STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 29, 2013
v	No. 311863 Calhoun Circuit Court
RAJESHKUMAR BABANBHAI TIWARI, Defendant-Appellant.	LC No. 2012-000446-FH

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

A jury convicted defendant of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a) (sexual contact by the use of force or coercion), and assault with intent to commit criminal sexual conduct (CSC) involving penetration, MCL 750.520g(1). Defendant was sentenced to 16 to 24 months' imprisonment for his CSC IV conviction and 38 to 120 months' imprisonment for his assault with intent to commit CSC involving penetration conviction. Defendant appeals as of right and we affirm.

Defendant was the manager of the Days Inn hotel in Albion, Michigan when the victim applied for a housekeeping position. Defendant interviewed the victim and subsequently hired her. On January 16, 2012, the victim went to the Days Inn for training. Defendant was in the hotel lobby when the victim arrived, and he motioned for the victim to enter a small room behind the front desk. The victim testified that, while they were in the small room, defendant asked her questions about her financial status. After the victim informed defendant that she was having difficulty paying her bills, he told her to leave her boyfriend and that he would "take care" of her. Defendant also got very close to the victim's face and smelled her. Defendant was close enough that he was able to detect that the victim, who possessed a medical marijuana card, had smoked marijuana earlier that morning. Defendant also asked the victim if she was scared multiple times.

Defendant then motioned for the victim to enter his office, and she followed him inside. Defendant closed the door to the office and told the victim "if I give you this, you have to give me that." Defendant "grabbed" the victim and kissed "all over" her. He put his hands up the victim's shirt and tried to put his hands down her pants. The victim testified that, while the assault was occurring, she stood there in shock and tried to think of a way to leave defendant's office. After about five minutes, defendant asked the victim if she had a condom and if she was

"clean." The victim responded that she did not have a condom but that she was clean. The victim testified that she told defendant that she wanted to "take it slow" between them and spend the day training. After the victim repeated this four or five times, defendant stopped groping her. The victim began training with a housekeeper, but she left the Days Inn after 20 minutes and reported the assault to the police.

On appeal, defendant first challenges the trial court's denial of his motion to adjourn so that his newly retained counsel could prepare for trial. We review a trial court's ruling on a defendant's request for an adjournment for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). A request for an adjournment must be based on good cause. MCR 2.503(B)(1); *Coy*, 258 Mich App at 18. Factors relevant to this determination are whether defendant (1) asserted a Constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments. *Id*. Even with good cause, the trial court's denial of a request for an adjournment is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. *Id.* at 18-19.

On January 19, 2012, attorney David Moore filed an appearance and represented defendant throughout his pretrial proceedings. The case was scheduled for trial in February, and was given two weeks on the docket. The trial was to begin on May 8, 2012. On May 3, 2012, defendant retained Michael Cronkright to represent him at his trial because he was concerned that Moore was not prepared. On May 4, 2012, defendant moved the trial court to substitute Cronkright as his counsel and adjourn trial so that Cronkright could have more time to prepare for trial.

One day before defendant's trial was scheduled to begin, a hearing on defendant's motion to adjourn trial was held. Cronkright argued that Moore failed to adequately investigate and to obtain requested discovery from the prosecution; and, as a result, Cronkright was not able to adequately prepare for trial. Cronkright requested an adjournment so that defendant's case could be properly investigated and defendant would not be denied effective assistance of counsel at trial.

Here, although defense counsel's request implicated defendant's Constitutional right to effective assistance of counsel, *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002), the record also reveals that defense counsel failed to establish a specific need for an adjournment beyond general preparation and unspecified follow-up investigation. Defendant waited until five days before trial to retain new counsel, and while defense counsel argued that defendant became concerned that his previous attorney was unprepared for trial, he failed to set forth when this concern arose. While the record reveals that defendant had never before requested an adjournment in this matter, we find that defendant's negligence coupled with the fact that he did not establish a legitimate need for adjournment supports the trial court's decision to deny the motion for adjournment. *Coy*, 258 Mich App at 18.

Defendant further argues that the trial court denied the motion to adjourn solely based on its desire to control its docket. While docket concerns alone do not support the denial of an otherwise proper request for an adjournment, *People v Williams*, 386 Mich 565, 577; 194 NW2d 337 (1972), it is clear from the record that defendant failed to establish good cause for an adjournment. As a result, we find that the trial court did not abuse its discretion by denying

defendant's motion for an adjournment. *Coy*, 258 Mich App at 17. Further, even if the trial court abused its discretion by denying defendant's motion, we find that defendant has failed to establish that he was prejudiced by the trial court's decision. *Id.*

Defendant also argues that the denial of the adjournment denied him the Constitutional right to retain counsel of his choice. This Court has previously held that a defendant's Constitutional right to retain counsel of his choice is not interfered with when the trial court permits the defendant to retain new counsel but denies a request to adjourn trial to accommodate the defendant's new attorney. *People v Akins*, 259 Mich App 545, 558-559; 675 NW2d 863 (2003). Accordingly, the trial court's denial of defendant's motion to adjourn did not interfere with his right to retain counsel of his choice because he was permitted by the trial court to retain new counsel before trial. *Id.*

Defendant next argues that the trial court erroneously instructed the jury concerning the charge of assault with intent to commit CSC involving penetration. Before the instructions were read, defendant argued that the jury should not solely be instructed on the definition of "sexual penetration" as provided in MCL 750.520a(r). Defendant argued that this would mislead the jury into believing that any intent to sexually penetrate, criminal or not, satisfied the element of intent to commit sexual penetration. Defendant argued that the jury should also be instructed on the definition of "force or coercion" to avoid this misconception. Over defendant's objections, the trial court instructed the jury based on CJI2d 20.17. We review preserved claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Jury instructions are to be read as a whole, rather than extracted piecemeal, to establish error. *Id.* Even if imperfect, reversal is not required if the jury instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001).

Here, we find that the instructions, when read as a whole, accurately stated the law and did not mislead the jury. The "elements of assault with intent to commit CSC involving penetration are (1) an assault, and (2) an intent to commit CSC involving sexual penetration." *People v Nickens*, 470 Mich 622, 627; 685 NW2d 657 (2004). The jury was instructed, in part, that, in order to convict defendant of assault with intent to commit CSC involving penetration, it needed to find that defendant assaulted the victim and that "when [he] assaulted [the victim], . . . [d]efendant intended to commit a sexual act involving criminal sexual penetration." It is well established that juries are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Despite defendant's argument that the jury should have been instructed as to what constituted "force or coercion" in order for it to adequately understand what constituted criminal sexual penetration, our Supreme Court has previously held that "nothing in MCL 750.520g(1) requires the existence of an aggravating circumstance . . . " *Nickens*, 470 Mich at 627. Accordingly, the existence of "force or coercion" is not an element of the offense. *Id.* Further, when a jury finds that a defendant assaulted the victim while intending sexual penetration, it necessarily finds that the defendant intended to use force to effectuate the sexual penetration. *People v Love*, 91 Mich App 495, 502-503; 283 NW2d 781 (1979). Accordingly, when reading the instruction as a whole, it is clear that the trial court did not give an erroneous or misleading instruction as to the requisite intent for a defendant to be convicted of assault with intent to

commit CSC involving penetration. Therefore, we find that the trial court did not err. *People v Stephan*, 241 Mich App 482, 495-496; 616 NW2d 188 (2000).

Next, defendant argues that there was insufficient evidence to support his conviction for assault with intent to commit CSC involving penetration. When sufficiency of the evidence is the issue on appeal in a criminal case, this Court reviews the record de novo and, viewing both the direct and circumstantial evidence in a light most favorable to the prosecution, determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All conflicts in the evidence must be resolved in favor of the prosecution. *Id.*

The elements of assault with intent to commit CSC involving penetration are (1) an assault, and (2) an intent to commit CSC involving sexual penetration. *Nickens*, 470 Mich at 627. An assault is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery. *Id.* at 628. A "battery is an intentional, unconsented, and harmful or offensive touching of the person of another, or of something closely connected with the person." *Id.* (quotation and citation omitted). An actor's intent may be express or it may be inferred from the surrounding facts and circumstances. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). It is not necessary to show that the sexual act was started or completed, *People v Lasky*, 157 Mich App 265, 270; 403 NW2d 117 (1987) (citation omitted), and the testimony of a victim does not need to be corroborated to support a conviction of criminal sexual conduct. MCL 750.520(h).

Here, there was sufficient evidence from which a reasonable jury could find that defendant committed an assault with intent to commit CSC involving penetration. The victim testified that defendant "grabbed" her and kissed her while they were alone in his office. She also testified that he put his hands up her shirt and tried to put his hands down her pants despite the fact that she never consented to him touching her. We find that this intentional, unconsented, and offensive touching by defendant could cause a reasonable jury to conclude beyond a reasonable doubt that defendant committed a battery. *Nickens*, 470 Mich at 628. Accordingly, "[b]ecause a battery includes an attempted-battery assault," the evidence was also sufficient to establish that the victim was assaulted by defendant. *Id.* at 630.

Further, the victim's testimony that defendant isolated her in his office, stated "if I give you this, you have to give me that," aggressively groped her without her permission, and then attempted to put his hands down her pants, could cause a reasonable jury to infer that defendant intended to criminally penetrate the victim's vagina with his finger. MCL 750.520a(r). Further, the victim's testimony that defendant aggressively groped her, put his hands down her pants, and asked if she was "clean" and had a condom could cause a reasonable jury to infer that defendant intended to criminally penetrate the victim's vagina with his penis. MCL 750.520a(r). Accordingly, we find that, when viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to support defendant's conviction of assault with intent to commit CSC involving penetration.

Defendant next argues that the trial court erred by failing to quash the bindover with respect to both the assault with intent to commit CSC involving penetration, and the CSC IV.

Additionally, defendant argues that there was insufficient evidence presented at the preliminary examination to establish that he used "force or coercion" to accomplish the sexual contact for purposes of the CSC IV charge. We need not review the bindover decision because a review of the record reveals that sufficient evidence was presented at trial to support the convictions. Therefore, any error in the bindover decision is rendered harmless. *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra