

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HASTON PHIPPS HAMPTON,

Defendant-Appellant.

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UNPUBLISHED

October 4, 1996

No. 176670

LC No. 93-003009 FC

Before: Holbrook, P.J., and Saad and W. J. Giovan,\* JJ.

PER CURIAM.

A jury convicted defendant of three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b; MSA 28.788(2). He subsequently pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. The trial court sentenced him as an habitual offender to ten to twenty years' imprisonment. Defendant appeals; we affirm.

Defendant's convictions arise from his sexual molestation of his girlfriend's 14-year-old daughter, who was mentally and emotionally impaired. He raises five issues on appeal, none of which merit reversal.

I.

Defendant first argues that the evidence presented at trial was not sufficient to prove the element of sexual penetration required for CSC-I. We disagree. The victim testified that defendant had sexual intercourse with her on three occasions. Viewing the victim's testimony in a light most favorable to the prosecutor, a rational jury could have found that sexual penetration was proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 465-466; 502 NW2d 177 (1993).

II.

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

Second, defendant maintains that he was denied a fair trial due to the prosecutor's failure to comply with a pretrial discovery order requiring prior disclosure of any and all records which the prosecutor planned to use to establish the victim's mental disability. We find no error. Although a witness produced additional records at trial, the prosecutor had not been given copies of these records in advance and did not know of their existence before trial. The witness who had these records in her possession did not rely upon them in forming her opinion; therefore these records were outside the scope of the discovery order. The trial judge did not clearly err by finding no violation of the pre-trial discovery order. MCR 2.613(C).

### III.

Defendant next claims that the trial court improperly allowed the prosecutor to substitute one medical witness for another because the prosecutor did not use due diligence to obtain the presence of the witness he originally listed. Defendant did not preserve this issue by moving for a new trial, so we consider it waived. *People v Lawton*, 196 Mich App 341, 356; 492 NW2d 810 (1992); *People v Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989).

### IV.

Defendant also argues that he was unfairly surprised by the substituted medical witness, Dr. Zmiejko, who testified that the victim's hymen was not intact due to sexual penetration. Defendant claims that he had been told by the court that the doctor could only testify that it was not intact, rather than the cause. Review of the record does not support defendant's assertion that the trial judge limited Dr. Zmiejko's testimony in this manner. The trial judge did not abuse his discretion by allowing Zmiejko to give this opinion testimony. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

### V.

Finally, defendant contends that the prosecutor improperly denigrated defendant's expert witness. We find no impropriety. The prosecutor can bring out the fact that an expert is being paid to testify, and can argue that a witness is not credible. *People v Buckey*, 424 Mich 1, 15; 378 NW2d 432 (1985); *People v Williams*, 162 Mich App 542, 549; 414 NW2d 139 (1987).

Affirmed.

/s/ Donald E. Holbrook, Jr.  
/s/ Henry William Saad  
/s/ William J. Giovan