

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 21, 2013

v

MARC EDWARD BENNETT,
Defendant-Appellant.

No. 311234
Oakland Circuit Court
LC No. 2010-234101-FC

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b. He was sentenced to serve 36 months to 40 years in prison. We affirm.

Defendant argues on appeal that the trial court improperly instructed the jury that the penetration element of the crime was met if defendant's mouth or lips touched the male victim's genitalia, rather than requiring entry into the mouth. The trial court must instruct the jury on the applicable law, including a fair presentation of all elements of the charged offense. MCL 768.29; *People v Fennell*, 260 Mich App 261, 265; 677 NW2d 66 (2004).

MCL 750.520b(1) states that first-degree criminal sexual conduct requires "penetration." MCL 750.520a(r) defines 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." The statutes do not define "fellatio." In *People v Johnson*, 432 Mich 931; 442 NW2d 625 (1989), the Supreme Court adopted the interpretation that the touching of a penis by the lips or mouth was not sufficient to constitute penetration; rather, entry into the mouth was required. See *People v Reid*, 233 Mich App 457, 479-480; 592 NW2d 767 (1999). This Supreme Court opinion is binding precedent. See *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987).

However, this error was harmless because no one alleged that defendant's mouth or lips merely touched the victim's penis; the victim testified there was entry, and defendant claimed there was no sexual contact or only touching with his hands. Compare *Reid*, 233 Mich App at 480. Further, defendant did not preserve this issue for appeal by objecting to the jury instructions, MCR 2.512(C), and the error did not likely affect the outcome of the proceedings;

therefore, the verdict should not be reversed. See *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999).

Defendant argues further that his trial counsel erred in failing to object to the erroneous instruction. The right to counsel is violated only when the attorney's performance fell below an objective level of reasonableness, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and the defendant was so prejudiced that he was denied a fair trial, *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because there was no reasonable probability that the outcome would have been different had counsel objected, reversal is not appropriate. See *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Next, defendant argues that his due process rights were violated because there was insufficient evidence to convict him. The verdict should be reversed only if a reasonable trier of fact could not have found each element of the crime beyond a reasonable doubt, when the evidence is viewed in the light most favorable to the prosecution. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002).

Defendant challenges the victim's credibility and offers alternative explanations for the evidence. However, it is the trier of fact's role to judge witness credibility and weigh the evidence. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012); *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). The victim's testimony did not strain credibility. He testified that he did not recall whether he was asked to "embellish" his testimony in an earlier proceeding; however, because he otherwise testified with certainty that this was what really happened, it was reasonable to interpret his testimony to mean only that he was unsure whether he was asked to provide more details. Defendant claims his testimony defied physical realities, but does not explain how. The alleged act was certainly physically possible. There was sufficient evidence to establish each element of the crime beyond a reasonable doubt.

Defendant also argues that the trial court failed to find that the victim had the capacity and sense of obligation to testify honestly after he admitted he was under the influence of marijuana and Xanax during his second day of testimony. Defendant failed to preserve this issue for appeal by objecting or requesting that the victim's testimony be stricken. See *People v Cobb*, 108 Mich App 573, 575; 310 NW2d 798 (1981). We review for an abuse of discretion the trial court's decision regarding the competency of a witness. *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001).

All witnesses are presumed to be competent, and this presumption is rebutted by showing that a person does not have sufficient capacity or sense of obligation to testify truthfully or understandably. *Id.*; *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991); see also MRE 601. The attorney assigned to protect the victim from self-incrimination argued that he lacked the ability to testify under MRE 601. However, the court rejected this argument, observing that the victim had testified all morning and seemed to understand the questions and answer appropriately. This is consistent with the trial transcript. Although the victim's substance use might reflect on his credibility, it did not overcome the presumption of competency to testify.

Finally, defendant argues that the prosecutor committed misconduct by misstating the evidence and by stating that the evidence was uncontroverted. Issues of prosecutorial misconduct are decided case by case. *Watson*, 245 Mich App at 586. A prosecutor cannot state a fact not supported by the evidence; however, a prosecutor may argue the evidence and all reasonable inferences. *Id.* at 588. The judgment should be reversed based on a prosecutor's comments and questions only when the defendant was denied a fair trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

The prosecution's closing arguments that witnesses corroborated the victim's testimony were not strictly untruthful and any misleading implications were corrected by counsel and the trial court. Further, the trial court instructed the jury that the attorneys' arguments were not evidence, and juries are presumed to follow their instructions. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant was not denied a fair trial. See *Abraham*, 256 Mich App at 272.

Defendant also argues that the prosecution erred in describing the evidence as "uncontroverted," because this improperly shifted the burden of proof and commented on defendant's choice not to testify. The prosecution cannot imply that the defendant must prove something or explain the evidence against him, *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010), and cannot comment on a defendant's decision to exercise his Fifth Amendment right not to testify, MCL 600.2159; *Griffin v California*, 380 US 609, 615; 85 S Ct 1229; 14 L Ed 2d 106 (1965).

However, it is not inappropriate for the prosecution to state generally that the evidence was uncontroverted, even when only the defendant could have contradicted the evidence. See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *Fyda*, 288 Mich App at 464; *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998); *People v Guenther*, 188 Mich App 174, 177-178; 469 NW2d 59 (1991). Further, the trial court instructed the jury that defendant did not have to prove his innocence or produce any evidence. The court could have provided additional instructions to the jury, had defendant objected. See *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro