

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT A. FALKIEWICZ,

Defendant-Appellant.

UNPUBLISHED

January 17, 1997

No. 190375

Recorder's Court of Detroit

LC No. 94-004679

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT ALAN FALKIEWICZ,

Defendant-Appellant.

No. 190376

Recorder's Court of Detroit

LC No. 94-004678

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber,* JJ.

PER CURIAM.

Following a consolidated bench trial, defendant was convicted of multiple counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (sexual penetration with another under age thirteen), and second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (sexual contact with another under age thirteen). In docket number 190376 of this consolidated appeal, defendant appeals as of right his convictions of two counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct committed against his eleven-

* Circuit judge, sitting on the Court of Appeals by assignment.

year-old stepdaughter. In docket number 190375, defendant appeals as of right from his convictions of three counts of second-degree criminal sexual conduct committed against his stepdaughter's nine-year-old cousin. Defendant was sentenced to concurrent terms of eight to twenty years' imprisonment for each of the first-degree criminal sexual conduct convictions and five to fifteen years' imprisonment for each of the second-degree criminal sexual conduct convictions. We affirm.

Defendant argues that the prosecution presented insufficient evidence to sustain his two convictions of first-degree criminal sexual conduct. We disagree. When reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a 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, 516; 489 NW2d 748, amended 441 Mich 1201 (1992). The elements of first-degree criminal sexual conduct are that a defendant engaged in sexual penetration with another, and that the other was under thirteen years of age. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). The testimony of a victim is sufficient evidence from which a trier of fact can infer that a sexual penetration occurred. *People v Robideau*, 94 Mich App 663, 674; 289 NW2d 846 (1980), *aff'd* on other grounds 419 Mich 458 (1984); see also MCL 750.520h; MSA 28.788(8). Witness credibility is a matter for the trial of fact to ascertain. It will not be resolved anew on appeal. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

In this case, evidence was presented that the victim, defendant's stepdaughter, was under thirteen years of age. The victim testified in detail about at least one incident where defendant forced her to perform fellatio on him. Sexual penetration is defined to include fellatio. MCL 750.520a(1); MSA 28.788(1)(1). Additionally, the victim testified that "something" happened fifteen, sixteen or seventeen times, and she described the various incidents of sexual abuse as having occurred in various rooms of the house. Moreover, she testified to instances where defendant placed his mouth on her "privates." Viewing this evidence in a light most favorable to the prosecution, we conclude that the evidence was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that defendant twice engaged in sexual penetration with the victim, who was under the age of thirteen. We will not resolve anew on appeal the issue of witness credibility. In addition, we further conclude that the trial court's findings that defendant engaged in two acts of sexual penetration were not clearly erroneous. MCR 2.613(C).

Next, defendant argues that the trial erred in assessing ten points in the scoring of offense variable 6 (OV 6) (multiple victims) under the sentencing guidelines for defendant's first-degree criminal sexual conduct convictions involving his stepdaughter. This argument is without merit.

OV 6 provides for the assessment of ten points where there are two or more victims. Michigan Sentencing Guidelines (2d ed, 1988), p 44. The instructions for OV 6 state that each person who is placed in danger of injury or loss of life should be counted as a victim. Guidelines, p 44. Scoring OV 6 for multiple victims is appropriate where there are other persons present at the scene of the crime who are therefore endangered. *People v Chesebro*, 206 Mich App 468, 473; 522 NW2d 677 (1994). Where the scoring of a variable is disputed by a defendant, the prosecution need only prove the

underlying facts to support the score by a preponderance of the evidence. *People v Walker*, 428 Mich 261, 268; 407 NW2d 367 (1987). The trial court has the discretion in determining the number of points to be scored provided there is record evidence that adequately supports that particular score. *People v Haacke*, 217 Mich App 434, 435; ___ NW2d ___ (1996). Scoring decisions for which there is any evidence in support will be upheld. *Id.*

Viewing the trial court's scoring decision in light of the considerable discretion that has historically been granted to trial judges in sentencing cases, we find that the evidence supported the trial court's decision. Both victims testified to numerous incidents of sexual abuse that were perpetrated against them by defendant, and that many of these acts were committed while each victim was in the presence of the other. The evidence clearly demonstrates that both victims were repeatedly placed in danger of injury by defendant's conduct. Thus, the trial court did not err in assessing ten points under OV 6 for multiple victims.

Finally, defendant contends that assessing ten points for OV 6 in the sentencing information reports prepared for each case constituted "unfair 'double counting'" where the two victims for whom the points were assessed (defendant's stepdaughter and her cousin) were identical in each case. However, defendant provides no authority for this argument and has, therefore, effectively abandoned the issue. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995).

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ John R. Weber