STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL M. SEFTON,

Defendant-Appellant.

UNPUBLISHED
December 6, 1996

No. 190024
LC No. 95-000283-FC

Before: Wahls, P.J., and Young and J.H. Fisher,* JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(f); MSA 28.788(3)(1)(f), and was sentenced to concurrent terms of five years' probation, with the first year to be spent in jail. He appeals as of right. We affirm.

Defendant first contends that he was denied a fair trial because the trial court did not give a specific unanimity instruction regarding the CSC II counts after the jury asked questions about them during deliberations. We disagree.

The information charged defendant with two counts of CSC II without describing the specific nature of the sexual contact alleged. However, the victim's trial testimony, if believed, was sufficient to prove three instances of improper contact: two separate touchings of her breasts, and one of her genital area. The jury, perceiving this discrepancy, asked the court how to reconcile the charges with the evidence, and the court responded that Count III referred to the genital touching, while Count II governed the breast contacts. Although defendant did not object at trial or request a unanimity instruction, he now relies on *People v Yarger*, 193 Mich App 532; 485 NW2d 119 (1992), to argue that error resulted from the court's failure to instruct the jury that it was required to unanimously agree on which breast touching constituted the basis for his conviction of Count II.

In *Yarger*, the information charged only one act of sexual penetration, but the complainant's trial testimony would have supported two separate convictions of CSC III, each based on a separate

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

penetration. The defendant impeached the complainant with her prior inconsistent testimony and denied any improper conduct. Noting that the jury instructions permitted conviction of the single penetration charged if the jury believed that the evidence proved either penetration, or both, this Court found that error occurred because the jury was not instructed that it must unanimously agree on *which* act(s) was proven. *Id*. at 536-537.

Unlike the defendant in *Yarger*, the present defendant did not furnish a separate defense or offer materially distinct evidence of impeachment regarding any particular act of breast-touching. Instead, he admitted each instance of breast-touching, but claimed that they were consensual. Under similar facts, this Court in *People v Cooks*, 446 Mich 503, 528-529; 521 NW2d 275 (1994), distinguished *Yarger* and held that "[b]ecause neither party presented materially distinct proofs regarding any of the alleged acts, the factual basis for the specific unanimity instruction mandated in *Yarger* . . . was nonexistent." See also *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993). Defendant's first allegation of error is therefore unpersuasive.

Defendant also maintains that the trial court, over his objection, improperly scored Prior Record Variable (PRV) 7 and Offense Variable (OV) 7. The court scored ten points for PRV 7 based on defendant's conviction of two concurrent CSC II offenses. Defendant now contends that this violated the Double Jeopardy Clauses of the Michigan Constitution, Const 1963, art 1, § 15, and United States Constitution, US Const, Am V. We disagree based on analogous case law approving punishment for each separate sexual penetration involved in a criminal transaction. *People v Wilson*, 196 Mich App 604, 608; 493 NW2d 471 (1992); *People v Dowdy*, 148 Mich App 517, 521; 384 NW2d 820 (1986).

Defendant further argues that the trial court improperly scored fifteen points for OV 7 based upon its determination that defendant exploited the victim via an abuse of his authority over her as a type of "mentor" at the hospital where both had worked. We hold there was sufficient evidence to support the court's scoring of OV 7. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993); *People v Johnson*, 202 Mich App 281, 288; 508 NW2d 509 (1993).

Viewed in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the conviction offenses were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992). Moreover, the convictions were not manifestly against the clear weight of the evidence. *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991).

Defendant's remaining allegations of error are either unpreserved by timely objection or substantively without merit. *Van Dorsten, supra*, at 544-545.

Affirmed.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.
/s/ James H. Fisher