

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DONALD CHARLES HUDDLESTONE,

Defendant-Appellant.

UNPUBLISHED

October 8, 2002

No. 233731

LC No. 00-002557-FC

Before: Hood, P.J. and O'Connell and Bandstra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct, MCL 750.520b(1)(a). He was sentenced to ten to twenty years' imprisonment, and appeals as of right. We affirm.

Defendant argues that a videotaped interview of the complainant and a note written by the complainant shortly after the charged assault were erroneously received into evidence. However, the record indicates that defense counsel expressly stipulated to the admission of the videotaped interview. Additionally, defense counsel explicitly stated on the record that he had no objection to the admission of the note. In light of this record, we hold that defendant has waived review of these issues. *People v Riley*, 465 Mich 442, 448-450; 636 NW2d 514 (2001).

Defendant also argues that defense counsel was ineffective for stipulating to the admission of the videotaped interview of the complainant, which was conducted by the Michigan State Police and the Family Independence Agency. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In the instant case, the complainant initially denied being sexually assaulted by defendant. In his opening statement, defense counsel maintained that the complainant fabricated her story after persistent questioning by the police and others. He pursued this theory in his cross-examination of several witnesses, inquiring whether their questioning techniques violated established protocol developed for interviewing young victims of sexual abuse. Additionally, in his closing argument, counsel highlighted inconsistencies between the complainant's trial testimony and her statements during the interview. It is apparent that counsel's decision to stipulate to the admission of the videotaped interview was strategic. Defendant has not overcome the presumption of sound strategy. *People v Toma*, 462 Mich 281, 310-311; 613 NW2d 694 (2000). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Next, defendant argues that the prosecution failed to present sufficient evidence of penetration to support his conviction for first-degree criminal sexual conduct. We disagree. The complainant testified that defendant licked her “crotch,” which she latter stated included the “lips” of her vagina. This testimony was sufficient to enable the jury to find that defendant performed cunnilingus on the complainant, thereby satisfying the element of penetration. MCL 750.520a(1); *People v Lemons*, 454 Mich. 234, 254-255; 562 NW2d 447 (1997).

Defendant also argues that he was denied a fair trial because of misconduct by the prosecutor. Because defendant did not object to the allegedly improper remarks by the prosecutor, we review this issue for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We are not convinced that the challenged remarks constituted improper vouching. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Further, any perceived prejudice that did occur could have been cured by a timely instruction had one been requested. Thus, this unpreserved issue does not warrant appellate relief. *People v Rodriguez*, 251 Mich App 10, 30-31; 650NW2d 96 (2002).

Affirmed.

/s/ Harold Hood
/s/ Richard A. Bandstra
/s/ Peter D. O’Connell