

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY MICHAEL MOORE,

Defendant-Appellant.

UNPUBLISHED

December 6, 1996

No. 181643

LC No. 94-001133-FH

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

PER CURIAM.

A jury convicted defendant of one count of third-degree criminal sexual conduct (CSC III), MCL 750. 520d(1)(a); MSA 28.788(4)(1)(a), and one count of attempted CSC III, MCL 750.92(2); MSA 28.287(2). He was sentenced to a term of four to fifteen years' imprisonment for the CSC III conviction, and a term of two to five years' imprisonment for the attempted CSC III conviction. Defendant appeals of right, and we affirm.

Defendant asserts that the evidence was insufficient to convict him of either charge and that his motion for directed verdict of acquittal should have been granted. We disagree. This Court reviews a challenge to the sufficiency of the evidence and a denial of a directed verdict using the same standard, i.e., we view the evidence in a light most favorable to the prosecution to determine whether there was sufficient evidence for a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

The victim, who was fifteen years old at the time of the assault, accompanied two friends on a weekend visit to defendant's hunting campsite in a remote location in Cheboygan County. Early one morning, defendant asked the victim to help him check on some beaver traps. Defendant and the victim went into a deer blind, where defendant forcibly performed fellatio on the victim. Upon returning to

* Circuit judge, sitting on the Court of Appeals by assignment.

camp, the victim told one of his friends about this incident. Later, the victim was left alone in the camper with defendant while the victim's two friends went for a walk. Defendant locked the door, approached the victim, unzipped the victim's pants and began rubbing the victim's penis. He stopped when the two friends returned after being gone for only a few minutes.

MCL 750.520d(1)(a); MSA 28.788(4)(1)(a) provides that a person is guilty of CSC III if he engages in sexual penetration with another person who is at least thirteen years of age and under sixteen years of age. MCL 750.520a(l); MSA 28.788(1)(l) defines "sexual penetration" to include fellatio. Here, the prosecution established that the victim was fifteen years old at the time of the assault. The element of penetration was proven when the victim testified that defendant pulled down his pants and performed fellatio on him. Despite defendant having disputed this incident, the victim's testimony is sufficient to establish penetration and CSC III when we examine the evidence in a light most favorable to the prosecution. *Wolfe, supra; Lugo, supra*. The jury was free to believe the victim over defendant. *People v Herbert*, 444 Mich 466, 473-474; 511 NW2d 654 (1993). Thus, defendant was not entitled to a directed verdict on the CSC III charge. *Jolly, supra*.

We reach the same conclusions with respect to the attempted CSC III charge. An attempt consists of (1) an intent to do an act or to bring about certain consequences which would in law amount to a crime, and (2) an act in furtherance of that intent which, as it is most commonly phrased, goes beyond mere preparation. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993), citing LaFave & Scott, Substantive Criminal Law, §6.2, p 18. Defendant's intent to commit CSC III and his committing an act in furtherance thereof were established by witness testimony and by defendant's own admissions. The victim testified that he was left alone with defendant in the camper, that defendant locked the camper door, unzipped the victim's pants and began rubbing the victim's penis but stopped when the victim's friends returned to the camper after a few minutes. Defendant does not deny being alone with the victim in the camper or locking the door, nor does he deny telling the police that he would have liked to have had sex with the victim had the circumstances been different. Defendant merely denies that he assaulted the victim. Again, the jury was free to believe the victim's testimony over that of defendant, *Herbert, supra*, and the victim's testimony alone was enough to establish the elements of attempted CSC III. MCL 750.520h; MSA 28.788(8). Thus, a directed verdict of acquittal was not merited and the attempted CSC III conviction should stand given defendant's apparent attempt to go further coupled with acts leading to penetration. *Jolly, supra; Lugo, supra*.

Next, defendant argues that the trial court improperly scored fifteen points for offense variable (OV) 7, exploitation of victim vulnerability, because the victim was no more vulnerable than the typical CSC victim. He asserts that "the victim's size/strength was used as the basis for the jury rendered verdict, thus requiring a scoring of five points rather than fifteen points for OV 7." We disagree. Appellate review of scoring decisions is very limited and we will affirm the decision if evidence exists to support the score. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993); *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994).

In sentencing defendant, the trial judge remarked that the score of fifteen points for OV 7 was proper because defendant had exploited the victim's youthful vulnerability in taking the victim, who was

defendant's fifteen-year-old guest, to an isolated place and physically restraining and assaulting him. The reverse but analogous situation was presented in *People v Piotrowski*, 211 Mich App 527, 530-532; 536 NW2d 293 (1995), in which this Court upheld a fifteen-point score for OV 7 where a defendant assaulted and robbed a seventy-eight-year-old woman after breaking into her home. The defendant argued that "had the victim been of any other age, [she] would still have been subjected to the exact same actions by defendant." *Id.* at 531. This Court disagreed, noting the distinctions in scoring OV 7 for exploitation through a difference in size or strength, scored at five points, and exploitation due to age, scored at fifteen points:

We take this to be an explicit recognition of the distinction between the decline in physical strength characteristic of advanced age, and the less easily articulated decline in aggressiveness in confrontational situations that also often accompanies advancing years. To fail to recognize this distinction would render nugatory OV 7 in the context of elderly victims, since virtually all exploitation of agedness would be ascribed to exploitation of physical infirmity, meaning that those who prey on the aged would receive more lenient sentences than recommended by the guidelines. The guidelines recognize and address exploitation of our senior citizens.

. . . Had the victim been twenty-eight rather than seventy-eight, regardless of her physical strength, we find it unlikely that she would have been all but forgotten in a bathroom, fearing for her life the entire fifteen minutes, while her knife-wielding assailant leisurely inventoried her possessions. In other words, had defendant not immediately dismissed the possibility that the elderly victim would offer any resistance, which dismissal can only be attributed to her age, we believe the victim would have been terrorized for a far shorter period of time. Therefore, we find ample evidence to support the sentencing court's conclusion that the victim was exploited solely because of her age, and, accordingly, uphold the scoring of OV 7. [*Id.* at 531-532.]

The reasoning of *Piotrowski* is equally applicable when the victim is a minor. To hold otherwise would reward assailants for having chosen victims whose size and strength were easily overcome because they had not yet reached physical maturity. Equally important is the fact that just as advancing age may render a person less aggressive in confrontational situations, so may youth and inexperience result in a teen-aged victim submitting to an older assailant's unwanted advances.

In addition, we note that in *People v Cotton*, 209 Mich App 82, 84; 530 NW2d 495 (1995), this Court held that a score of fifteen points for OV 7 was appropriate even if the victim's tender age was an element of the crime: "[b]ecause OV 7 is applicable to the full range of criminal sexual conduct offenses, including those where the age of the victim is an element of the crime, the special circumstances regarding victim vulnerability of each sexual crime are considered in imposing sentence." *Id.* This Court found no error in the OV 7 score given the vast disparity in age between the defendant and his six-year-old victim. *Id.* The special circumstances in this case are the disparity in age between the forty-eight year-old defendant and the fifteen-year-old victim and the fact that defendant had taken the boy to a deer blind in a remote location. Those circumstances most likely made the boy, who was

not even old enough to drive a car legally, feel vulnerable and helpless - - feelings that defendant exploited. Thus, evidence existed to support the trial judge's score of fifteen points for OV 7, *Hernandez, supra*; *Hoffman, supra*, and we find no abuse of discretion. *People v Raby*, 218 Mich App 78, 85; ___ NW2d ___ (1996) (Markman, concurring).

Affirmed.

/s/ Jane E. Markey

/s/ Michael J. Kelly

/s/ Michael J. Talbot