

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT E. JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

December 3, 1996

No. 185899

LC No. 94-011949

Before: Fitzgerald, P.J., and Cavanagh and N.J. Lambros,\* JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Defendant was sentenced to three concurrent terms of ten to fifteen years' imprisonment for these convictions. We affirm.

Defendant first argues that the prosecution presented insufficient evidence of the acts of penetration to justify his conviction on any of the charges. We disagree. At trial, the child-complainant testified that he was under ten years old and described three acts of penetration. His in-court testimony was corroborated by his mother, who testified regarding complainant's initial description of the sexual acts. Although defendant and defendant's mother contradicted the testimony of complainant and complainant's mother, this Court will not interfere with the fact finder's determination as to the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Considering the evidence presented in the light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to conclude that each element of the crime was established beyond a reasonable doubt. *Id.* at 515.

Defendant next challenges the trial court's decision to admit hearsay testimony related to complainant's initial statements about the sexual acts alleged. Complainant's out-of-court statements described sexual acts committed by defendant and appeared to be spontaneous. Defendant's instructions to complainant not to tell complainant's mother excused complainant's delay in reporting these incidents to his mother. Thus, these statements fall within the "tender years" exception to the

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

hearsay rule. MRE 803A; *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995). The prosecution provided adequate notice to defendant of both the substance of the testimony and her intent to introduce it at trial. MRE 803(2). We find that the trial court did not abuse its discretion in admitting this testimony. See *People v Anderson*, 209 Mich App 527, 535-536; 531 NW2d 780 (1995).

Defendant's final claim is that the prosecutor denied him a fair trial by shifting the burden of proof during closing argument. Defendant did not object to the allegedly improper argument below, and therefore failed to preserve this claim for appeal. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). After considering defendant's claim, we believe that the challenged argument was proper commentary on the credibility of a witness, *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995), and that the trial court, sitting as the trier of fact, presumably rejected any impermissible argument tending to shift the burden of proof. See *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Mark J. Cavanagh  
/s/ Nicholas J. Lambros