

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM BARTLEE OLSON,

Defendant-Appellant.

UNPUBLISHED

June 14, 2005

No. 254626

Montmorency Circuit Court

LC No. 03-000433-FH

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d, for which he was sentenced to serve a term of eight to twenty-five years' imprisonment. Defendant appeals as of right. We affirm, but remand for correction of the judgment of sentence and presentence investigation report.

Defendant's convictions arise from allegations of sexual misconduct against two young men. At trial, both men testified regarding a nonconsensual act of fellatio performed on them by defendant as they slept. On appeal, defendant argues that the trial court erred in failing to expressly instruct the jury that, in order to convict defendant of third-degree criminal sexual conduct, it must find that the acts alleged by the victims involved actual entry of the victims' penises into defendant's mouth, as opposed to the mere touching of the young men's genitals with defendant's mouth or tongue. See, e.g., *People v Reid*, 233 Mich App 457, 479-480; 592 NW2d 767 (1999). However, defendant expressed satisfaction with the trial court's instructions to the jury and, in doing so, waived the right to assert any claim of instructional error. See *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000) (one who waives his rights may not seek appellate review of a claimed deprivation of those rights, for his waiver extinguishes any error). Moreover, because in addition to the complained of instruction, the trial court in its preliminary instruction correctly stated the issue and in its final instruction specifically told the jury that the people's theory was that defendant engaged in oral sex with each victim, we are satisfied that taken as a whole the instructions fairly presented the issue to be tried. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001).

Defendant also argues that he was improperly assessed two crime victim's rights fees. The prosecution concedes that assessment of two fees in this matter was improper, and we agree. With respect to assessments payable to the crime victim's rights fund, MCL 780.905(1) provides that "[t]he court shall order a defendant to pay only 1 assessment . . . per criminal case." Here,

although the crimes for which defendant was convicted involved two separate acts against two separate individuals, defendant was charged, tried, and convicted for those acts in a single criminal case. Accordingly, we remand for a correction of the judgment of sentence to reflect assessment of only a single fee payable to the crime victim's rights fund. Further, to the extent that the trial court's order to remit prisoner funds for fines, costs, and assessments reflects the assessment of a second fee, the order should similarly be corrected on remand.

Defendant further argues that he is entitled to have a corrected presentence investigation report prepared. Again, we agree and thus remand with instructions that the trial court prepare a corrected presentence investigation report and provide a copy of the report to the Department of Corrections. Defendant raised a timely challenge to the relevancy of any reference to allegations of prior sexual misconduct of which defendant had been exonerated. MCR 6.429(C). The trial court agreed to strike such references from the presentence investigation report, but apparently failed to do so. As the prosecutor concedes on appeal, defendant is entitled to have the correction made and to have a copy of the corrected report sent to the Department of Corrections. MCL 771.14(6); MCR 6.425(D)(3).

We affirm, but remand for correction of the judgment of sentence and presentence investigation report. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly