

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY GUY WALKER,

Defendant-Appellant.

UNPUBLISHED

July 18, 1997

No. 196695

Wayne Circuit Court

LC No. 95-004759

Before: Murphy, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of criminal sexual conduct in the first-degree, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). He was sentenced to 180 to 360 months' imprisonment on the first count and life imprisonment for the second count. The sentences are to run concurrently. He appeals as of right. We affirm.

Defendant's first issue on appeal dealt with the scoring of the sentencing guidelines by the trial court. Pursuant to *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997), we are prevented from reviewing this issue. Under *Mitchell*, in order for a defendant to raise a valid claim on appeal challenging the guidelines, the defendant must allege 1) that a factual predicate is unsupported, 2) that a factual predicate is materially false, and 3) that the sentence is disproportionate. *Id.* at 176-177. Defendant has failed to establish that a factual predicate relied on by the Court is either unsupported or materially false. Therefore, defendant's challenge does not state a cognizable claim on appeal.

Next, defendant argues that there was insufficient evidence to support the jury's verdict. We review a claim of insufficiency of the evidence, by considering the evidence in a light most favorable to the prosecution and determining whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994). The essential elements of criminal sexual conduct in the first-degree are (1) that the defendant engaged in sexual penetration with the complainant and (2) that the defendant was armed with a weapon. MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). The absence of consent is not an element to the crime of criminal sexual conduct in the first degree. *People v Stull*, 127 Mich App

14, 19-20; 338 NW2d 403 (1983). However, once consent is raised as an affirmative defense, the prosecution must prove lack of consent beyond a reasonable doubt. *People v Thompson*, 117 Mich App 522, 528; 324 NW2d 22 (1982).

In this case, the victim testified that there were two penetrations. The lab results confirmed sexual penetration. The victim testified that during the attack, defendant held a knife in his hands. Lastly, the victim stated that she did not consent to the sexual acts performed by defendant. Viewing this evidence in a light favorable to the prosecution, there was sufficient evidence to support defendant's convictions.

Finally, defendant argued that the trial court erred when it admitted a threatening letter written by defendant to a prosecution witness. At trial defendant objected to the letter based on relevancy. On appeal, defendant argues that the letter is more prejudicial than probative and that the letter was improper character evidence. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Since defendant did not properly preserve this issue on appeal, we decline to review it.

Affirmed.

/s/ William B. Murphy

/s/ Michael J. Kelly

/s/ Roman S. Gibbs