

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 26, 2012

v

RANDOLPH LEE PRESCOTT II,
Defendant-Appellant.

No. 303046
Ogemaw Circuit Court
LC No. 10-003448-FC

Before: STEPHENS, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

Defendant appeals his conviction, following a jury trial, of one count of criminal sexual conduct, third degree (CSC III), MCL 750.520d(1)(a) (victim at least 13 years old but under 16 years old) . Defendant was found not guilty of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(f) (force or coercion causing personal injury). The circuit court sentenced defendant to 30 months to 15 years in prison. We affirm.

This prosecution stems from an admitted sexual encounter between defendant and the complainant. Defendant and the complainant agree that the encounter occurred on a pontoon boat in a lake near defendant's home. Defendant testified that the encounter was consensual; the complainant testified it was not. At issue in this appeal is whether the evidence presented at trial established that the complainant was 15 years old at the time defendant assaulted her.

Defendant argues that the evidence presented at trial was insufficient to show that the complainant was aged 15, and thus his conviction is not supported. Alternatively, defendant contends that his conviction was against the great weight of the evidence. Defendant's claim that the evidence was insufficient to support his conviction is not subject to a preservation requirement. *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987). We review de novo a claim by a criminal defendant that his conviction is not supported by sufficient evidence. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

In general, the test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Musser*, 259 Mich App 215, 219;

673 NW2d 800 (2003). However, defendant's assertion that the verdict was against the great weight of the evidence is unpreserved because he did not timely move for a new trial on that basis. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Accordingly, review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Contrary to defendant's contention, there was sufficient evidence that the victim was 15 years old at the time of the crime. Generally, the complainant testified that defendant penetrated her in August 2008, prior to her sixteenth birthday. Defendant claimed at trial that the sex was consensual and occurred after the complainant's birthday. Michigan State Police Trooper Jesse Diaz, who spoke with defendant about the incident in his patrol car, contradicted defendant's testimony, stating that defendant acknowledged during their interview that he knew the complainant was not legally able to consent to sexual intercourse at the time of their sexual encounter.

To the extent that defendant's argument calls for the Court to consider the credibility of the witnesses appearing at trial, the argument lacks merit. It is the role of the jury to determine which witnesses it finds credible, *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), and it is well-established that the Court will not second-guess those determinations with the benefit of hindsight, *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). Here, the jurors were instructed that where testimony does not agree, "you must decide which testimony you accept." Accordingly, deferring to the jury's evaluation of witness credibility, and viewing the evidence in a light most favorable to the prosecution, sufficient evidence was adduced to establish that the complainant was aged 15 when the first sexual encounter occurred.

In his argument that the verdict was against the great weight of the evidence, defendant characterizes the complainant's testimony as being "patently incredible." Specifically, he argues that the jury must have concluded that the complainant lacked credibility, because it did not find him guilty of CSC I or the lesser included CSC III. He contends that both CSC I and CSC III are predicated on the use of force or coercion causing injury, and therefore, the jury necessarily "rejected her testimony that she was forcibly raped or that injury occurred." He concludes that because the jury found the complainant to not be credible in this respect, and because Diaz admittedly did not retain his note book in which he took notes during his interview of defendant, the verdict was against the great weight of the evidence.

This argument lacks merit. It is unknown why the jury did not find defendant guilty of either CSC I or the lesser included CSC III for count 1. In any event, a corollary of the jury's power to evaluate witness credibility is the rule that it may believe or disbelieve part or all of the complainant's testimony. CJI2d 2.691), 3.6(1).¹ Again, we will not adjudge anew the issue of the credibility of the trial witnesses.

¹ The jurors were instructed that "if you think the witness lied about some things but told the truth about the others, you may simply accept the part you think is true and ignore the rest."

As for Diaz not producing at trial his notes of the interview, he explained that that he does not “always keep his note pad” and that the notes were probably destroyed. “Things are all . . . documented on computer, in the report. And I guess it is easier to keep that information in the computer than keep it on a note pad,” Diaz testified. It is unclear whether defendant is implying that Diaz’s memory was inaccurate or that the report does not accurately reflect the conversation. In any event, it was the jury’s obligation to evaluate Diaz’s testimony in light of the failure to keep or produce his notes. Defendant is not entitled to relief on this issue.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Donald S. Owens