

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT RICHARD RILEY,

Defendant-Appellant.

UNPUBLISHED

February 3, 2004

No. 242950

Macomb Circuit Court

LC No. 01-001149-FH

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right the jury's verdict finding him guilty on three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(c), and two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(c).¹ We affirm.

The complainant is mentally disabled and was twenty years old when defendant engaged in sexual conduct with, and penetration of, her. She met defendant while cleaning hallways in the same apartment complex where defendant was a maintenance man. Defendant testified that on or about December 4, 1999, he engaged in one act of digital penetration with the complainant, and he claims that the complainant was capable of consenting to the sexual acts.

Contrary to defendant's assertions regarding the number of sexual acts engaged in, the victim testified that on three or four occasions between late December 1999 and February 5, 2000, defendant took her from where she was working alone in the apartment complex to his apartment, removed her clothes, and penetrated her orally and digitally. Defendant also engaged in other sexual contact with the complainant not involving penetration. At first, the complainant did not relay any of these acts to others because defendant told her not to, but after the last incident, she finally told her father what had been happening. Her father promptly reported the crimes to the police.

¹ The judgment of sentence from the trial court mistakenly states that defendant was convicted under MCL 750.520e(1)(b), and that defendant was convicted for sexual contact with, and penetration of, a mentally incapacitated victim. Defendant was convicted for such conduct with a mentally *incapable* victim.

Defendant first claims that a school psychologist, who performed a routine evaluation of the complainant in March 1999, including an IQ test, an academic skills test, and a test of the complainant's adaptive functioning, should not have testified. The psychologist testified about the results of those tests and also testified that complainant had difficulties with abstract thinking that would render her unable to understand what was involved with a sexual act and the consequences and moral implications of sexual acts. Defendant argues that the psychologist's testimony was outside the scope of her expertise and that she failed to testify about the basis of her opinion. He also argues that the psychologist's testimony that the complainant would not understand sexual acts was impermissible testimony on an ultimate issue of the case. Defendant fails to adequately support these arguments, and we consider these issues waived. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority"). But even if this Court were to consider the merits of his assertions, we would conclude that defendant is not entitled to relief under *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), which enunciated the standard of review for unpreserved error. Defendant has not shown plain error affecting his substantial rights. See *id.* at 774. And even setting aside the dictates of *Carines*, *supra*, admission of the psychologist's testimony was not improper. The psychologist testified that she was licensed to practice psychology in this state and that she had performed approximately seven hundred routine evaluations like the one she performed on complainant. Unlike the current form of MRE 703 that explicitly requires that the basis for an expert's testimony be in evidence, the plain language of MRE 703 in existence at the time of trial left this to the trial court's discretion. Moreover, defendant did not object at trial to the psychologist's testimony about the results of the tests. Further, otherwise admissible expert testimony on an ultimate issue at trial is admissible. MRE 704.

Additionally, regarding defendant's argument that the psychologist's testimony about the victim's inability to understand the acts was improper, this Court has held that a mentally incapable victim who is able to understand what is happening when he is subjected to a physical act of criminal sexual conduct may still be considered incapable of consenting to such conduct if he does not understand the broader ramifications of the acts. *People v Breck*, 230 Mich App 450; 584 NW2d 602 (1998). As support for its conclusion that the prosecution had presented sufficient evidence to support the defendant's convictions, this Court in *Breck* discussed a psychologist's testimony who had opined that the victim, a mentally retarded adult male who was repeatedly subjected to anal intercourse by the defendant, was not capable of understanding the nature of a romantic relationship, the moral ramifications of the sexual acts being perpetrated, or the risks or need for making informed sexual choices. *Id.* at 455-456. Thus, it was not error for the trial court to admit testimony of a psychologist where complainant's capability to consent to sexual acts with defendant were similarly at issue.

Defendant next argues that there was insufficient evidence to support his convictions. We review that claim to determine whether the evidence, when viewed in the light most favorable to the prosecution, was such that a reasonable jury could have found that all of the elements of the crimes were proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). The complainant testified that defendant digitally penetrated her on several occasions and that he performed cunnilingus on her and had sexual contact with her on several occasions. The testimony of a criminal sexual conduct victim need

not be corroborated. MCL 750.520h. The complainant's testimony, as well as the psychologist's and the complainant's father's testimony about her mental capabilities, provided sufficient evidence on which a reasonable jury could have found that the prosecutor proved defendant's guilt beyond a reasonable doubt.

Defendant also argues that his convictions were against the great weight of the evidence. Defendant did not move for a new trial before the trial court and has thus failed to preserve this issue for appeal. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997), citing *People v Dukes*, 189 Mich App 262, 264; 471 NW2d 651 (1991). Absent manifest injustice, this Court need not address defendant's argument. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). "Because the evidence reasonably supports the verdict in this case, no miscarriage of justice will result from our failure to consider this issue." *Id.*

Defendant's final claim is that the trial court's sentence was disproportionate and amounted to an abuse of discretion constituting cruel and unusual punishment. But defendant's sentence was within the sentencing guidelines. Defendant does not allege that there was a factual error underlying the scoring of the guidelines or an error in scoring the guidelines themselves. "This Court shall affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence." MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). Consequently, we affirm the sentence of the lower court.

Affirmed.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello