

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BILLIE JOE BROOKS,

Defendant-Appellant.

UNPUBLISHED

May 18, 2004

No. 246269

Oakland Circuit Court

LC No. 02-185896-FC

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct (victim was under thirteen years of age), MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct (victim was under thirteen years of age), MCL 750.520c(1)(a). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to eighteen years and nine months to thirty years in prison for each first-degree criminal sexual conduct conviction, and fifteen to twenty-two years and six months in prison for each second-degree criminal sexual conduct conviction. Defendant appeals his convictions and sentences, and we affirm.

Defendant argues that the trial court erred in denying his motion for a directed verdict, as there was insufficient evidence to convict him of first- and second-degree criminal sexual conduct. We review a trial court's decision on a motion for a directed verdict de novo to determine whether the evidence presented up to the time the motion was made, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002), citing *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

The prosecution must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Under MCL 750.520b(1)(a), "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person" who "is under thirteen years of age." See also *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). MCL 750.520a(o) defines sexual penetration 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." This Court defines cunnilingus as the act of "placing the mouth of a person

upon the external genital organs of the female which lie between the labia, or the labia itself, or the mons pubes” *People v Legg*, 197 Mich App 131, 132-134; 494 NW2d 797 (1992), quoting *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987). “An act of cunnilingus, by definition, involves an act of sexual penetration.” *Legg, supra* at 132.

Defendant asserts that the trial court erred in denying his motion for a directed verdict, as there was insufficient evidence to convict him of first-degree criminal sexual conduct, as the only evidence presented was the victims’ testimony, which was inconsistent and not credible. We find defendant’s argument without merit, as “[i]t is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for a directed verdict of acquittal, no matter how inconsistent or vague that testimony might be.” *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997), citing *People v Herbert*, 444 Mich 466, 473-474; 511 NW2d 654 (1993), overruled on other grounds *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). “A directed verdict of acquittal is appropriate only if, considering all the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt.” *Mehall, supra*, 454 Mich at 6, citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Both victims testified that defendant licked their vaginas, which constitutes cunnilingus, part of the statutory definition of sexual penetration. Because it is not appropriate for the trial court to consider the victims’ credibility in deciding the motion, *Mehall, supra*, 454 Mich at 6, the trial court did not err in denying defendant’s motion, regardless of credibility, as there was sufficient evidence to establish the essential elements of first-degree criminal sexual conduct.

Defendant also asserts that the trial court erred in denying his motion for a directed verdict, as there was insufficient evidence to convict him of second-degree criminal sexual conduct for the same reasons as stated above. Under MCL 750.520c(1)(a), “[a] person is guilty of criminal sexual conduct in the second degree if he or she engages in sexual contact with another person” who “is under thirteen years of age.” See also *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). MCL 750.520a(n) defines sexual contact, in relevant part, as “the intentional touching of the victim’s or actor’s intimate parts . . . if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification” Both victims testified that defendant touched his penis to their thighs while moving up and down and side to side. This is an intentional touching of defendant’s intimate parts to the victims’ bodies for purposes of sexual arousal or gratification, which constitutes sexual contact. Because it is not appropriate for the trial court to consider the victims’ credibility in deciding the motion, *Mehall, supra*, 454 Mich at 6, the trial court did not err in denying defendant’s motion, regardless of credibility, as there was sufficient evidence to establish the essential elements of second-degree criminal sexual conduct.

Defendant says that there was insufficient evidence to support his convictions of first- and second-degree criminal sexual conduct. We disagree.

“In reviewing whether there was sufficient evidence to support a conviction, . . . we view the evidence in a light most favorable to the prosecution to decide whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003), citing *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

Defendant claims that the prosecution's case was based solely on the victims' testimony which was not credible and inconsistent, and therefore, insufficient to convict him of first and second-degree criminal sexual conduct. The testimony of a victim, however, need not be corroborated in prosecutions for sexual assault. MCL 750.520h. See also *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). This Court has long held that the credibility of witnesses is a matter of weight, not sufficiency. Determinations of credibility are made by the jury that heard the testimony and observed the witnesses, and we will not substitute our judgment on this issue. *People v Hughes*, 217 Mich App 242, 248-249; 550 NW2d 871 (1996). Even if, as defendant contends, the victims were not wholly consistent in their descriptions of the assaults, there was evidence, as outlined above, that the jury, sitting as the trier of fact, could choose to believe that, if believed, would justify defendant's convictions. *Id.* The victims' testimony was sufficient for the jury to convict defendant because it encompassed every element of the crimes charged. Furthermore, testimony of the victims alone, if believed by the trier of fact, is sufficient to support a conviction of criminal sexual conduct. *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994). Accordingly, we hold that there was sufficient evidence for which a "rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Knowles, supra*, 256 Mich App at 58.

Additionally, defendant maintains that the sentences imposed by the trial court violate the principle of proportionality. "If a minimum sentence is within the appropriate guidelines range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence" MCL 769.34(10). Here, the applicable guidelines minimum sentence range as scored for defendant's first-degree criminal sexual conduct conviction, as a second habitual offender, was 108 to 225 months. Defendant received sentences of 225 to 360 months' imprisonment for the first-degree criminal sexual conduct convictions and 180 to 264 months' imprisonment for the second-degree criminal sexual conduct convictions, which were both within the guidelines range. A minimum sentence within the legislative guidelines is not reviewable pursuant to the principle of proportionality. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). Because defendant's sentences were within the applicable guidelines range, they must be affirmed. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Furthermore, we find meritless defendant's claim that the trial court erred in failing to prepare a separate sentencing information report for the second-degree criminal sexual conduct convictions. The trial court prepared a sentencing information report for the first-degree criminal sexual conduct conviction only, as MCL 771.14(2)(e)(iii) requires a computation of the sentencing guidelines only for the crime having the highest crime class. In any event, defendant's sentences for first-degree criminal sexual conduct run concurrent with his sentences for second-degree criminal sexual conduct, rendering the latter sentences irrelevant. See *People v Hill*, 221 Mich App 391, 396; 561 NW2d 862 (1997) (concurrent sentences need not be

separately scored because all sentences will be served at the same time and the most severe offense will encompass the sentences for the lower offenses).¹

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Karen M. Fort Hood

¹ Defendant asserts that the sentences imposed by the trial court constitute cruel and unusual punishment. Defendant failed to properly preserve this issue for appeal, as he did not raise the issue of cruel and unusual punishment in the lower court. As such, we will review the issue for a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Am VIII. This Court, in *People v McLaughlin*, 258 Mich App 635, 670-671; 672 NW2d 860 (2003), rejected this same argument where the defendant's minimum sentence fell within the statutory guidelines; therefore, the trial court did not commit a plain error affecting defendant's substantial rights in imposing defendant's sentences.