

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK DOMINIC PETRUCCI,

Defendant-Appellant.

UNPUBLISHED

June 15, 2001

No. 224721

Barry Circuit Court

LC No. 99-000109-FH

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and one count of distributing obscene matter to a minor, MCL 722.675; MSA 25.254(5). After a jury trial, defendant was convicted of the second-degree criminal sexual conduct charge. Defendant was sentenced to eight to fifteen years' imprisonment and now appeals as of right. We affirm.

Defendant argues that the prosecutor engaged in misconduct during the trial and the trial court should have issued a cautionary instruction. We note that defendant cites no authority for this argument. "A party may not leave it to this Court to search for authority to support its position." *McPeak v McPeak (On Remand)*, 233 Mich App 483, 495-496; 593 NW2d 180 (1999). Thus, we find that this issue has been abandoned on appeal.

Defendant raises several arguments related to sentencing. We will not reverse a trial court's decision regarding sentencing absent an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636, 667; 461 NW2d 1 (1990).

First, defendant argues that the trial court penalized him for maintaining his innocence and mistakenly equated this with a lack of remorse. Defendant is correct that "[a] court cannot base its sentence even in part on a defendant's refusal to admit guilt." *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977). However, our Supreme Court has stated that evidence of a lack of remorse can be considered in determining an individual's potential for rehabilitation. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995); *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987).

In sentencing defendant, the trial court stated:

[T]here are no points assessed for the lack of remorse or appreciation for the wrongfulness of the conduct, which I think creates a higher risk of re-offending in the future.

We find that this remark was not an expression that the trial court was penalizing defendant for not admitting guilt. Indeed, the trial court simply indicated that defendant's lack of remorse was indicative of his potential for rehabilitation. We find that this was a permissible consideration.

Second, defendant argues that the trial court inappropriately sentenced him for first-degree criminal sexual conduct, a crime of which defendant was acquitted. We disagree and note that a trial court can consider other criminal activities established at trial although the defendant was acquitted of the charges. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). However, contrary to defendant's assertions, we find no evidence that the trial court considered these other charges. Specifically, defendant argues that the trial court could not consider evidence of multiple penetrations because the jury acquitted defendant of first-degree criminal sexual conduct. The trial court did not ignore the jury verdict as defendant claims. In fact, the trial court agreed with defendant's contention that offense variable twelve, which deals with penetration, was scored incorrectly at fifty points. The trial court stated that "it doesn't seem ... appropriate under the circumstances where the jury acquitted him on the penetration issues." The trial court changed the scoring of offense variable twelve to zero. Thus, we conclude that defendant's argument has no merit.

Third, defendant argues that the trial court inappropriately sentenced him based upon the mistaken belief that defendant had inappropriately touched the victim more than fifteen times. At trial, the victim did testify that the encounters with defendant happened a lot. Initially, the victim testified that it happened more than five times, but was not sure if it happened more than ten times. Later, the victim testified that it happened nine or ten times. The victim, however, remembered telling a police officer that it happened every other day. In addition, the victim later clarified that the number of times these encounters occurred was too many for her to remember. Therefore, we conclude that the trial court's statement that defendant inappropriately touched the victim eight to fifteen times was a fair characterization of the victim's testimony.

Fourth, defendant argues that the trial court expressed its dissatisfaction with the new statutory sentencing guidelines, which colored its treatment of defendant. This argument fails. The trial court, in addressing defendant's argument that the sentence would be less under the new statutory guidelines, did express the drawbacks of those guidelines. However, the trial court did not sentence defendant under the new statutory sentencing guidelines. Rather, defendant was sentenced under the Supreme Court's sentencing guidelines. Thus, the trial court's opinion on the new statutory guidelines was irrelevant and did not affect defendant's sentence.

Finally, defendant argues that the trial court abused its discretion in sentencing defendant because his sentence is disproportionate and there was no valid basis for the departure from the sentencing guidelines. In this case, defendant's crimes were committed between February 1998 and November 1998, so the Supreme Court's sentencing guidelines apply.

A sentencing court abuses its discretion when it violates the principle of proportionality. *Milbourn, supra* at 635-636. A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000). “Under *Milbourn*, the ‘key test’ of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter.” *Houston, supra* at 320.

Defendant argues that he is entitled to resentencing because the trial court departed from the sentencing guidelines for impermissible reasons. In fact, defendant’s recommended minimum sentence, under the guidelines, was one to four years’ imprisonment. The trial court, in sentencing defendant, stated as follows:

On the other hand, I do have to consider the seriousness of what you’ve done. I don’t think it’s adequately captured by the sentencing guidelines. They allow no points for the psychological injury to the victim’s family, and it’s obvious that in these types of cases the injury is not just to the child but to the family and—and in some cases to the extended family.

* * *

There are no points scored as far as the victim’s input into the sentencing process, the victim’s feelings about what would be a fair sentence. There’s—we talk a lot about victim’s rights. Politicians talk about it. Judges talk about it. But the sentencing guidelines contain no offense variable that scores anything about how the victim feels about the situation. There are no points scored for the consideration of the number of victims in this type of offense. It’s not just the child who was molested, but the extended family. And there are no points assessed for the lack of remorse or appreciation for the wrongfulness of the conduct, which I think creates a higher risk of re-offending in the future.

So I’ve taken those things into consideration. The victim here has asked that I impose a sentence that would allow her to get to adulthood without having to worry about things. I think that’s a reasonable suggestion in this case.

The trial court then sentenced defendant to eight to fifteen years’ imprisonment.

Generally, departures from the judicial guidelines should alert appellate courts to the possibility of violation of the principle of proportionality. *Milbourn, supra* at 660. However, “trial judges may continue to depart from the guidelines when, in their judgment, the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime.” *Id.* at 657. Further, sentences that depart from the guidelines because of particularly egregious circumstances are not to be assessed for proportionality based on arithmetical measurements. *People v Merriweather*, 447 Mich 799, 807-808; 527 NW2d 460 (1994). It is entirely appropriate for the trial court to consider, during sentencing, the defendant’s attitude toward his criminal behavior and the effect of the defendant’s crime on his victim. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000); *Compagnari, supra* at 236.

Furthermore, the relationship between the defendant and the victim is an important factor not included in the guidelines' calculations. *Houston, supra* at 323.

In this case, it is uncontroverted that defendant had no recent criminal history. However, defendant did have a drug conviction in 1984. Defendant served six months in jail and was on probation for three years.

The seriousness of the offense, however, is undeniable. Defendant sexually abused his stepdaughter, while she was entrusted to his care by her mother. The abuse occurred while the victim was between seven and nine years old. The sexual abuse occurred on numerous occasions and, the victim described incidents where defendant vaginally penetrated her, forced her to perform fellatio, and engaged in cunnilingus with her. There is no doubt that the victim has been dramatically affected and will continue to experience problems because of defendant's behavior. According to the victim's mother, the sexual abuse has caused the victim to suffer from separation anxiety anytime she is away from her mother. The victim's mother has stated that the victim has trouble eating and sleeping. The victim has also been required to regularly see a counselor to deal with the abuse. Indeed, we have noted that sexually abused children have substantial psychological repercussions. *People v Girardin*, 165 Mich App 264, 266; 418 NW2d 453 (1987).

Furthermore, we find defendant has failed to realize the seriousness of what he has done and has failed to acknowledge the wrongfulness of his conduct. The presentence investigation report indicated that defendant has at times blamed the victim, stating that the victim initiated fellatio because she "likes to take care of people to make them feel better." Yet, it also reflects that, on other occasions, defendant has flatly denied the incidents ever occurred, stating that "what [the victim] was experiencing was the result of suggestions."

We conclude that the trial court's sentence, which departed from the sentencing guidelines, was appropriate.

Affirmed.

/s/ Janet T. Neff

/s/ Martin M. Doctoroff

/s/ Kurtis T. Wilder