

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DAVID EMERY,

Defendant-Appellant.

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UNPUBLISHED

January 10, 2008

No. 273368

Wayne Circuit Court

LC No. 06-003538-01

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct (CSC 1), MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct (CSC 2), MCL 750.520c(1)(a). Defendant was sentenced to 6 to 15 years for the CSC 1 conviction and 17 months to 15 years for each of the CSC 2 convictions. Defendant appeals as of right. We affirm.

**I. FACTS**

Defendant and victim resided in the same household, which included the victim's grandmother, stepmother, and siblings. The home was owned by the victim's grandmother. The victim, defendant's daughter, was born June 8, 1994. The three incidents of sexual assault occurred when the victim was 11-years-old. The victim first revealed the assaults to a school counselor in 2005. At first, the victim was too fearful to talk to the counselor, even though the counselor was known and trusted by the victim, but eventually she was able to write out a description of the sexual abuse. The written statement, given in the presence of the school's police liaison officer, indicated that the victim's father was sexually abusing her and forcing her to perform fellatio on him.

The victim testified at trial and described three specific instances of sexual abuse. First, she testified that defendant forced her to lie on a couch in the basement and then removed her pants and underwear; he then penetrated her vagina with his fingers and his penis, and he ejaculated. Second, defendant took the victim upstairs while the other children were outside; defendant locked the front door and the bedroom door and performed cunnilingus on her. Third, after the family moved into a new home, defendant called the victim into the bathroom. He removed his shorts and exposed himself, pushed the victim to her knees, grabbed her hair, told her to open her mouth, and forced her to perform fellatio. He held her head and moved it back and forth until he ejaculated and then told the victim to go outside. The victim also testified that

defendant threatened to “whoop” her if she told anybody, and he did “whoop” her for refusing to have sex with him.

## II. SUFFICIENCY OF THE EVIDENCE

Defendant argues on appeal that there was insufficient evidence to support his convictions and the findings of fact by the lower court are insufficient.<sup>1</sup> We disagree.

### A. Standard of Review

This Court reviews challenges to the sufficiency of the evidence de novo. *People v Osantowski*, 274 Mich App 593, 612-613; 736 NW2d 289 (2007, lv pending \_\_\_ Mich \_\_\_ (2007). “In reviewing the sufficiency of the evidence in a criminal case, this Court must review the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Harmon*, 248 Mich App 522, 523; 640 NW2d 314 (2001).

### B. Analysis

Defendant argues that the evidence is insufficient to support his convictions because of inconsistent statements in the victim’s testimony and the lack of facts proving either sexual penetration or touching. Defendant points out that the victim testified that she had been disciplined at school for stealing and lying and later recanted the abuse allegations in order to be removed from foster care and returned to her step-grandmother’s home. Defendant contends that these facts make the victim’s testimony unreliable and insufficient to support his convictions. We disagree.

A conviction for first-degree criminal sexual conduct requires that a person engage in sexual penetration with another person and that other person is under 13 years of age. MCL 750.520b(1)(a); *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). Penetration includes “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.” *People v Heflin*, 434 Mich 482, 559 n 19; 456 NW2d (1990). A conviction for second-degree criminal sexual conduct requires that a person engage in sexual contact with another person and that other person is under 13 years of age. MCL 750.520c(1)(a); *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). Sexual contact is the “‘intentional touching of the victim’s or actor’s intimate parts . . . if that intentional touching can

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<sup>1</sup> In his statement of questions presented, defendant stated the single issue as one of insufficient evidence to support the conviction. In the argument section, however, defendant stated that the court’s factual findings are insufficient. Since defendant failed to state that the factual findings are insufficient in the statement of questions presented, that issue is not properly before this court. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Nevertheless, this Court will analyze this issue.

reasonably be construed as being for the purpose of sexual arousal or gratification.” *Id.* at 645, quoting MCL 750.520a.

Here, the parties stipulated that the victim was 11 years old at the time of the sexual assaults. The victim, defendant’s daughter, testified that defendant sexually assaulted her on multiple occasions. The victim recalled defendant ordering her into the basement, where, after forcing her to lie on a couch, he removed her clothes and penetrated her vagina with his index finger and penis. On another occasion, defendant ordered the victim to her bedroom. After locking both the front and bedroom doors to prevent the other children from entering, defendant performed cunnilingus on her. Finally, the victim recalled an instance when defendant, while in the bathroom, removed his shorts and exposed himself to her. Grabbing her shoulders and head, he pushed her to her knees, instructed her to open her mouth, and forced her to perform fellatio.

Some of the victim’s testimony was corroborated by witnesses. Her stepmother testified that defendant lied at a previous hearing about being alone with the victim and, on at least one occasion, was informed by the victim that defendant “kissed her funny.” The victim’s school counselor testified that the victim approached her, wishing to speak confidentially. The victim then wrote out an account of her abuse in front of the counselor and the school’s liaison officer.

“This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). After listening to the testimony and observing the demeanor of the victim, the court found it natural for a child to be secretive about abuse and did not believe she was making anything up. The court reasoned that failing to recall some incidents simply is not an indicator of untruthfulness. There were no compelling inconsistencies that permitted the rejection of her testimony; therefore, the judge properly convicted defendant of one count of CSC 1 and two counts of CSC 2.

Further, the findings of fact made by the lower court are legally sufficient. Defendant argues, improperly, that the factual findings of the court are insufficient because they did not indicate either sexual touching or penetration. As a result of this omission, the appellate court would be unable to determine if the lower court correctly applied the law to the facts.

Findings of fact are governed by MCR 2.517(A)(1). The rule states that “the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.” Under MCR 2.517(A)(2), “[b]rief, definite, and pertinent findings and conclusions on contested matters are sufficient, without overelaboration of detail or particularization of facts.” See also *Kemerko Clawson LLC v RxIV Inc*, 269 Mich App 347, 355; 711 NW2d 801 (2005). So long as it appears from the court’s findings of fact that the trial court was aware of the issues in the case and correctly applied the law, the requirements of the rule have been met. *People v Fair*, 165 Mich App 294, 297-298; 418 NW2d 438 (1987). Here, the lower court met the requirements of the rule. First, the court believed the victim’s testimony. It found that inconsistent statements made by the victim were a consequence of pressure applied to her. In finding that the victim told the truth, the court found the circumstances horrific and difficult to admit to strangers in a courtroom. The court doubted complete penetration necessary for the first CSC 1 charge, and thus, found defendant guilty of CSC 2. For the second charge of CSC 1, the court also found no simple penetration but a complete act of fellatio, thereby convicting

defendant. Additionally, the court found contact for the purpose of gratification and arousal and convicted defendant on the third charge, CSC 2. All of this is supported by facts.

Affirmed.

/s/ Bill Schuette  
/s/ Stephen L. Borrello  
/s/ Elizabeth L. Gleicher