

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT GENE WINNIE,

Defendant-Appellant.

---

UNPUBLISHED

April 19, 2005

No. 253717

Midland Circuit Court

LC No. 03-001627-FC

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction on two counts of first-degree criminal sexual conduct (CSC), MCL 750b(1)(a), for performing cunnilingus on his three-year-old granddaughter. We affirm.

On appeal, defendant argues that the jury was improperly instructed that the prosecution did not have to prove penetration to establish first-degree CSC charges under MCL 750.520b(1). Because defendant's counsel affirmatively approved the instructions, the issue is waived and any error extinguished. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). However, even if we reviewed the issue we would conclude that the jury was properly instructed. See *People v Lemons*, 454 Mich 234, 254-255; 562 NW2d 447 (1997); *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992); *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987).

Next, defendant argues that he was denied constitutional equal protection in light of the interpretation that MCL 750.520b does not require penetration with regard to cunnilingus, MCL 750.520b. See US Const Am XIV; Const 1963, art 1, s 2. Because defendant did not raise this issue below, our review is for plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Plain error has not been established. Defendant claims that “[b]y eliminating the requirement of penetration only where the female genitals are involved, section 750.520b provides greater protections to some female victims, as well as increasing the penalty [sic] some female perpetrators.” This argument is without merit. As this Court in *Harris*, *supra* at 468-469 explained, the definition of “sexual penetration” in the statute includes certain types of sexual conduct. However,

[t]he definition does not state that, *if* these defined acts include penetration, they are penetration within the meaning of this section. It is rather the format of the definition that the acts *in and of themselves are acts that involve sexual penetration*. *Id.* [Emphasis added.]

The *Harris* Court concluded that an act of cunnilingus, i.e. “the placing of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself, or the mons pubes,” involved an act of sexual penetration. *Id.* at 470. We agree and therefore reject defendant’s contention that MCL 750.520b eliminates the requirement of penetration with regard to cunnilingus; thus, there is no “gender-based scheme” that violates his right to equal protection and he has failed to establish plain error.

Next, defendant claims that he was denied the effective assistance of counsel because his attorney did not object or challenge the three-year-old victim’s competency to testify. Whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of constitutional law are reviewed by this Court de novo and factual findings are reviewed for clear error. *Id.*

To establish ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel’s errors, the outcome of the trial would have been different. See *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant argues that his counsel was ineffective because the victim was incompetent to testify at trial but counsel did not object to the testimony. After reviewing the trial court’s determination of the victim’s competency for an abuse of discretion, we disagree. See *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998).

Under MRE 601, every person is competent to testify unless a court finds that he or she does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably. *Id.* Here, at the preliminary examination on this matter, the court made the determination that the victim was competent to testify after she was questioned in such a manner as to determine if she would correct a misstatement that was made, i.e., understood that it would be wrong to identify something as other than it really was. At the *Ginther*<sup>1</sup> hearing on this issue, defendant’s trial counsel testified that he believed the court made a correct ruling at the preliminary exam, therefore, he did not challenge the competency of the victim at trial. At the conclusion of the *Ginther* hearing, the trial court concurred with defense counsel’s assessment holding that, after considering the preliminary examination testimony and the victim’s appearance in the trial court, the court continued to conclude that the victim was competent. We defer to the trial court’s conclusion in light of its vantage point, and we also find such conclusion supported by the record. The trial court also held that it was unlikely, even if counsel would have challenged the victim’s competency, that the outcome of the trial would have been different. We agree with this conclusion in light of the record evidence that included other

---

<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

testimony related to the victim's disclosure and change in behavior, as well as defendant's statements to police. In sum, defendant has failed to establish his ineffective assistance of counsel claim.

Next, defendant argues that his sentence was unconstitutional under *Blakely v Washington*, \_\_\_ US \_\_\_; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because the trial court relied on findings of fact that were not made by the jury in determining defendant's sentence under the guidelines. However, our Supreme Court explained in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), that *Blakely* is inapplicable to Michigan's guideline scoring system. That determination constitutes binding precedent on this Court. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004).

Defendant also argues that, regardless if *Blakely* applies, he is entitled to resentencing because he should not have been scored fifty points for offense variable (OV) 13 since neither the jury nor the trial court made a finding that defendant had committed three or more sexual penetrations. At sentencing, defendant's counsel objected to the scoring of OV 13 on the ground that defendant "maintains his innocence. So penetration should not be scored." The trial court asked counsel if it was correctly scored in light of the jury verdict and counsel indicated that it was correctly scored. Defendant's objection, then, did not properly preserve this issue for appeal. See MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Nevertheless, this claim is without merit. Under OV 13 fifty points is to be assessed when the offense involved a pattern of criminal activity involving three or more sexual penetrations over a five-year period, regardless of whether the offenses resulted in convictions. MCL 777.43(2)(a). Here, there was evidence of three penetrations thus the fifty point score is adequately supported. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Hilda R. Gage