STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 17, 2001
v	No. 220063 Grand Traverse Circuit Court
RICHARD HUNTER CARVER, Defendant-Appellant.	LC No. 98-007724-FC

Before: Collins, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim below age thirteen). The trial court sentenced defendant to fifteen to fifty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in finding that he voluntarily made statements during a police interrogation and in denying defendant's motion to suppress these statements. We review de novo legal questions such as whether a defendant's waiver of his constitutional right against self-incrimination was voluntary, or knowing and intelligent. We review for clear error, however, the trial court's factual findings supporting its ruling regarding a motion to suppress. Credibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000).

Following a *Walker*[1] hearing, the trial court found that defendant's statements were made voluntarily, knowingly and intelligently. Testimony established that defendant willingly went to a Michigan State Police station to take a polygraph examination and discuss the victim's allegations against him. At the beginning of defendant's meeting with a police detective, the detective advised defendant of his *Miranda*[2] rights, and defendant initialed a form waiving those rights. The detective also indicated that she apprised defendant of the polygraph examination procedure and reminded him of his right to remain silent, after which defendant indicated his

[1] *People v Walker* (*On Rehearing*), 374 Mich 331; 132 NW2d 87 (1965).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

understanding by signing an acknowledgment regarding the polygraph examination. While defendant argues that the detective promised that his pre and post examination interview statements would be kept confidential, the detective testified that she informed defendant that only background information not connected with this case or this victim would remain confidential. Moreover, defendant acknowledged at the hearing that his attorney advised him before the polygraph examination not to make any statements following the examination because they could be used against him at trial. After reviewing the record, we are left with no definite and firm conviction that the trial court erred in finding that defendant voluntarily waived his constitutional rights and was fully aware of the nature and consequences of giving up those rights. To the extent that the trial court chose to believe the detective's testimony regarding her discussion of confidentiality with defendant rather than defendant's version of that discussion, we will not second guess the trial court's credibility determination. *Daoud*, *supra*.

Defendant also suggests that because he did not know when the polygraph examination had concluded, certain post examination statements should have been suppressed. We note, however, that defendant's own testimony indicated that the now challenged statements were made only after the electrodes worn during the polygraph examination were removed from his body, the detective ran and scored the examination charts, and indicated to defendant that he had failed the examination. Moreover, defendant told the detective during the post examination interview that he should not be talking with the detective because his attorney advised him to remain silent after the polygraph examination ended. Under these circumstances, we cannot conclude that the trial court clearly erred in rejecting defendant's suggestion that he did not know at what point the examination concluded. *Daoud*, *supra*.

Defendant next argues that the trial court should have excluded evidence of other sexual contact between himself and the victim because the evidence was too prejudicial. We review the admission of evidence for an abuse of discretion. *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998).

Generally, other acts evidence tending to reveal a defendant's character may be admitted as long as it is introduced for a proper purpose, such as to show an opportunity, scheme, plan or system in doing an act. MRE 404(b)(1); *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998). A trial court has discretion to admit evidence of other acts of sexual intimacy between a defendant and his minor victim because beyond merely showing the defendant's character, the other acts have the proper purpose and are probative of helping to explain an otherwise incredible charge. *People v DerMartzex*, 390 Mich 410, 413-414; 213 NW2d 97 (1973); *People v Puroll*, 195 Mich App 170, 171; 489 NW2d 159 (1992). Evidence of additional acts of sexual intimacy is intended to corroborate other evidence, including the victim's testimony, not merely to show that the defendant must be guilty of the charged offense because he is a bad person. *People v Jones*, 417 Mich 285, 285-287; 335 NW2d 465 (1983); *DerMartzex*, *supra* at 413. A trial court should exclude relevant evidence if the danger of unfair prejudice to the defendant substantially outweighs the evidence's probative value. MRE 403.

In this case, defendant was charged with penetrating the victim one day in November 1995. The victim testified that on this occasion, while defendant and the victim showered together, defendant placed his finger inside the victim's anus and that defendant also placed his

penis inside the victim's mouth. According to the victim, he and defendant engaged in oral sexual contact between five and ten times between November 1995 and January 1997.[3] The victim also testified that he and defendant had always showered together, and that during their showers defendant routinely placed his index finger inside the victim's anus. The victim further recalled that he and defendant had viewed pornographic magazines in the months before November 1995 and began watching pornographic movies after the November 1995 contact. While viewing the pornographic materials, defendant gave the victim alcoholic beverages and masturbated in the victim's presence.

The evidence of these other acts of sexual intimacy established the sexual familiarity between defendant and the victim and consequently strengthened the victim's credibility and corroborated his testimony that defendant penetrated him in November 1995. Moreover, the evidence of other instances of sexual intimacy showed defendant had a scheme or system in committing the alleged offense. MRE 404(b); *Puroll*, *supra*; *People v Dreyer*, 177 Mich App 735, 738; 442 NW2d 764 (1989). In light of the significant probative value of the victim's testimony regarding other instances of sexual intimacy with defendant, which clearly show defendant's pattern of abuse of the victim and rebutted "the incredibility inherent in a seemingly isolated act of sexual misconduct within a household," *Dreyer*, *supra*, we cannot conclude that any risk of unfair prejudice to defendant substantially outweighed the evidence's probative value. MRE 403; *DerMartzex*, *supra* at 413. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the victim's testimony regarding other moments of sexual intimacy with defendant. *Bartlett*, *supra*.

Defendant next claims that insufficient evidence supported his CSC I conviction. As we have noted, the victim testified that while he and defendant showered together on one occasion in November 1995 defendant placed his finger inside the victim's anus and his penis inside the victim's mouth. Viewing this testimony in the light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992), we conclude that the jury reasonably could have found beyond a reasonable doubt that defendant sexually penetrated the victim, who was under thirteen years of age.[4] MCL 750.520b(1)(a); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995) (citing MCL 750.520a(1), which defines "sexual penetration" as "any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body"). It appears obvious that the jury believed the victim's testimony, and we will not disturb the jury's credibility determination. *Wolfe*, *supra*.

Defendant next argues that the trial court erred in scoring offense variable (OV) 12 when calculating the sentencing guidelines' range, which led to a disproportionate sentence. We need not consider defendant's claim that the trial court mistakenly interpreted OV 12 because "[t]here

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[3] Another witness testified that late one evening when defendant and the victim stayed overnight in her home, she observed defendant and the victim together in her bathtub and that the victim had defendant's penis in his mouth.

[4] It was not disputed that the November 1995 incident occurred while defendant was ten years of age.

is no juridical basis for claims of error based on alleged misinterpretation of the guidelines." *People v Raby*, 456 Mich 487, 497; 572 NW2d 644 (1998), quoting *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). To the extent that defendant suggests that no facts supported the trial court's scoring of OV 12 or that the facts on which the court relied were materially false, in light of the evidence of record regarding defendant's numerous other penetrations of the victim we cannot conclude that the trial court abused its discretion in scoring OV 12 at fifty points. *People v Cain*, 238 Mich App 95, 129-130; 605 NW2d 28 (1999).

Moreover, we conclude that defendant's fifteen to fifty-year sentence was a proportionate sentence for defendant's numerous acts of oral and anal penetration of a minor who had looked to defendant as his father. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). We note that the sentence was presumptively proportionate because it fell within the range recommended by the sentencing guidelines,[5] and defendant offered no unusual circumstances to overcome this presumption. *Id*. at 661; *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996).

Affirmed.

/s/ Jeffrey G. Collins
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

[5] Defendant incorrectly opines that the trial court should have applied statutory sentencing guidelines in fashioning his sentence. The legislatively created guidelines only apply to crimes committed after January 1, 1999. MCL 769.34(1), (2).