STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH M. DANIELS,

Defendant-Appellant.

UNPUBLISHED
December 27, 1996

No. 179494
LC No. 94-001089

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber,* JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of two counts of criminal sexual conduct in the first degree, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), two counts of criminal sexual conduct in the second degree, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and one count of felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to prison for a term of twenty years minimum and thirty years maximum on the two counts of CSC I, three years minimum to fifteen years maximum on the two counts of CSC II and two years minimum to four years maximum on the charge of felonious assault, concurrent to each other. We affirm.

Defendant first argues that the 180-day rule was violated when defendant's trial began on July 13, 1994, 220 days after he was found guilty of earlier charges in Oakland Circuit Court. Defendant asserts that the 180-day period began to run on December 3, 1993, when he was found guilty of the earlier charges, some of which carry mandatory prison terms, and was detained in the county jail awaiting sentencing. In the alternative, defendant argues that even if the 180-day period did not commence until he was sentenced on the earlier charges on December 23, 1993, a violation of the 180-day rule still occurred because 202 days passed between the date of sentencing and the commencement of trial in the instant case and no delays were attributable to defendant. We disagree.

Michigan's 180-day rule provides in part:

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

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. [MCL 780.131(1); MSA 28.969(1)(1).]

Generally, the 180-day period commences when either: (1) the prosecutor has actual knowledge that the person is incarcerated in a state prison, or (2) the Department of Corrections knows or has reason to know that a criminal charge is pending against a defendant incarcerated in a state prison. MCR 6.004(D); *People v Taylor*, 199 Mich App 549, 552; 502 NW2d 348 (1993). Specifically, the 180-day period begins "when 'the prosecutor knows' that the person is incarcerated, *not* when the prosecutor knows *or has reason to know* of the incarceration. Thus, a prosecutor must now have actual, not imputed, knowledge of the incarceration in order for the 180-day period to be triggered." *Taylor, supra*, 199 Mich App 552. Therefore, defendant's 180-days began to run on the sentencing date, December 23, 1993, because the prosecutor can only have actual knowledge of an incarceration when defendant is actually sentenced to jail.

Two lines of reasoning lead us to the conclusion that the 180-day rule was not violated in this case. First, if a defendant's preliminary examination begins within the 180-day limitation period and there is no showing of lack of good faith on the part of the prosecution in proceeding promptly towards trial, reversal is not required. *People v Finely*, 177 Mich App 215, 219-220; 441 NW2d 774 (1989). Defendant had a preliminary examination on January 25, 1994. This was well within the 180-day limitation period. Moreover, there is no indication from the record that the prosecution did not make a good faith effort to proceed promptly to trial.

Defendant's argument also fails because only 177 of the days which passed from defendant's earlier sentencing date to his trial were attributable to the prosecution. To determine the amount of days that passed, we count the number of days actually passed and subtract the days for which the defendant caused the delay. Delays must be subtracted because delays which are attributable to the defendant negate a violation of the 180-day rule. *People v Crawford*, 161 Mich App 77, 83; 409 NW2d 729 (1987); *People v Pelkey*, 129 Mich App 325, 329; 342 NW2d 312 (1983). The record shows and logic leads us to conclude that defendant's requests for a new attorney and adjournments caused a twenty-five day delay. Therefore, the trial occurred in 177 days, 202 days less the twenty-five days delayed.

Defendant's second argument is that there was insufficient evidence to convict him of first-degree criminal sexual conduct. We disagree. In Michigan, a person is guilty of first-degree criminal sexual conduct if he engages in sexual penetration with another person and if that other person is under thirteen years of age. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). There is no dispute as to the age

element; the complainant was eleven years old at the time of the alleged incidents. Instead, defendant challenges that the sexual penetration element was not established. He argues that there is no evidence of sexual penetration because the complainant was not credible because of her inconsistent statements. We disagree.

The question on appeal is not whether there was conflicting or inconsistent statements, but rather whether there was evidence that the trier of fact could choose to believe and if it did so believe that evidence, that the evidence would justify convicting defendant. *People v Smith*, 205 Mich App 69; 517 NW2d 255 (1994). In this case, the complainant testified to at least two incidents where defendant had sexual intercourse with her. Such evidence, if believed, would justify a trier of fact in convicting defendant. The trial court believed complainant's testimony. This Court will not interfere with the trial court's role in determining credibility. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992).

Hence, viewing the evidence in a light most favorable to the prosecution a rational trier of fact could find that the essential elements of first-degree criminal sexual conduct were proven beyond a reasonable doubt.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ John R. Weber