

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AHN TRAN,

Defendant-Appellant.

UNPUBLISHED

June 12, 2003

No. 236621

St. Clair Circuit Court

LC No. 00-002515-FH

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

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(b) (sexual contact accomplished by force or coercion). We affirm.

On appeal, defendant first argues that the trial court improperly admitted hearsay testimony from the victim's friend which included that the victim had told her that defendant touched her breast. We conclude that the trial court did not abuse its discretion, *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998), by admitting this testimony under the excited utterance exception to the hearsay rule, MRE 803(2).

For a statement to be admissible as an excited utterance, there must be evidence (1) of a startling event and (2) that the statement was made while under excitement caused by the event. *Smith, supra* at 550. Importantly, the time that passes between an event and the statement is not dispositive because "it is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule." *Id.* at 551. Also, whether a statement made in response to questioning may nevertheless be admitted as an excited utterance "depends on the circumstances of the questioning and whether it appears that the statement was the result of reflective thought." *Id.* at 553.

The unsolicited touching of her breast and related conduct described by the victim could be viewed as a startling event. See *id.* at 552. The victim's friend testified that the victim telephoned her after 6:00 p.m. on the date of the incident and was "crying hysterically" and was so upset that she "could hardly understand her." She further testified that the victim told her that defendant had tried to kiss her and grabbed her breast. In *Smith, supra*, our Supreme Court considered as an excited utterance a statement made by the victim to his mother referencing a sexual assault that occurred about ten hours earlier when, at the time of the statement, the victim

acted in an uncharacteristic manner in various ways and broke into tears before the statement. *Id.* at 552-553. We similarly conclude that the trial court did not abuse its discretion by admitting the testimony at issue here because there was evidence to reasonably support a conclusion that the victim's statements were made while she was under the stress of a startling event on the date that the event occurred.

In connection with this issue, defendant also refers to evidence that three young men went to defendant's business to confront him as being highly prejudicial. However, this matter is not properly presented for our review because it is not within the scope of defendant's statement of the question presented, nor has defendant sufficiently articulated a basis for any claim that he is entitled to relief based on this matter. See *People v Knox*, ___ Mich App ___; ___ NW2d ___ (Docket No. 226944, issued 4/8/03), slip op at 16 (declining to address an issue not presented in statement of questions or adequately briefed). In any event, contrary to defendant's claim, we do not believe that reference to the three young men was highly prejudicial, because it reflects little more than the obvious fact that the victim reported defendant's alleged conduct toward her to others.

Next, defendant argues that the trial court failed to properly instruct the jury because it did not define the term "sexual contact" or state that there had to be sexual contact accomplished by "force or coercion" in order to convict defendant of CSC IV. However, defendant failed to object to the jury instructions, therefore, any error is waived unless the error was plain and relief is necessary to avoid manifest injustice. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Sabin (On Second Remand)*, 242 Mich App 656, 657-658; 620 NW2d 19 (2000). Here, defendant has failed to establish that reversal is warranted.

CSC IV consists, in relevant part, of sexual contact with another person where force or coercion is used to accomplish the sexual contact. MCL 750.520e(1)(b). The trial court, without using the terms "sexual contact" or "force or coercion," instructed the jury that to prove the CSC IV charge in this case the prosecutor had to prove three elements: (1) "that the Defendant intentionally touched [the victim's] breast or the clothing covering that area," (2) "that this touching was done for sexual purpose or could reasonably be construed as having been done for sexual purpose," and (3) "that the Defendant achieved the sexual conduct through concealment or by the element of surprise." As an initial matter, the trial court's instructions required the jury to find that defendant "intentionally touched" the victim's breast or the clothing covering that area in order to convict him. Thus, contrary to what defendant suggests, the trial court's instruction would not have allowed the jury to treat an accidental touching of the victim's breast as a "sexual touching," as set forth above. Thus, the jury instructions did not allow defendant to be convicted on the basis of an accidental touching.

At the time of the alleged incident in 2000, MCL 750.520a(k) defined "sexual contact" as including "intentional touching [that could] reasonably be construed as being for the purpose of sexual arousal or gratification."¹ The trial court's instruction describing the second element as a touching that "was done for sexual purpose or could reasonably be construed as having been done for sexual purpose" is similar to, but arguably differs somewhat from, the statutory

¹ MCL 750.520a(l), in its present form, provides a more expansive definition of "sexual contact."

definition of “sexual contact.”² Nevertheless, this case did not involve any claim that defendant intentionally touched the victim’s breast or the clothing covering it for a legitimate or non-sexual purpose, or in some other way that could not reasonably be construed as being for the purpose of sexual arousal or gratification. Rather, defendant testified that he never tried to kiss or touch the victim in any way. It is apparent that the jury accepted the victim’s version of the incident. Further, obviously, this conduct could reasonably be construed as being for the purpose of sexual arousal or gratification because, according to the victim, defendant made suggestive remarks to her and kissed her in connection with touching her breast. Thus, any error with regard to whether the trial court’s instruction required a finding of “sexual contact” did not affect defendant’s substantial rights. Accordingly, this unpreserved issue does not warrant appellate relief. See *Carines, supra*.

With regard to the “force or coercion” requirement, MCL 750.520e(1)(b)(v) provides that force or coercion for purposes of CSC IV includes “[w]hen the actor achieved the sexual contact through concealment or by the element of surprise.” Thus, the trial court’s instruction regarding the third element of the CSC IV charge as requiring the prosecutor to prove that defendant committed the sexual conduct through concealment, or by the element of surprise, thereby required the prosecutor to prove a form of force or coercion as defined in the relevant statute. Indeed, if anything, the trial court’s instruction was overly generous to defendant because it did not allow the jury to convict him on the basis of other forms of force or coercion contemplated by the CSC IV statute. See MCL 750.520e(b) (enumerating, on a nonexclusive basis, types of force or coercion for purposes of CSC IV). Thus, plain error has not been shown.

Next, defendant asserts that the CSC IV statute, MCL 750.520e, at least as applied to this case, is unconstitutionally vague. As we understand defendant’s argument, it appears he is contending that MCL 750.520e(1)(b)(v) is unconstitutionally vague because it does not define the terms “concealment” or “surprise.” We disagree. To provide fair notice of its requirements so that it is not unconstitutionally vague, a statute “must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *People v Noble*, 238 Mich App 647, 651-652; 608 NW2d 123 (1999). The terms “concealment” and “surprise” are commonplace words with well-understood meanings. A statute is sufficiently definite if its meaning can be fairly determined by, among other means, “the commonly accepted meanings of words.” *Id.* at 652. On its face, MCL 750.520e(1)(b)(v) plainly provides that sexual contact accomplished through concealment, e.g., by hiding and then unexpectedly engaging in sexual contact with a victim, or by surprise, e.g., by engaging in sexual contact with a victim in circumstances in which it would be unexpected, is prohibited. Because the statute provides fair notice that allows a person of ordinary intelligence a reasonable opportunity to avoid engaging in the conduct it prohibits, it is not unconstitutionally vague.

² We note that the present statutory definition of “sexual contact,” which became effective on March 28, 2001, after the date of the charged incident, defines “sexual contact,” in pertinent part, as requiring that the relevant conduct reasonably be construed as being “for the purpose of sexual arousal or gratification” or as being “done for a sexual purpose.” That the Legislature included the latter phrase, rather than merely the former, suggests a legislative concern that it may be possible to do an act for a sexual purpose without that act necessarily being done for the purpose of sexual arousal or gratification.

Next, defendant argues the trial court erred in denying his motion for judgment notwithstanding the verdict (JNOV) because the verdict was against the great weight of the evidence. We disagree. A trial court's decision on a motion for JNOV is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). A jury verdict is against the great weight of the evidence if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Conflicting testimony, even if impeached to some extent, is an insufficient basis for granting a new trial. *Lemmon, supra*.

This case was essentially a credibility contest. The victim testified that defendant touched her breast while in a back room, defendant testified that he did not, and defendant's witness testified that defendant did not go into the back room. While defendant emphasizes discrepancies in the victim's accounts of the event, a witness' confusion about some relatively minor details of an event, especially one that could well have been startling and upsetting, does not render the witness' testimony about the crucial facts "patently incredible" or "inherently implausible." See *id.* Credibility questions "posed by diametrically opposed versions of the events in question" are to be resolved by the factfinder. *Id.* at 646-647. This Court "may not attempt to resolve credibility questions anew." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Therefore, the trial court did not abuse its discretion by denying defendant's motion for JNOV based on the great weight of the evidence.

Next, defendant argues that the CSC IV statute violated the due process requirement that every element of a crime be proven beyond a reasonable doubt because it allows conviction based on conduct that could reasonably be construed as being for a sexual purpose, rather than requiring a determination that the defendant actually acted with a sexual purpose. We disagree. This general argument has previously been rejected by this Court, primarily for the reason that criminal sexual conduct is a general intent crime; consequently, proof of defendant's specific intention is not an element of the offense. See *People v Langworthy*, 416 Mich 630, 645, n 26; 331 NW2d 171 (1982); *People v Piper*, 223 Mich App 642, 645-647; 567 NW2d 483 (1997), citing *People v Fisher*, 77 Mich App 6; 257 NW2d 250 (1977). The statute does require proof beyond a reasonable doubt on all of the actual elements of that crime; therefore, this issue is without merit.

Finally, defendant claims that he received ineffective assistance of counsel. Because defendant did not preserve this claim below, our review is limited to mistakes apparent on the record. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001). To establish a claim of ineffective assistance of counsel, a defendant must affirmatively show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

First, defendant claims that his counsel was ineffective because he failed to bring out "crucial factual inconsistencies" in the victim's testimony. However, a review of trial counsel's cross-examination of the victim shows that he did bring out details of prior accounts by the victim at the preliminary examination that were inconsistent or arguably inconsistent in some details with the victim's trial testimony. Similarly, defendant claims his trial counsel did not clarify where a witness was during the alleged assault, but his counsel did elicit testimony from

the witness that he was watching television in the same room as the victim was located and that he never saw defendant touch or come up to and speak with the victim. Accordingly, we conclude that defendant has not established that his trial counsel's performance fell below an objective standard of reasonableness with regard to these matters.

Second, defendant argues tersely that his trial counsel failed "to object to the ultimate jury instructions and request the proper instructions." We presume that defendant refers to the trial court's instructions previously discussed in this opinion regarding the elements of the CSC IV charge in this case. While maybe somewhat imperfect with regard to the "sexual contact" element of the charge, for the reasons previously discussed, there is no reasonable probability that this affected the outcome of the trial, particularly considering that the basic dispute at trial was whether defendant touched the victim's breast at all.

Third, defendant refers in conclusory fashion to trial counsel's "failure to effectively define the beyond a reasonable doubt standard to the jury." However, defendant does not argue with any specificity what trial counsel should have done to better define this concept for the jury. Thus, defendant has abandoned this assertion of ineffective assistance by failing to argue its merits. See *People v Harmon*, 248 Mich App 522, 533; 640 NW2d 314 (2001), quoting *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999) (a "party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim").

Fourth, defendant criticizes trial counsel for not having been successful in his objection to the victim's friend's testimony about the victim's statement to her, and by failing to object to references to the three young men going to the business. However, as previously discussed, the trial court did not abuse its discretion by admitting the contested testimony under the excited utterance exception to the hearsay rule. Thus, trial counsel did not fall below an objective standard of reasonableness in failing to succeed in his objection to such testimony. With regard to references to the three young men, we conclude that there is no reasonable probability that any failure by trial counsel to object to such references affected the outcome of the trial because, as discussed above, this testimony reflected little more than the obvious fact that the victim had told others of her allegation against defendant.

Finally, defendant claims that his counsel was ineffective for not arguing that defendant's witness was his brother-in-law and would not likely have allowed defendant to engage in sexual contact with another female or forgive him for doing so. However, in fact, trial counsel essentially made such a point by asking the jury to look at the context in which the alleged incident supposedly occurred including that defendant's "wife's brother is present." Defendant also claims his counsel should have suggested the possibility that the victim may have fabricated her allegation for financial gain through a civil suit against him. However, from the record, we cannot conclude that trial counsel lacked sound strategic reasons for avoiding such a suggestion. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Thus, we conclude that defendant has not established that

trial counsel's performance fell below an objective standard of reasonableness with regard to these matters.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Brian K. Zahra