

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 19, 2013

v

ROBERT GEAN CONKLIN,
Defendant-Appellant.

Nos. 305471 & 305472
Eaton Circuit Court
LC Nos. 11-020116-FC;
11-020032-FH

Before: FITZGERALD, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM.

In these consolidated appeals, defendant Robert Gean Conklin appeals by right his jury convictions of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) in Docket No. 305471, and one count of CSC II in Docket No. 305472. The trial court sentenced Conklin as a fourth-offense habitual offender, MCL 769.12, to serve concurrent prison terms of 30 to 60 years for each CSC I conviction and 15 to 30 years for each CSC II conviction. Because we conclude that there were no errors warranting relief, we affirm.

The jury convicted Conklin after hearing testimony that he sexually assaulted three girls who were under thirteen years of age. On appeal, Conklin argues that this Court must reverse his convictions because the jury's verdicts were against the great weight of the evidence; specifically, he argues that the jury's verdict was against the great weight of the evidence because the girls were each not worthy of belief. Because Conklin did not preserve this claim of error with a motion for a new trial, this Court will review it for plain error. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

A defendant may be entitled to a new trial where the verdict is against the great weight of the evidence presented at trial; a court may grant a new trial on that basis if "the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). However, claims that a witness is not credible will rarely warrant a new trial under this standard. As our Supreme Court explained: "absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'" *Id.* (citation omitted). Moreover, the majority of CSC cases will be "fought on the battlefield of witness credibility" and courts must be careful to defer to the jury's

resolution of credibility in those cases. *Id.* at 642-643 n 22. A court may only grant a new trial on the basis of incredible witness testimony where the testimony “contradicts indisputable physical facts or laws,” “is patently incredible or defies physical realities,” “is material and is so inherently implausible that it could not be believed by a reasonable juror,” or has been “seriously impeached.” *Id.* at 643-644 (quotation marks and citations omitted).

Here, the victims’ testimony established the elements of each charged offense. There was testimony that Conklin sexually penetrated the first victim on at least two occasions and that she was under age 13. MCL 750.520b(1)(a). The first victim testified that Conklin put his penis inside her vagina more than once. She stated that it would happen while she was watching cartoons at his house, and he would take her clothes off. She also testified that he tried to put his penis in her mouth, and was successful on one occasion. She was able to describe Conklin’s penis and demonstrated what he did to her using anatomically correct dolls. While her description of the events to previous people, including a psychologist, may have been different, the jury had the opportunity to hear about these limitations and her testimony otherwise did not fall within one of the exceptional circumstances. Therefore, we must defer to the jury’s resolution of her credibility. See *Lemmon*, 456 Mich at 646-647 (stating that courts must leave the test of credibility where statute, case law, common law, and the constitution repose it—with the jury).

Likewise, the second and third victims’ testimony similarly established the elements of the two CSC II charges. MCL 750.520a(q); MCL 750.520c(1)(a). The second victim testified that Conklin would take his clothes off and get on top of her and kiss her while she was watching cartoons. She stated that he would rub her private area and it hurt her. She also testified that he placed a vibrating massager on her vagina and held it there for a little bit. She was able to identify this massager, which had been recovered from Conklin’s house. The third victim testified that she went to Conklin’s home to watch cartoons and he touched her private area. Another witness saw Conklin lying on top of the third victim when the witness looked through his window and another witness thought she heard the third victim say “ow.” As with the first victim, the jury was entitled to accept these witnesses’ testimony as credible. See *Lemmon*, 456 Mich at 646-647.

There was no plain error warranting relief.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Patrick M. Meter

/s/ Michael J. Kelly