified that he could see defendant the whole time Deborah was gone and defendant and J.H. were never alone together. Later, after J.H.'s mother picked her up, J.H. told his mother that defendant "licked me on my private" and described how it had happened.

**II. Analysis**

### A. Sufficiency of Evidence

Defendant argues that there was insufficient evidence to support his conviction for CSC I, because the evidence of sexual penetration was insufficient. “In reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” *People v Akins*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2003) (Docket No. 240359, issued December 9, 2003), slip op at 5.

Defendant was charged with violating MCL 750.520b(1)(a), which provides:

(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

“Sexual penetration” is defined, in relevant part, to mean: “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body . . . MCL 750.520a(o). For the purpose of CSC, “sexual penetration” includes cunnilingus. MCL 750.520a(o). Cunnilingus, by definition, does not require penetration. *People v Lemons*, 454 Mich 234, 255; 562 NW2d 447 (1997). This Court defined “cunnilingus” as “ ‘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].’ ” *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992), quoting *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987). If cunnilingus is performed, there is no requirement that there be something additional in the way of penetration for there to be a “sexual penetration.” *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987). Under this definition, the act of touching one’s mouth to the female genital opening or organs constitutes “cunnilingus.”

Defendant argues that, although there was testimony that J.H. stated that defendant licked her “private,” this testimony was not specific enough to prove that sexual penetration or cunnilingus occurred. We disagree. In addition to J.H.’s statement that defendant licked her “private,” J.H. circled the genital region of a picture of a young girl to explain where defendant licked her. J.H. also testified that defendant pulled down her pants and panties before he licked her. “Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime.” *Akins*, *supra* at 5. From this evidence, it would be reasonable to infer that J.H. was referring to cunnilingus when she stated that defendant licked her “private.” Furthermore, to accept defendant’s argument that J.H.’s statement was too vague to satisfy the sexual penetration element of the crime would be contrary to the policy of the act and would discourage child victims from testifying by requiring them to describe explicitly the details of the cunnilingus. *Lemons*, *supra* at 255. Therefore, we conclude that there was sufficient evidence of cunnilingus for the jury to convict defendant of CSC I.

### B. CSC I Jury Instruction

Defendant argues that he was denied a fair trial because the trial court failed to instruct the jury that penetration was necessary to convict him of CSC I. Defendant failed to preserve

this issue for appeal by making an objection on the record. MCR 2.516(C). Therefore, this issue is reviewed for plain error affecting defendant's substantial rights. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003).

Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Accordingly, jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). [*People v McKinney*, 258 Mich App 157, 162-163; 670 NW2d 254 (2003).]

Here, in regard to the sexual penetration element of the crime, the trial court instructed the jury that the prosecution must prove as follows: "First, that the [d]efendant engaged in a sexual act that involved entry into—and any entry, no matter how slight, is enough—or touching of [J.H.'s] genital opening or genital organs by the [d]efendant's tongue or mouth." Defendant argues that the trial court's jury instruction was erroneous because it allowed the jury to convict him of CSC I based on touching without penetration. We disagree. As discussed, one of the elements of CSC I is "sexual penetration," which includes cunnilingus. MCL 750.520b(1)(a); MCL 750.520a(o). Cunnilingus, by definition, does not require penetration. *Lemons, supra* at 255; *Harris, supra* at 470. The trial court's instruction to the jury, that defendant's touching of J.H.'s genital opening or genital organs with his tongue or mouth was enough to satisfy the "sexual penetration" element of CSC I, is consistent with the CSC definition of "sexual penetration and the definition of cunnilingus. It is also consistent with the standard jury instructions. See CJI2d 20.1(2)(c). Therefore, the trial court correctly instructed the jury of the elements of CSC I.

#### C. Prior Inconsistent Statements Jury Instruction

Finally, defendant argues that he was denied a fair trial by the trial court's failure to instruct the jury that J.H.'s prior inconsistent statements could be used to impeach her credibility. Because defendant failed to request such an instruction or otherwise object to the instructions as given, this issue was forfeited. *Gonzalez, supra* at 642-643. Therefore, we review this issue for plain error affecting defendant's substantial rights. *Id.* at 643.

Prior inconsistent statements may generally be used to impeach the credibility of a witness. MRE 613; *People v Stanaway*, 446 Mich 643, 692; 521 NW2d 557 (1994). The trial court gave the following instructions regarding the credibility of witnesses:

You must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness said. You are free to believe all, none or part of any person's testimony.

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[Y]ou may conclude that a witness deliberately lied about something that is important to how you decide the case. If so, you may choose not to accept anything that witness said.

On the other hand, if you think the witness lied about some things and told the truth about others, you may simply accept the part you think is true and ignore the rest.

The trial court also gave the standard jury instruction regarding prior inconsistent statements, CJI2d 4.5, in regard to the prior statements of Deborah Roach, although it did not refer to J.H.'s statements when giving the instruction:

Now, there's been some evidence that a witness, Deborah Roach, made an earlier statement that did not agree with her testimony during the trial. You must be very careful about how you consider this evidence.

The statement was not made during the trial. So you must not consider it when you decide whether the elements of the crime have been proven.

On the other hand, you may use it to help you decide whether you think the witness, Deborah Roach, is truthful.

Consider the statement carefully. Ask yourself if the witness made the statement, whether it was true and whether it differs from the witness' testimony here in court. Then remember that you may only use it to help you decide whether you believe the witness' testimony here in court.

Defendant argues that the trial court should have instructed the jury that evidence of J.H.'s prior inconsistent statements could be used to impeach her credibility. "This Court reviews jury instructions as a whole to determine if the trial court made an error requiring reversal. Even if somewhat imperfect, jury instructions are not erroneous if they fairly present the issues for trial and sufficiently protect the defendant's rights." *People v McLaughlin*, 258 Mich App 635, 668; \_\_\_ NW2d \_\_\_ (2003) (citations omitted). We conclude that the instructions given by the trial court fairly instructed the jury how to use prior inconsistent statements. Although the trial court did not use J.H.'s name when giving the standard prior inconsistent statement jury instruction, the instruction was sufficient to inform the jury that any prior inconsistent statement could be used for impeachment purposes. Additionally, if a witness made a prior inconsistent statement, it logically follows that either the testimony or the prior statement must be untrue. The jury was instructed to accept statements it believed to be true and disregard statements it found to be untrue. Therefore, the jury instructions regarding prior inconsistent statements and the credibility of witnesses sufficiently protected defendant's rights. Defendant has not shown a plain error affecting his substantial rights.

Affirmed.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Jessica R. Cooper