STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL BALLARD,

Defendant-Appellant.

UNPUBLISHED
August 26, 1997

No. 167934
Recorder's Court
LC No. 92-006191

Before: Smolenski, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant was originally sentenced to thirty to fifty years' imprisonment on each of the first-degree criminal sexual conduct convictions and ten to fifteen years' imprisonment on the second-degree criminal sexual conduct conviction, the three sentences to run concurrently. However, this Court granted defendant's motion to remand and, on remand to the trial court, defendant was resentenced to ten to twenty-five years' imprisonment for each first-degree CSC conviction and five to fifteen years' imprisonment for the second-degree CSC conviction. Defendant appeals as of right.

Defendant argues that the evidence was insufficient to support his convictions on two counts of first-degree criminal sexual conduct because there was insufficient evidence to establish an act of anal penetration and an act of vaginal penetration. In determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201; 489 NW2d 748 (1992).

A conviction under MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) requires proof that a defendant engaged in sexual penetration with another person who is under thirteen years of age. *People*

v Hammon, 210 Mich App 554, 557; 534 NW2d 183 (1995). "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required. *Id.;* MCL 750.520a(l); MSA 28.788(l)(1). Count III of the information charged defendant with anal penetration of the nine-year-old complainant, and Count IV charged defendant with vaginal penetration.

Defendant first contends that the evidence was insufficient to prove beyond a reasonable doubt that anal penetration occurred. We agree. The first trial of this matter resulted in a hung jury. At the second trial, the complainant's testimony from the first trial, as well as her preliminary examination testimony, were offered into evidence. At the first trial, the complainant testified that defendant put his penis by her "behind" in the basement and at church. She also testified at the first trial that when defendant put his penis by her "behind," she did not know if it was inside or outside that part of her body. When asked if the contact hurt, the complainant responded, "not really." At the second trial, the complainant testified consistent with the testimony given at the first trial. The complainant testified that defendant's penis touched her "bottom part." When the complainant used the phrase, "bottom part," she meant her "behind" and the place that she would "go to the bathroom," "number two." When defendant's penis touched her behind, the complainant testified at trial that "it kind of tickled." The complainant also testified at the second trial that she could not tell whether defendant's penis was inside her "behind" or just touching her body. When defendant's penis would touch her behind, defendant would move his body. At the preliminary examination, the complainant did not testify to any acts related to anal penetration or contact. Viewing the evidence in the light most favorable to the prosecution, we do not believe that a rational trier of fact could find that there was any intrusion, however slight, of defendant's penis into the complainant's anal opening. The evidence does not appear to establish any physical invasion, whatsoever, but rather "sexual contact" as defined by MCL 750.520a(k); MSA 28.788(1)(k).

"Sexual contact includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(k); MSA 28.788(1)(k). In the absence of evidence of penetration, the evidence presented at trial with respect to defendant's contact with the complainant's anal opening would support only a conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and that other person is under thirteen years of age. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a); *People v Piper*, ____ Mich App ____; ____ NW2d ____ (Docket No. 186133, issued 5/27/97). Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of second-degree criminal sexual conduct were proven beyond a reasonable doubt. Indeed, defendant essentially admits that the evidence was sufficient to support a conviction of second-degree criminal sexual conduct, as he has simply requested that the conviction be reduced from first-degree to second-degree criminal sexual conduct. Therefore, defendant's conviction on Count III should be reduced to the lesser offense of

second-degree

criminal sexual conduct. See, e.g., *People v Patterson*, 428 Mich 502, 528; 410 NW2d 733 (1987). Accordingly, we remand this case to Recorder's Court for entry of such a judgment and for resentencing as to this conviction.

Defendant further contends that the evidence was insufficient to support a finding of vaginal penetration. We disagree. The complainant testified at the trial that in June 1991 defendant took her into a gymnasium and told her to pull her pants halfway down. Defendant then pulled his pants halfway down. Defendant then tried to force his penis into her vagina. The complainant testified at trial and at the preliminary examination that she did not know if defendant was able to put his penis in her vagina, but that she thought that defendant inserted his penis into her vagina because her vagina was painful and because she found little drops of blood on the tissue after she went to the bathroom.

In addition to the foregoing testimony of the complainant, an emergency room physician who examined the complainant testified that the complainant's hymen was absent and that he would not expect the hymen of an eleven-year-old to be absent.[1] The doctor further opined that an absent hymen is consistent with penile penetration. This evidence, viewed in the light most favorable to the prosecution, was sufficient to permit a rational trier of fact to find that defendant sexually penetrated the complainant's vagina.

Defendant suggests that the complainant's credibility is questionable because of the inconsistencies in her testimony. Where the testimony given is conflicting, it is for the jury to decide what weight to assess the evidence. *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). Moreover, assessing the credibility of a testifying witness is a function of the jury. We will not resolve it anew. *Id.*

Next, defendant claims that he was denied the effective assistance of counsel when counsel offered into evidence the prior testimony of the complainant because that prior testimony was the only evidence of penetration. Because defendant did not request an evidentiary hearing or new trial regarding this claim, our review of this issue is limited to errors apparent on the record because defendant failed to move for a new trial or an evidentiary hearing. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Contrary to defendant's contention, the transcripts of the complainant's prior testimony were not the only evidence of penetration. Further, offering the complainant's testimony into evidence appears to have been strategy as it was offered for the purpose of attacking the complainant's credibility by showing the inconsistencies in her various accounts of the events. This Court will not substitute its judgment for that of defense counsel on matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Finally, defendant takes issue with the thirty to fifty year sentence imposed by the trial court. However, subsequent to the filing of defendant's appellate brief this Court granted defendant's motion to remand. The trial court granted defendant's motion for resentencing, and defendant's minimum

sentence was reduced to ten to ten to twenty-five years. Because defendant has not contested the sentence imposed on remand, we deem this issue abandoned.

The case is remanded to the trial court for entry of a judgment of second-degree CSC on Count III and for resentencing on this count. In all other respects, defendant's convictions and sentences are affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage

[1] The physician examined the complainant nearly two years after the initial alleged assault.