

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANKLIN D. PITTS,

Defendant-Appellant.

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UNPUBLISHED

August 9, 1996

No. 180658

LC No. 93-004460

Before: Corrigan, P.J., and MacKenzie and P.J. Clulo\*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.288(2)(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.288(3)(1)(a), in the sexual assault of two girls whom his wife was babysitting. He was sentenced to two concurrent terms of two to fifteen years' imprisonment. He appeals by application for delayed appeal granted. We affirm.

First, defendant argues that the trial court abused its discretion when it denied the jury's request to reread the testimony of one of the victims. We disagree.

MCR 6.414(H) provides:

**Review of Evidence.** If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Here, the jury's request was made after only approximately seventy-five minutes of deliberation. Further, the court's response to the request, that transcripts had not yet been prepared so the jurors should rely on their collective memories, did not foreclose the possible reading back of testimony. See

\* Circuit judge, sitting on the Court of Appeals by assignment.

*People v Bonner*, 116 Mich App 41, 46; 321 NW2d 835 (1982). Under these circumstances, we find no abuse of discretion.

Defendant next contends that the trial court erred in denying his motion for directed verdict on the charge of first-degree criminal sexual conduct because the prosecution failed to prove sexual penetration of the genital area, a necessary element of first-degree criminal sexual conduct. We disagree.

Sexual penetration means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of a part of a person's body or of any object into the genital or anal openings of another person's body; but emission of semen is not required. MCL 750.520a(1); MSA 28.788(1)(1). Because both victims testified that there was penetration of the labia majora, there was sufficient evidence to sustain a finding of penetration of the "genital opening" within the meaning and intent of the statutory definition of sexual penetration and defendant's motion was properly denied. *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1982).

Defendant's related argument, that his convictions were against the great weight of evidence, has not been preserved for appellate review since he did not move for a new trial. *People v Johnson*, 168 Mich App 581, 585; 425 NW2d 187 (1988); *People v Dukes*, 189 Mich App 262; 471 NW2d 61 (1991). We therefore decline to address it.

Defendant also asserts that the magistrate abused her discretion in binding him over for trial on charges of first-degree criminal sexual conduct, and that the trial court erred in denying his motion to quash the bindover. We reject defendant's argument. While the testimony by both complainants at the preliminary examination hearing was slightly different than their testimony at trial, the preponderance of the evidence showed that there was probable cause to believe that defendant made a slight intrusion into the labia majora of both of the complainants and therefore there was no error. *People v Woods*, 200 Mich App 283, 287-288; 504 NW2d 24 (1993).

Defendant contends that he was denied a fair trial because the jury heard inadmissible hearsay testimony which did not qualify under an exception to the hearsay rule. Defendant, however, has failed to articulate what improper testimony was admitted into evidence. Because defendant has failed to argue the merits of this allegation of error, this issue is not properly presented for review. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Finally, defendant claims that he was denied the effective assistance of counsel. On the record before us, however, defendant has failed to establish that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Affirmed.

/s/ Maura D. Corrigan  
/s/ Barbara B. MacKenzie  
/s/ Paul J. Clulo