

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

LEEMAN WHITE,

Defendant-Appellant.

UNPUBLISHED

June 18, 2002

No. 230408

Kalkaska Circuit Court

LC No. 00-1991-FH(M)

Before: Jansen, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his conviction on the charge of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e. On September 6, 2000, the trial court sentenced defendant to 16 to 24 months imprisonment, with credit for 94 days already served.¹ We affirm.

I. Facts and Proceedings

Defendant's CSC IV conviction arose out of the events of December 6, 1999. On that date, defendant and the victim, both of whom were employed by Eagle Trim in Kalkaska, left work and proceeded to their respective cars in the parking lot. As the victim started to open her car door, she noticed defendant approaching her as though he was going to his car, which was parked behind the victim's car. Because the space between the cars was just large enough to open the car door, the victim decided not to open the car door, and instead turned and faced her car in order to give defendant room to pass. The victim testified that as defendant passed by her he grabbed her between her legs, continued to walk toward his car, and laughed. The victim filed a complaint with the Michigan State Police, and sought and was granted a personal protection order (PPO) against defendant. As a result of the State Police investigation, defendant was arrested on December 14, 1999. Following a preliminary examination held on March 15, 2000, defendant was bound over for trial on one count of CSC IV, and one count of stalking, MCL 750.411h.

Defendant's trial commenced on June 23, 2000, and the victim testified as follows:

¹ As discussed *infra*, defendant was also convicted of misdemeanor stalking, MCL 750.411h, and sentenced to twelve months in jail to run concurrently with defendant's CSC IV sentence. The stalking conviction and resulting sentence is not appealed by defendant.

Q. You say he grabbed you up under, or something like that. Can you help us understand just where . . . he grab[bed] you?

A. Just . . . underneath my private areas. Just grabbed me and – it was real quick. . . .

Q. And was this from behind you?

A. Yes.

Q. How far . . . up, or forward did his hand go?

A. All the way underneath.

Q. As far around as the zipper on the front of your pants?

A. Maybe the bottom of the zipper.

The victim also testified that beginning around June of 1999, defendant repeatedly stalked her by following her around the workplace, staring at her while at work, offering her money for sex, and following her while she traveled to Traverse City, work, home, or other places. The victim also testified that defendant came to her house uninvited on November 15, 1999, staying in his car for over ten minutes, causing the victim to remain in her car instead of going into her house. The victim also testified that she had complained to her supervisor about defendant's conduct, that she had not encouraged defendant's behavior and had told him several times to leave her alone, and that defendant had followed her and her brother-in-law on at least one occasion after she had obtained the PPO against defendant.² The prosecution presented corroborating testimony of the victim's account of the stalking through various witnesses, including defendant's supervisor, Charles Bushey. Bushey testified that on October 18, 1999, defendant was formally notified that the victim had complained that defendant had sexually harassed her at work, and that any further credible allegations that defendant had sexually harassed the victim or any other coworker would result in termination. Bushey also testified that he was aware that on at least two occasions, defendant left work after noticing that the victim either had left early or was not working.

Defendant testified in his own defense. He denied staring at or following the victim around at work, and explained the victim's testimony that he had offered her money in exchange for sex as a misunderstanding. According to defendant, while he did offer the victim \$100 for "stuff," meaning antique toys and other items, the victim apparently misinterpreted the meaning of the word "stuff," and wrongfully assumed he was referring to sex. Defendant admitted that he went to the victim's house on two separate occasions, and explained that his reason for going to her home was to discuss his reprimand for allegedly offering her \$100 for sex. Defendant also admitted that he had gone to Traverse City on the same day as the victim, but claimed that this was just a coincidence, and that he had not intentionally followed her to Traverse City.

² Defendant was charged in this incident with aggravated stalking, MCL 750.411h. Defendant was tried for this charge at a separate trial, and therefore that charge is not a part of this appeal.

With regard to the CSC IV allegation, defendant denied intentionally grabbing or touching the victim. Instead, defendant testified that the victim leaned against her car so that he could get between her and the adjacent car, and that he accidentally brushed up against her while trying to pass.

Following closing arguments and jury instructions, the jury deliberated for thirty-six minutes, finding defendant guilty of both CSC IV and misdemeanor stalking. The trial court then sentenced him to 16 to 24 months imprisonment on the CSC IV conviction, and to twelve months in jail for the stalking conviction. In sentencing defendant, the trial court departed from the statutory sentencing guidelines and did not follow the presentence investigation report (PSIR) recommendation of 0 to 11 months probation on the CSC conviction, and 24 months probation, the first 12 months in the county jail, on the stalking conviction. In support of its departure, the trial court stated:

Well, this is a very difficult matter because of the guidelines and the sentencing information scoring grid for CSC fourth which is the first count; stalking, of course being the second count. The CSC fourth having the two-year maximum, the stalking having a one-year maximum. CSC fourth being a felony . . . The stalking being a misdemeanor having a penalty of one year or less.

And an important factor in this whole case was the evidence at the trial of the -- of a few things. Number one, the very serious mental and emotional impact that this has had upon the victim which I don't believe the guidelines sufficiently measure or gauge. Although they do take into account whether a person needs counseling, et cetera.

But based on the testimony and observing the witness who is very timid and shy, this did have a tremendous serious and detrimental mental and emotional impact. And that's based on her own testimony which -- and the testimony of her husband and others. And the victim has become paranoid as a result of [defendant's] assault and stalking. And that's very uncharacteristic of how she was prior to the offense -- the offenses here.

"The husband reports a change in demeanor in his wife." This is quoting from the presentence report. Fear -- "she's fearful and does not want to go anywhere." And that is very different from the way she used to be. And she states, "It's made me nervous not knowing what to expect next, looking behind me when I walk around or drive around." So the impact has been quite substantial on the victim. And I don't believe the guidelines do take that sufficiently into account.

And more importantly here, I don't -- again, I don't think it's taken into account is the fact that part of the testimony here involved a violation of a court order by [defendant]; a blatant violation. And here -- with probation being part of the recommendation, I think that's just an improper step; because here we have a man who's already demonstrated disregard for court orders and he's expected to be put on probation with a series -- a multiple series of court orders? I just don't believe that's prudent.

He also has a prior conviction involving very similar conduct. Not that's not, again, scored or reflected or categorized in the sentence guidelines, the different variables, because it's just not one of the scoring factors; whether his prior conviction was involving a similar assaultive conduct male -- male upon female. So I think that's very serious. It only scores it, I think, as a CCW. It involved must more than that. It involved an assault on his ex-wife.

And I think the observations of the . . . probation officer, who's very experienced as well, are important. He states this is a difficult case. The guidelines call for probation on the one hand, yet the offender could be extremely dangerous to the victim. And I think that's a reasonable conclusion based on the testimony. The way he kept -- kept up with his conduct and the stalking of this lady who -- there was no relationship at all between them. This isn't a normal staking care where it's an ex-boyfriend/girlfriend situation. Here there was never any relationship between the victim and the offender. Just, essentially, co-workers. He has -- he became infatuated with -- with the victim and projected his feelings upon her, similar to a celebrity stalker.

* * *

Someone who's shown a propensity to violate court orders in connection with the PPO and has that type of criminal background with a similar offense, I think this is not a probationable type case in my view. I don't think that would be prudent.

I think the only proper sentence and one that would serve the goals of the sentencing, and for deterrence and protection of society, and some punishment -- hopefully [defendant] will think twice before engaging in this conduct in the future, which would be a third time because, really, essentially he's done the same thing in the past, doing it here in -- in this case. And I don't think he's a candidate for probation at all. It -- it would be unreasonable.

So I think for the reasons stated, I do have to exceed the guidelines and sentence [defendant] on CSC fourth degree. You're sentenced to 16 to 24 months. And on stalking, you're sentenced to twelve months.

II. Defendant's Insufficient Evidence Claim

Defendant argues that there was insufficient evidence to support his CSC IV conviction. We disagree. When a defendant claims the evidence is insufficient to support conviction, we review the evidence presented at trial in the light most favorable to the prosecution in order to determine whether a rational trier of fact could find that all the elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Taylor*, 245 Mich App 293, 296; 628 NW2d 55 (2001).

In order to convict defendant of CSC IV, the prosecution had to prove, among other things, that defendant intentionally³ touched either the victim's intimate parts or the clothing covering the victim's intimate parts. *People v VanderVliet*, 444 Mich 52, 76; 508 NW2d 127 (1993); see also MCL 750.520e(1), MCL 750.520a(c), MCL 750.520a(l). Defendant contends that the prosecution failed to present sufficient evidence that he touched the victim in an intimate area. The victim testified that defendant touched her "just underneath [her] private areas," from behind, and that his hand went "all the way underneath" her pants to "the bottom of the zipper." MCL 750.520a(c) defines "intimate parts" as "the primary genital area, groin, inner thigh, buttock, or breast of a human being." The victim's testimony would permit a rational trier of fact to find beyond a reasonable doubt that defendant touched the victim's intimate parts. Accordingly, viewing the evidence in the light most favorable to the prosecution, we conclude that the prosecution presented the jury with sufficient evidence of defendant's guilt beyond a reasonable doubt. *Johnson, supra*; *Taylor, supra*.

III. Sentencing

Defendant also contends that his sentence of 16 to 24 months imprisonment on the CSC IV conviction is not proportional. See *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990). We again disagree. We review for an abuse of discretion the trial court's decision that objective and verifiable factors constitute substantial and compelling reasons for departing from the guidelines' recommended minimum sentence. *People v Armstrong*, 247 Mich App 423, 424; 636 NW2d 785 (2001), citing *People v Fields*, 448 Mich 58, 69-70; 528 NW2d 176 (1995), and *People v Babcock*, 244 Mich App 64, 75-75-76; 624 NW2d 479 (2000); see also *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001).

Because defendant committed the instant offense on December 6, 1999, defendant's sentence was subject to the statutory sentencing guidelines. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Although MCL 750.52e(2) enumerates CSC IV as misdemeanor, because it is punishable by a two-year term of imprisonment, it is considered a class G felony for sentencing purposes. MCL 761.1(g), 777.16y; see also *People v Ackels*, 190 Mich App 30, 33-34; 475 NW2d 413 (1991); *People v McGill*, 131 Mich App 465, 477; 346 NW2d 572 (1984). In the instant case, defendant's guideline score placed him in the B-III category, which provides for a minimum sentence range of between 0 and 11 eleven months, MCL 777.68. Because the upper limit of this sentence range was below eighteen months, the trial court was required to impose an intermediate sanction (such as probation or jail, see MCL 769.31), unless it found substantial and compelling reasons to sentence defendant to prison. See MCL 769.34(4). In addition, pursuant to MCL 769.34(3)(a) and (b), the trial court is only permitted to depart from the guidelines if it finds that there are legitimate nondiscriminatory

³ Although defendant claimed below that any touching of the victim was accidental, defendant has not raised this issue on appeal. We note, in any event, that the prosecution also charged defendant with stalking the victim, and the jury convicted the defendant of this charge. There is no question that the jury could have reasonably concluded that, consistent with defendant's stalking conduct, defendant intentionally touched the victim's intimate parts in a sexual manner or for his sexual arousal or gratification. See MCL 750.520a(l).

factors that have not been considered in the guidelines, or that the factors used in the guidelines were given inadequate or disproportionate weight. *Armstrong, supra*, citing *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998), and *People v Nelson*, 234 Mich App 454, 464; 594 NW2d 114 (1999).

Here, the trial court, in departing from the guidelines, found that defendant's altercation with his ex-wife and defendant's violation of the PPO which prohibited him from having contact with the victim, were incidents not sufficiently accounted for by the guidelines.⁴ The trial court also found that the emotional and mental distress suffered by the victim as the result of defendant's conduct was not given appropriate consideration by the guidelines. See *Armstrong, supra* at 424. Additionally, the trial court concluded that the guidelines did not adequately account for defendant's contemporaneous misdemeanor conviction for stalking, and for the importance of ensuring both the victim's safety and the protection of society. See *id.*

Accordingly, we find the trial court articulated objective and verifiable factors supporting its departure from the minimum sentencing range, *Babcock, supra*; MCL 769.34(3); MCL 769.34(4), and that defendant's sentence adequately reflects the seriousness and nature of the crime committed, *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000); *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). Thus, defendant's sentence was not disproportionate, *Milbourn, supra*, and the trial court did not abuse its discretion by departing from the guidelines in sentencing defendant. *Babcock, supra* at 75-76.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder

⁴ When defendant violated the PPO his bond was revoked and he was charged with aggravated stalking. The trial court found that neither of these facts was accounted for by the guidelines and the trial court felt they were factors requiring consideration at sentencing. See *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994), and *People v Parr*, 197 Mich App 41, 46; 494 NW2d 768 (1992) (indicating that a sentencing court may consider the facts underlying uncharged offenses and pending charges).