STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of RONALD J. RUSHFORD, a minor.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD J. RUSHFORD,

Respondent-Appellant.

UNPUBLISHED
October 11. 1996

No. 179192
LC No. 92-305189

Before: Taylor, P.J., and Markey and N.O. Holowka,* JJ.

PER CURIAM.

Pursuant to a probate court adjudication, respondent was found guilty of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). He was sentenced to placement and supervision at a campus-based facility and to a sexual offender treatment program until medically discharged. Respondent appeals as of right. We affirm defendant's conviction.

Respondent first argues that the prosecution failed to introduce sufficient evidence to convict him of second-degree criminal sexual conduct because it failed to establish that respondent touched the complainant's buttock with a sexual purpose. Viewing the evidence in a light most favorable to the prosecution, we find that the prosecution established the essential elements of the crime beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 269; 380 NW2d 11 (1985); *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). Second-degree criminal sexual conduct is a general intent crime. *People v Bell*, 101 Mich App 779, 783; 300 NW2d 691 (1980); *People v Fisher*, 77 Mich App 6, 13; 257 NW2d 250 (1977). The prosecution is not required to prove a defendant's specific intent, but only that the defendant intentionally touched an intimate part. *Fisher, supra* at 13. The prosecution thus was not required to prove that respondent acted with the purpose of sexual

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

gratification in order to convict him. *Id.* Here, the prosecution established that defendant intentionally touched complainant based upon complainant's testimony that defendant touched her buttocks more than once, that he also touched complainant's sides, that the touching occurred in defendant's bedroom, and that she did not think the touching was "okay." The complainant's brother also testified that defendant took complainant to a remote corner of the basement on one occasion away from everyone else, and that he saw defendant rubbing complainant's bare leg as she lay on defendant's bed. Given the age disparity between defendant and the victim, we find sufficient evidence supporting the court's conclusion that the touching was for purposes of sexual gratification or arousal. Accordingly, the prosecution introduced sufficient evidence to convict defendant of second-degree criminal sexual conduct beyond a reasonable doubt. *Petrella, supra; Lugo, supra.*

Next, respondent asserts that the second-degree criminal sexual conduct statute, MCL 750.520c; MSA 28.788(3), is unconstitutional because it violates the due process guarantees of the Fourteenth Amendment to the United States Constitution. We disagree. *People v Clark*, 85 Mich App 96, 102-103; 270 NW2d 717 (1978) (second degree criminal sexual conduct statute meets due process requirements). A statute may be challenged as vague, and thus violative of due process, on three grounds: the statute does not provide fair notice of the conduct which is proscribed; the statute confers unlimited discretion upon the trier of fact to determine whether an offense has been committed; or it is overbroad and impinges upon freedom of speech. *People v White*, 212 Mich App 298, 309; 536 NW2d 876 (1995); *Clark, supra*.

Respondent asserts that the statute violates due process because it does not require the prosecution to prove beyond a reasonable doubt that a defendant intentionally touched a victim for a sexual purpose. As discussed above, second-degree criminal sexual conduct is a general intent crime. Consequently, whether a defendant touched a victim for a sexual purpose is not an element of the crime that the prosecution must prove beyond a reasonable doubt, and the statute is not unconstitutional because it does not require proof of sexual purpose. *Fisher, supra*. Respondent also apparently contends that the statute gives the trier of fact unlimited discretion to determine whether the defendant committed the offense. The statute, however, contains clearly defined elements that the prosecution must prove beyond a reasonable doubt -- sexual contact with any intimate parts of a person under thirteen years of age. MCL 750.520c; MSA 28.788(3). The criminal sexual conduct statutes define "sexual contact" and "intimate parts," so the trier of fact is not given unlimited discretion to determine the meaning of these terms. Thus, we find that the second-degree criminal sexual conduct statute is not unconstitutionally vague. Accord *Clark, supra*.

Respondent further argues that he was denied due process and a fair trial because of remarks the prosecution made during closing arguments. Where, as here, there has been no objection to the remarks at trial, we review only to avoid a miscarriage of justice or if a curative instruction could not have eliminated the prejudicial effect of the comments. *People v Stanaway,* 446 Mich 643, 687; 621 NW2d 557 (1994). Because defendant was tried before a referee, not a jury, any improper remarks by the prosecution were harmless. Thus, respondent did not suffer a miscarriage of justice and a

curative instruction was unnecessary. Id. at 687-688; *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

Respondent further argues that his trial counsel was ineffective in failing to object to the prosecution's remarks. To prevail on a claim of ineffective assistance of counsel, a defendant "must show that counsel's performance fell below an objective standard of reasonableness, and the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Respondent cannot show prejudice because he cannot show that an objection by his counsel would have affected the outcome, as discussed above. Respondent was not, therefore, denied the effective assistance of counsel.

Finally, upon our review of the probate court record, we find that the probate court's order of disposition entered on September 16, 1994 states that respondent was adjudicated by plea when in fact an adjudication hearing was held on July 14, 1994. We therefore instruct the probate court to file an amended order of disposition to reflect that defendant was adjudicated by the court as opposed to by plea.

Affirmed.

/s/ Clifford W. Taylor
/s/ Jane E. Markey
/s/ Nick O. Holowka