STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2012
v	No. 301411 Tuscola Circuit Court
CORY DOUGLAS FRITZ, Defendant-Appellant.	LC No. 09-011320-FH

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

Defendant was convicted by a jury of five counts of criminal sexual conduct, third-degree, MCL 750.520d(1)(a) (victim between the ages of 13 and 16) (CSC III). Defendant was sentenced to serve 10 to 15 years in prison for each count and now appeals by right. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecution did not present sufficient evidence to support his convictions. We disagree.

We review de novo challenges to the sufficiency of the evidence.[1] We must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.[2]

"A person is guilty of [CSC III] if the person engages in sexual penetration with another person and . . . [t]hat other person is at least 13 years of age and under 16 years of age."[3]

[1] *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010).

[2] *Id*. at 196.

[3] MCL 750.520d(1)(a).

Defendant claims that the prosecution failed to establish that the complainant was between the ages of 13 and 15 years old when he engaged in sexual intercourse with her. Defendant's argument focuses primarily on a portion of the complainant's testimony from the preliminary examination in which the complainant discussed what type of car she drove while engaged in the relationship with defendant. Specifically, at defendant's preliminary examination, the following exchange occurred between defense counsel and the complainant:

> *Q.* You drove a black Taurus during the time you were in a dating relationship with my client, true?
>
> *A.* No, green.

However, the complainant testified at trial that she did not buy the Taurus or drive until she was 16. When asked by defense counsel whether she recalled previously testifying that she was driving the Taurus while dating defendant, the complainant explained that she misunderstood the question, and meant only to clarify that while she did own a Taurus when she was 16, it was green, not black, and not that her relationship with defendant began when she was 16.

In essence, defendant's argument is that his testimony is more credible than the complainant's. However, this Court must make "credibility choices in support of the jury verdict,"[4] and must defer to the jury's superior ability to assess the credibility of witnesses.[5] The jury apparently found the complainant's explanation credible, and reversal is unwarranted simply because there was some inconsistent testimony presented at trial.

Moreover, even if the complainant's testimony is understood to mean that she drove a green Taurus during her dating relationship with defendant, it does not establish that she was over sixteen when the sexual activity first took place. The complainant testified that the last time she and defendant went on a date was February 24, 2007. At that point she had been 16 for three months. By defendant's own admission, the two dated for a year. Accordingly, she would have been driving the Taurus "during the time" she and defendant were dating.

Further, the overwhelming weight of the other testimony offered at trial, including most of the complainant's testimony, the testimony of two of her softball teammates, as well as defendant's own written statement, established that the complainant was 14 years old when she first became sexually involved with defendant. In the written statement, provided by defendant to the investigating detective, and read into evidence at trial, defendant claimed that he had started dating the complainant in "May of 2005 . . . [when] I was 22 and [the complainant] was 14. I was dating [her] for one year." The only explanation defendant offers regarding why his written statement is in error is his claim that "he was given the wrong year for a frame of reference" by the investigating detective. However, the detective testified that he did not give

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[4] *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

[5] *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

defendant guidance regarding what to write, nor did defendant make any attempt to clarify his confusion regarding the complainant's age while writing his statement. Accordingly, the prosecution presented sufficient evidence to support the verdict.

II. FAIR TRIAL

Defendant next argues that he was denied his right to a fair trial by the circuit court's refusal to admit a photograph he offered at trial as evidence. We disagree.

"A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion."[6] "An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible range of principled outcomes."[7]

Defendant claims that the photograph depicts him and the complainant from behind at a concert they attended together in June 2006, during the time the complainant was pregnant, according to her testimony. According to defendant, the photograph shows that the complainant was not pregnant on the date of the concert and that she had worn a "skintight strapless tank top" that day, contrary to testimony that she wore only baggy clothes during her pregnancy. Defense counsel originally produced the photograph during his cross examination of the complainant and asked her whether the people in the photograph were her and defendant. The complainant denied that the photograph depicted her and defendant. Later, during direct examination of defendant, defense counsel sought to admit the photograph. The prosecution objected, noting that "[defense] counsel indicated any exhibits . . . were only going to be for impeachment purposes." The court denied admission of the photograph on the basis that the discovery rules had been violated. Defense counsel countered that the photograph was "offered obviously for impeachment." The trial court responded, "[r]ight. . . . If you have had any impeachment, it's occurred." On appeal, defendant argues that because the evidence was "rebuttal in nature," the discovery rules do not apply, and the trial court erred by excluding the photograph.

We note that defendant does not offer citations to any authority to support the assertion that because the photograph was offered as rebuttal evidence, the discovery rules do not apply. Accordingly, he has abandoned this argument.[8] Moreover, this argument lacks merit. MCR 6.201(H) provides that "[i]f at any time a party discovers additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party." MCR 6.201(A)(6) provides that "a party upon request must provide . . . a description of and an opportunity to inspect any tangible physical evidence a party intends to introduce at trial, including any . . . photograph." In its discovery request, the prosecution sought admission of "[a]ny book, paper, document, picture, or tangible object the defendant intends to

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[6] *People v Brown*, 294 Mich App 377, 385; 811 NW2d 531 (2011).

[7] *Id.*

[8] See *People v Huffman*, 266 Mich App 354, 371; 702 NW2d 621 (2005).

offer in evidence, or that relates to the testimony of any witness, other that the defendant, that the defense intends to call at trial."[9] Because he had not previously provided the photograph to the prosecution, defense counsel's attempt to introduce the photograph as substantive evidence on direct examination of defendant violated the discovery rules. When the photograph was offered as impeachment evidence, because the photo only serves to contradict the complaint's testimony, it was collateral to an issue of consequence, and because the collateral matter was brought forth during the complainant's cross-examination, defendant must take her answer, which was that the photograph did not depict her and defendant.[10] Accordingly, the trial court did not abuse its discretion when it ruled that the photograph was inadmissible.

III. PROSECUTORIAL MISCONDUCT

Following the prosecutor's closing argument, defense counsel asked the court for a curative instruction based on the prosecutor's alleged improper characterization of defendant's written statement and oral statements to police during his interview as confessional in nature. The court denied the request. Defendant argues that the court's decision denied him his right to a fair trial because his written statement was not a confession because defendant did not state specifically that the five sexual encounters he admitted to having with the complainant occurred before her sixteenth birthday. We disagree.

This Court reviews de novo claims of prosecutorial misconduct.[11] "An admission of fact is distinguished from a confession of guilt by the fact that an admission, in the absence of proof of facts in addition to those admitted by the defendant, does not show guilt."[12] "If . . . the fact admitted does not of itself show guilt but needs proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a confession, but an admission . . . ."[13]

Defendant's redacted written statement was read into evidence at trial by the officer who had interviewed him. Despite defendant's argument at trial and on appeal that he was confused about the timing and dates of his relationship with the complainant, his statement, as read at trial, does not show signs of any such confusion. According to the record, defendant admitted that he began "hanging out" with the complainant during the "second week [of] January 2005 when she reported for practice . . . . In May of 2005 I began dating [the complainant]. I was 22 and [she] was 14[;] I was dating [her] for one year."

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[9] The language of the discovery request tracks almost exactly the language of MCL 767.94a(1)(d), which governs disclosure of evidence to the prosecution by the defense.

[10] 1 McCormick, Evidence, ¶ 45, pp 215-216.

[11] *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

[12] *People v Gist*, 190 Mich App 670, 671-672; 476 NW2d 485 (1991).

[13] *People v Schumacher*, 276 Mich App 165, 181; 740 NW2d 534 (2007) (citations omitted).

Defendant argues that the error in time frame is evidenced by his erroneous claim that he became the softball coach in 2003. However, it appears from the record that defendant simply made a clerical error; he wrote that "I was a softball coach starting at [sic] year of 2003-2005 and coached . . . girls [sic] varsity softball[;] also was assistant for many years." The complainant was 14 years old when he became her softball coach in January 2005. In any event, defendant stated clearly that the complainant was 14 years old when they began dating. If he was confused during the interview only regarding the year he began dating the complainant, it does not necessarily follow that he would have been confused regarding the complainant's age.

Similarly, defendant's claim that his written statement was not a confession of wrongdoing because he admitted only to dating the complainant before she was 16 and not to having sex with her also lacks merit. Defendant wrote that he dated the complainant for "one year," beginning in May 2005. He further admitted to having had sexual intercourse with the complainant five times that he could recall. As the sex took place during their year-long dating relationship, it would have occurred between approximately May 2005, when the complainant 14 years old, and May 2006, when she was 15 years old. Accordingly, defendant's statement amounts to a confession because he admitted that the complainant was under 16 years of age when he had sex with her.

IV. THE PRESENTENCE INVESTIGATION REPORT

Next, defendant argues that he was sentenced on the basis of inaccurate information because the Presentence Investigation Report (PSIR), in its entirety, is "inaccurate, irrelevant and objectionable." We disagree.

As a threshold matter, at sentencing, the court denied defense counsel's request to address defendant's objections to the PSIR of the court's scoring of the offense variables. Apparently, the court adhered to a policy requiring that any such objections must be filed in writing prior to the date of the sentencing hearing. We agree with both parties to this appeal that the court erred. However, because defendant later filed a motion for resentencing in which he could have raised his objections, we find that the court corrected its error by considering and holding a hearing on defendant's motion.

We review for an abuse of discretion a trial court's response to a claim of inaccuracy in the PSIR.[14] In *People v Spanke*,[15] this Court held that "[t]he sentencing court must respond to challenges to the accuracy of information in a presentence report; however, the court has wide latitude in responding to these challenges." The sentencing court "may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged

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[14] *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

[15] *Id.*

information."[16] However, if the court chooses to disregard the defendant's challenges, "it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence."[17] Here, the reasons the court gave for the sentence imposed did not rely on any of the information in the PSIR. Although the court stated that it had examined the PSIR "several times," as well as the letters in support of defendant submitted by his friends and family, it clarified that defendant's decision to take advantage of his "leadership position" in the community and in the life of the complainant was enough, "in and of itself . . . to justify a sentence." Based on the record, it is not apparent that the court relied on any alleged inaccuracies in the PSIR in order to sentence defendant.

V. SENTENCING GUIDELINES

Finally, defendant does offer specific objections to the court's scoring of the guidelines on appeal, arguing that offense variables (OVs) 3, 4, 10, 11, 13, and 19 were scored incorrectly. According to defendant, the correct sentencing range for defendant based on properly scored guidelines would have been 36 to 60 months, or 45 to 75 months, rather than 10 to 15 years (120 to 180 months). We disagree; defendant is not entitled to resentencing.

"The imposition of a sentence is reviewed for an abuse of discretion."[18] "The interpretation of the statutory sentencing guidelines and the legal questions presented by application of the guidelines are subject to review de novo."[19] "Resentencing is an appropriate remedy where a defendant's sentence is based on an inaccurate calculation of the sentencing guidelines range and, therefore, does not conform to the law."[20]

A. OV 3

Defendant argues first that the court erred in scoring 25 points for OV 3.[21] Twenty-five points is an appropriate score when "[l]ife threatening or permanent incapacitating injury occurred to a victim."[22] Defendant contends that there was no evidence of such an injury to the

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[16] *Id.*

[17] *Id.* at 649.

[18] *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008).

[19] *Id.* at 337.

[20] *Id.*

[21] MCL 777.33 (physical injury to a victim).

[22] MCL 777.33(1)(c).

complainant. However, "[p]regnancy resulting from rape is . . . considered a form of grave bodily injury."[23]

Moreover, this Court has held that a sentencing court may consider all record evidence, including the contents of the PSIR and other evidence that was not admitted at trial, when calculating the sentencing guidelines.[24] The PSIR here reports the complainant's statement that she and defendant looked up "home deliveries" on the Internet before defendant delivered their baby in the complainant's bedroom. Although defendant argues on appeal that he would have contested some of the information in the PSIR, he did not dispute this account of the termination of the pregnancy in his motion for resentencing. Based on defendant's admission to impregnating the complainant, and in light of the information contained in the PSIR about the method of delivery and the danger to the complainant's health that entailed, and defendant's role in it, the trial court's score of 25 points for OV 3 is appropriate.

B. OV 4

Next, defendant argues that the trial court improperly scored 10 points for OV 4,[25] because there was no evidence of a serious psychological injury to the complainant. Under the statute, a score of 10 points is appropriate if the victim suffered "[s]erious psychological injury requiring treatment;" however, the Legislature provided that 10 points was an appropriate score where psychological treatment *may* be necessary, and stipulated that "the fact that treatment has not been sought is not conclusive."[26] Based on the information in the PSIR and evidence provided at trial, it was not an abuse of the court's discretion to score 10 points for OV 4.[27] It is possible, if not likely, that a teenager who was impregnated by her high school softball coach and later lost the pregnancy could suffer psychological damage. The court's score was appropriate.

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[23] *People v Cathey*, 261 Mich App 506, 515; 681 Nw2d 661 (2004) (citations omitted).

[24] *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008).

[25] MCL 777.34 (psychological injury to a victim).

[26] MCL 777.34(2) (emphasis added).

[27] The PSIR recounts, in part:

> While on the surface it may appear that [the complainant] has been able to move forward with her life, as she stated in her Victim Impact Statement, people look at her as "that girl." [The complainant] stated that when her own sister gave birth, she ([the complainant]) had a hard time even holding the baby because of the memories and images that it brought up regarding the birth of her own child. [The complainant] stated she continues to have dreams about her baby and what happened.

C. OV 10

Scoring of OV 10 is appropriate where the crime involved exploitation of a vulnerable victim.[28] Defendant argues that OV 10 was improperly scored at 15 points because there was no evidence of predatory conduct, other than the victim's age. The statute defines "'predatory conduct' [as] preoffense conduct directed at a victim for the primary purpose of victimization."[29] Two of the complainant's teammates testified that defendant showed the complainant preferential treatment while he was their coach, driving the complainant home after practice and being generally "friendlier" toward her than the other players. Even though defendant did not start dating the complainant until after the softball season was over, it was not an abuse of the court's discretion to find that he was laying the groundwork, so to speak, for an improper dating relationship while he was still her coach. Thus, the court's score for OV 10 was appropriate, as a finding of predatory conduct was not outside a principled range of outcomes.

D. OV 11 AND OV 13

Next, defendant argues that the trial court should have scored OV 11 (criminal sexual penetration) at zero rather than 50 points.[30] According to defendant, zero points were warranted because all of the sexual penetrations that the jury found had occurred resulted in convictions. The prosecution agrees that under *People v Johnson*,[31] the OV was improperly scored. However, the prosecution argues that *Johnson* was wrongly decided. This Court is bound by the precedent established in *Johnson*.[32]

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[28] MCL 777.40(1).

[29] MCL 777.40(3)(a).

[30] MCL 777.41.

[31] 474 Mich 96; 712 NW2d 703 (2006).

[32] In *Johnson*, 474 Mich at 101-102; a case that also concerned CSC III, the Court observed that it had

> Previously defined "arising out of" to suggest a causal connection between two events of a sort that is more than incidental. We continue to believe that this sets forth the most reasonable definition of "arising out of." Something that "aris[es] out of," or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen. For present purposes, this requires that there be such a relationship between the penetrations at issue and the sentencing offenses.

Defendant's total score, when OV 11 is assessed at 0 points, would be 85 points. However, defendant's sentencing range remains the same with a corrected score. Defendant's minimum sentencing range with 85 points, or with 135 points, is 84 to 140 months, which is within the court's minimum sentence of 120 months.[33] Thus, resentencing defendant is unnecessary on the basis of this error.

Defendant argues next that OV 13, scored for a continuing pattern of criminal behavior, "could be considered appropriately scored at 25 [points] only if offense variable 11 is changed to 0." Having agreed that OV 11 was improperly scored, defendant's concession resolves any challenge to the scoring of OV 13.

E. OV 19

Finally, defendant argues that OV 19 was improperly scored at 10 points based on the evidence, although he does not explain why, or suggest a revised score. Offense variable 19 is "threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services."[34] The prosecutor argues that defendant was properly scored 10 points as an "offender [who] . . . interfered with or attempted to interfere with the administration of justice,"[35] because he "had [the complainant] give birth from her home in order to prevent her going to the hospital" and risk exposing the relationship. The prosecutor also notes the information in the PSIR that defendant buried the baby "in order to prevent

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> In this case, the sentencing offenses are for third-degree criminal sexual conduct. Therefore, in order to count the penetrations under OV 11, there must be the requisite relationship between the penetrations and the instances of third-degree criminal sexual conduct. The victim testified that she had sexual intercourse with defendant on two different dates in November 2001. There is no evidence that the penetrations resulted or sprang from each other or that there is more than an incidental connection between the two penetrations. That is, there is no evidence that the penetrations arose out of each other. More specifically, there is no evidence that the first sexual penetration arose out of the second penetration or that the second penetration arose out of the first penetration. Because the two sexual penetrations did not "arise out of" each other, the trial court erred in scoring OV 11 at 25 points.

Based on *Johnson*, the sentencing court's score of 50 points was not appropriate. Despite the fact that both the complainant and defendant testified that they had sexual intercourse more than five times, it was not clear that any of these additional instances "arose out of" any of the charged penetrations.

[33] MCL 777.63.

[34] MCL 777.49.

[35] MCL 777.49(c).

discovery of his sexual abuse . . . by law enforcement officers." This argument is sound. Accordingly, the sentencing court did not abuse its discretion by scoring 10 points for OV 19.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra