

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY CHARLES COOK,

Defendant-Appellant.

UNPUBLISHED

April 26, 2007

No. 268807

Wayne Circuit Court

LC No. 05-007037-01

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant was convicted at a bench trial of two counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(d) (incest), and was sentenced to concurrent terms of two years' probation. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that his conviction should be reversed because the prosecutor did not prove the element of sexual contact, which is required for a conviction under MCL 750.520e(1)(d). We disagree.

We review a claim of insufficiency of the evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). All evidence must be viewed in the light most favorable to the prosecutor. *Id.* Evidence is sufficient to sustain a conviction if "any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515-516; 442 Mich 1201; 489 NW2d 748 (1992). Defendant's argument that there was no testimony identifying the area of the touching is without merit. Complainant testified that she fell asleep but awoke to find defendant touching her under her shirt on the breast and between her legs. Defendant also argues there was no testimony establishing that the touching was done for sexual purposes. However, "a fact finder can infer a defendant's intent from his words or from the act, means, or the manner employed to commit the offense." *Hawkins, supra* at 458. Defendant's conduct can reasonably be construed as being done for a sexual purpose.

It is not the function of the appellate court to weigh the credibility of testimony. *Wolfe, supra* at 514-515. The prosecutor presented evidence to prove each of the required elements of CSC IV, i.e., that defendant engaged in sexual contact with complainant and that they were related "by blood or affinity to the third degree." When viewed in the light most favorable to the

prosecution, the evidence was sufficient to allow a rational trier of fact to conclude that defendant was guilty beyond a reasonable doubt of two counts of CSC IV.

Defendant next argues that his conviction must be reversed because he was denied the effective assistance of counsel. Specifically, defendant asserts that defense counsel failed to call a key witness whose testimony would have changed the result of his trial.

In reviewing a claim of ineffective assistance of counsel, a trial court's factual findings are reviewed for clear error while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To prove ineffective assistance of counsel, a defendant must show that counsel's performance was not objectionably reasonable, and that it so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Accordingly, a defendant shows prejudice if there is a probability sufficient to undermine confidence in the outcome that the result of the proceeding would have been different, but for counsel's errors. *Id.* at 314.

It is clear from the record that the trial court, as the finder of fact, was aware of what the "key" witness might have testified to had she been called as a witness. Defense counsel presented the essence of what the witness could have testified to during cross-examination of complainant. However, the court said that such information was irrelevant.

Similarly, it is clear that the witness' testimony would not have created a reasonable doubt or changed the result of defendant's trial because the court stated, "This one is not even close. I don't think she made that up." Therefore, defendant has not met the burden of showing he was prejudiced. *Pickens, supra* at 314.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello