

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW PAUL WALRATH,

Defendant-Appellant.

UNPUBLISHED

October 17, 2013

No. 310876

Montcalm Circuit Court

LC No. 2011-014730-FC

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(f) (actor caused personal injury and force or coercion was used to accomplish sexual penetration). The trial court sentenced defendant to 8 to 30 years' imprisonment. Because the verdict was not against the great weight of the evidence and defendant is not entitled to resentencing, we affirm.

Defendant's conviction stems from the sexual assault of his 23-year-old niece, "TC," during a boating trip on August 28, 2010. Defendant first argues that the verdict was against the great weight of the evidence because TC's testimony was patently incredible and too inherently implausible to be believed by a reasonable fact-finder. A verdict contravenes the great weight of the evidence if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "[W]hen testimony is in direct conflict and testimony supporting the verdict has been impeached, if it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the [fact-finder] could not believe it, the credibility of witnesses is for the [fact-finder]." *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998) (quotation marks and citation omitted). A new trial is not warranted unless "testimony contradicts indisputable physical facts or laws," "testimony is patently incredible or defies physical realities," "a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable [fact-finder]," or witness "testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *Id.* at 643-644 (Quotation marks and citations omitted). We must defer to the trial court's credibility determinations

because of that court's superior opportunity to judge the credibility of witnesses. MCR 2.613(C); *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

MCL 750.520b provides, in relevant part:

(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:

* * *

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

The testimony of the victim alone, if believed by the fact-finder, can be sufficient to support a criminal sexual conduct conviction. MCL 750.520h; *People v Gursky*, 486 Mich 596, 623 n 52; 786 NW2d 579 (2010).

In this case, the nurse who examined TC testified that TC suffered two bodily injuries, i.e., a bruise on her inner thigh and an abrasion on her labia minora. TC testified that defendant digitally penetrated her after she told him to stop his advances and that force or coercion was used to accomplish the sexual penetration. TC maintained that she attempted to prevent defendant from touching her by closing her legs, but defendant forced her legs apart with his fist and then penetrated her with his fingers. Although the trial court noted many inconsistencies in TC's statements, it nevertheless found her testimony regarding digital penetration and how it occurred credible. Defendant argues that several facts cast doubt on TC's credibility, including that she lost her camera, which purportedly held photographic evidence of the assault, that there were various inconsistencies in TC's testimony regarding how she reached different stages of undress, and that TC had other photographs depicting herself partially clothed. The trial court specifically addressed those concerns and more or less agreed with defendant that the camera's disappearance undermined TC's credibility and indicated that her exposure to the camera may have been voluntary to some degree, but the court credited TC's testimony that defendant escalated the encounter to digital penetration after TC told him to stop.

Defendant also argues that the fact that TC admitted that she allowed defendant to photograph her with her legs spread apart undermines her testimony. The trial court's decision, however, did not turn on whether force or coercion was used when defendant was photographing TC in various states of undress. Defendant further argues that TC's statement that no one could have seen the assault defies logic because the alleged incident occurred on one of the busiest days of the boating season. Although the trial court agreed that TC's testimony on that point was not credible, it found that that discrepancy did not warrant a determination that TC's testimony regarding the essential elements of the offense was incredible. Finally, defendant points to the delay before TC sought assistance, his mother's testimony that TC displayed no signs that anything was amiss when TC and defendant arrived home, and TC's prior abusive outbursts and

pulling out her own hair as further evidence casting doubt on TC's veracity. The trial court determined, however, that TC's testimony regarding why she did not seek assistance previously was essentially credible.

Therefore, although there were some inconsistencies and factors that cast doubt on TC's testimony, the trial court ultimately credited TC's testimony regarding digital penetration and how it occurred. TC's testimony was not patently incredible or so inherently implausible that it could not be believed by a reasonable fact-finder, and it was not deprived of all probative value. See *Lemmon*, 456 Mich at 643-644. Further, TC's testimony did not contradict indisputable physical facts or laws. See *id.* Accordingly, defendant has not shown that the verdict was against the great weight of the evidence.

Defendant next argues that judicial fact-finding at sentencing based on less than proof beyond a reasonable doubt violated his Fifth and Sixth Amendment rights. He contends that facts used in scoring his offense variables that were neither admitted by defendant nor proven beyond a reasonable doubt impermissibly increased his sentencing guidelines range. As defendant concedes, however, his argument is contrary to current law. Our Supreme Court specifically rejected defendant's argument in *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006) ("As long as the defendant receives a sentence within th[e] statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the [fact-finder's] verdict."). We are bound to follow our Supreme Court's decision. See *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000). Thus, defendant's argument is without merit.

Affirmed.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello