

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM HENRY CARLYLE, JR.,

Defendant-Appellant.

UNPUBLISHED

March 14, 1997

No. 191449

Berrien Circuit Court

LC No. 95-001123

Before: Bandstra, P.J., and Hoekstra and J.M. Batzer,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(h)(i); MSA 28.788(2)(1)(h)(i). Because defendant was a second criminal sexual conduct offender, the trial court sentenced defendant, pursuant to MCL 750.520f; MSA 28.788(6), to twenty to sixty years of incarceration to be served consecutively to a sentence for which defendant was on parole at the time he committed the instant offense. Defendant appeals as of right his conviction and sentence. We affirm.

Defendant first argues that the trial court erred in assessing fifteen points to offense variable (OV) 7 because the evidence presented at trial was insufficient to establish that defendant exploited the victim due to a mental disability of the victim. We review a sentencing court's guidelines scoring determination for an abuse of discretion. *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). Scoring decisions for which there is any supportive evidence will be upheld. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629.

The sentencing guidelines provide that fifteen points should be assessed to OV 7 if the "[o]ffender exploits the victim due to a physical disability, mental disability, youth, agedness, or an abuse of authority status." Michigan Sentencing Guidelines (2d ed, 1988), p 45. Our review of the record leads us to conclude that there was evidence to support the trial court's assessment that defendant exploited the victim due to a mental disability. Further, the elements of criminal sexual conduct under

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

MCL 750.520b(1)(h)(i); MSA 28.788(2)(1)(h)(i) do not require that defendant exploited his victim's mental disability to be convicted. This was not a situation where that exploitation was typical of all convictions for the crime charged and OV 7 was properly scored against defendant. See *People v Parlor*, 184 Mich App 235, 236; 457 NW2d 55 (1990). The trial court did not abuse its discretion in assessing fifteen points to OV 7.

Defendant also contends that the trial court erred in assessing fifteen points to OV 25. Offense Variable 25 allows for a score of fifteen points if the convicted defendant had engaged in "3 or more contemporaneous criminal acts." Michigan Sentencing Guidelines (2d ed, 1988), p 46. The instructions to OV 25 provide:

A criminal act is contemporaneous if: (1) it occurs within twenty-four hours of the offense upon which the offender is being sentenced or within six months if it is identical to or similar in nature and (2) it has not and will not result in a separate conviction.

There was evidence in the presentence investigation report to support the trial court's assessment that defendant committed three or more such criminal acts. The trial court did not abuse its discretion in assessing fifteen points to OV 25.

Defendant also argues that the evidence presented at trial was insufficient to support his conviction. In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine 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, amended 441 Mich 1201 (1992). Circumstantial elements and reasonable inferences therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Defendant first contends that the evidence was insufficient to establish that he engaged in penetration with the victim. We disagree. At trial, the victim testified that defendant performed fellatio on him. We will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514-515. Further, the testimony of a CSC victim need not be corroborated. MCL 750.520h; MSA 28.788(8). A rational trier of fact could have found, beyond a reasonable doubt, that defendant engaged in penetration with the victim.

Defendant also contends that the evidence presented by the prosecution was insufficient to establish that the victim suffered from a mental disability at the time of the offense. Persons with a "mental disability" for purposes of MCL 750.520b(1)(h)(i); MSA 28.788(2)(1)(h)(i) include those who are "mentally retarded." MCL 750.520a(e); MSA 28.788(1)(e). "Mentally retarded" means that a person has "significantly subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior." MCL 750.520a(h); MSA 28.788(1)(h). The prosecution presented an expert who testified that he performed a mental evaluation on the victim approximately four months before the sexual assault for the purpose of evaluating the victim's cognitive, academic, and adaptive abilities. The results of the evaluation revealed

that the victim fell within the bottom one percentile of those in his age group in each area tested. The expert concluded that the victim was mentally retarded. We conclude that, in viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found, beyond a reasonable doubt, that the victim was mentally disabled at the time of the offense. *Wolfe, supra* at 515. Therefore, we find that the evidence supports defendant's conviction.

Defendant finally challenges the trial court ruling that evidence of uncharged prior bad acts between the victim and defendant was admissible. However, because our review of the record reveals that the challenged evidence was never admitted, we need not review whether the trial court ruled correctly on this issue.

We affirm.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

/s/ James M. Batzer