

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 12, 2013

v

TOMMY LEE UNDERWOOD,

Defendant-Appellant.

No. 309730
Van Buren Circuit Court
LC No. 11-017609-FC

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct, MCL 750.520b(2)(b) (sexual penetration with person under 13 years of age), and second-degree criminal sexual conduct, MCL 750.520c(2)(b) (sexual contact with person under 13 years of age). Defendant was sentenced to concurrent sentences of 25 to 40 years for first-degree criminal sexual conduct and 8 to 40 years for second-degree criminal sexual conduct. We affirm.

I. FACTUAL BACKGROUND

The victim was 12 years old when her mother engaged in a dating relationship with defendant. According to the victim, during the summer of 2010, defendant made her suck on his penis “every chance he got.” She recalled one incident in particular where she and defendant were parked in her driveway, defendant unzipped his pants, and he made her put his penis inside of her mouth. She testified that this happened in the driveway more than once. She also recalled another specific incident where defendant drove to an open field, unzipped his pants, and made the victim place his penis inside of her mouth.

The victim also testified about numerous instances where she and defendant had sexual contact. On one occasion, defendant took his finger and on the outside of her clothing, he placed his finger up into her vagina. Defendant also touched her breast once and while he said it was accidental, she did not know if that was true.

After the victim’s mother and defendant ended their relationship, the victim eventually confessed to her mother what defendant had been doing. She did not tell anyone before because defendant informed her that they would no longer have a “special thing” between them if she told anyone. The victim’s mother instructed the victim to tell her therapist about the incidents,

and the therapist notified the police. When defendant was interviewed by the police, he admitted to kissing the victim and touching her buttocks. He also admitted that the victim touched his penis with her hand and tongue.

James Shiltz, defendant's friend and employee, testified that during the summer of 2010, defendant would leave work for long periods of time during the day. Shiltz also heard defendant make an inappropriate sexual comment about a young girl on one occasion. Another friend of defendant's, Susan Anderson, likewise heard defendant make an inappropriate sexual comment about a young female waitress. Defendant also told Anderson that he did not want to resume his relationship with the victim's mother after they separated because he was afraid the victim would accuse him of molesting her.

At trial, defendant contested the victim's credibility due to her inability to remember details about the sexual conduct and other inconsistencies in her testimony. There also was evidence concerning the victim's bipolar depression, Attention Deficit Disorder, and Attention Deficit Hyperactivity Disorder. The defense called two character witnesses, a classmate of the victim and the classmate's mother, who testified that the victim had a character for untruthfulness. The jury, however, found defendant guilty of first-degree criminal sexual conduct and second-degree criminal sexual conduct. Defendant now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

"Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). This Court reviews "de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

B. First-Degree Criminal Sexual Conduct

MCL 750.520b(1)(a) provides that a "person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . [t]hat other person is under 13 years of age."¹ "Sexual penetration" includes "fellatio" or "any other

¹ Defendant does not dispute that the victim was 12 years old and he was 59 years old during the alleged sexual assaults.

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." MCL 750.520a(r).

The record supports a finding that there were multiple instances of sexual penetration between the victim and defendant. The victim testified that on at least two specific occasions, once in the driveway and once in the field, defendant's penis was inside of her mouth. She also testified that defendant forced her to perform oral sex on him "every chance he got." The victim further testified that defendant placed his finger in her vagina through her clothes. While defendant denies penetration occurred, this Court resolves all conflicts of the evidence in favor of the prosecution in a sufficiency challenge. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). We also do not second-guess jury determinations regarding the weight of the evidence or the credibility of the witnesses. *Unger*, 278 Mich App at 222. Thus, we defer to the jury's determination that the victim in the instant case was providing credible testimony, especially because the testimony of a victim need not be corroborated in prosecutions for first-degree criminal sexual conduct. MCL 750.520h. In light of the victim's explicit testimony regarding sexual penetration, we find that there was sufficient evidence to sustain defendant's conviction.

C. Second-Degree Criminal Sexual Conduct

MCL 750.520c(1)(a) provides that a "person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if . . . [t]hat other person is under 13 years of age." "Sexual contact" is defined as "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 [or] done for a sexual purpose" MCL 750.520a(q). "'Intimate parts' includes the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(e).

The victim testified that defendant touched her breast. When being interviewed by the police, defendant admitted that he touched her breast and that the victim had touched his penis with her hand and tongue. Thus, this evidence demonstrates that there was sexual contact of intimate parts, defined to include the genital area, buttocks, or breasts. See MCL 750.520a(e). As for whether defendant's behavior was intentional, "[a] factfinder can infer a defendant's intent from his words or from the act, means, or the manner employed to commit the offense. In other words, a defendant's intent can be proved by circumstantial evidence." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001) (footnotes omitted). Here, the victim testified that defendant initiated the sexual contact over the course of several months. Defendant was always alone with the victim during the sexual contact, and he told her to keep it a secret. This is sufficient evidence demonstrating that the sexual contact was intentional, not accidental.

Lastly, the determination of whether the contact could reasonably be construed as having been for a sexual purpose is objective. *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997). A reasonable jury could have found that defendant did not have a nonsexual purpose for allowing a 12 year old female to touch his penis; nor did he have such a purpose for touching her breasts and buttocks. Again, this Court will not revisit issues of credibility on appeal. *Unger*, 278 Mich App at 222. Accordingly, the record contained sufficient evidence to support a finding

that the intentional sexual contact between defendant and the victim could reasonably be construed as having been for a sexual purpose. Therefore, the evidence viewed in a light most favorable to the prosecution was sufficient for a rational fact-finder to conclude that defendant committed second-degree criminal sexual conduct.

III. CONCLUSION

There was sufficient evidence adduced at trial to support defendant's convictions of first-degree criminal sexual conduct and second-degree criminal sexual conduct. We affirm.

/s/ Kurtis T. Wilder

/s/ Patrick M. Meter

/s/ Michael J. Riordan