

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE M. BERBERICH,

Defendant-Appellant.

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UNPUBLISHED

January 30, 2001

No. 228333

Genesee Circuit Court

LC No. 98-003571-FH

Before: Collins, P.J., and Doctoroff and White, JJ.

MEMORANDUM.

Defendant appeals as of right from a plea-based conviction of attempted second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), for which he was sentenced to three to five years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is that his sentence was disproportionate because the minimum sentence exceeded the upper end of the guidelines by six months. We limit our review to determining whether the trial court abused its discretion by violating the principle of proportionality. An abuse of discretion will be found "where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender." *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998); *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998).

A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). "The crucial test for proportionality is not whether the sentence departs from, or adheres to, the recommended range under the sentencing guidelines, but whether it reflects the seriousness of the matter." *Castillo, supra* at 442, 447-448. The trial court may depart from the guidelines where there are legitimate factors not considered by the guidelines, where there are factors considered but inadequately weighed by the guidelines, or where the recommended sentencing range is disproportionate to the seriousness of the offense. *Castillo, supra* at 448; *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

Given that defendant sexually abused his niece over a seven-year period beginning when the child was only four, the nature of the threats used to induce the child to engage in such

conduct, plus the fact that the charged life offense of first-degree criminal sexual conduct was reduced to a five-year-maximum attempt offense, we find that the upward departure from the guidelines was warranted and defendant's sentence was not disproportionate. *People v Brzezinski (After Remand)*, 196 Mich App 253, 255-57; 492 NW2d 781 (1992).

Affirmed.

/s/ Jeffrey G. Collins  
/s/ Martin M. Doctoroff  
/s/ Helene N. White