

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ALLEN JIPPING,

Defendant-Appellant.

UNPUBLISHED

December 20, 1996

No. 184346

LC No. 94-018232 FC

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

PER CURIAM.

Defendant appeals as of right his conviction by a jury of three counts of first-degree criminal sexual conduct (CSC), MCL 750.520(b)(1)(a); MSA 28.788(2)(1)(a). Defendant was sentenced to three concurrent sentences of five to fifteen years' imprisonment. We affirm.

Defendant was arrested and charged with three counts of first-degree CSC after his oldest daughter reported to protective services and the Ottawa County Sheriff's Department that at various times defendant had engaged in sexual penetration with defendant's youngest daughter, while that daughter was eight and nine years old. At trial, defendant denied having had any type of sexual contact with his youngest daughter.

I

First, defendant argues that he was denied a fair trial because the prosecutor repeatedly attempted to introduce inadmissible evidence of defendant's relationships with family members other than the victim. We disagree. Prosecutorial misconduct issues are decided on a case-by-case basis, and this Court must examine the relevant portion of the record and evaluate the prosecutor's remarks or conduct in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996); *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). The test of prosecutorial conduct is whether the defendant was denied a fair and impartial trial as the result of the prosecutor's conduct. *McElhaney*, *supra*. Defendant contends that the prosecutor attempted to introduce allegations of

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

criminal sexual conduct against defendant by his oldest daughter, evidence of physical violence by defendant against his wife and middle daughter, and evidence of the type of relationship defendant had with his wife. Our review of the record reveals that the prosecutor did not present inadmissible evidence to the jury or otherwise deprive defendant of a fair and impartial trial. *Id.*

The prosecutor is under no obligation to use the least prejudicial evidence available to establish a fact at issue. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). While evidence of physical violence by defendant toward his family members could be highly prejudicial, defendant's demeanor and violent temper were at issue, and the prosecutor acted properly in seeking to admit this evidence. Further, a review of the record reveals that the prosecutor made no attempt to introduce the challenged evidence after the court ruled that it was inadmissible. Accordingly, defendant was not deprived of a fair trial as a result of the prosecutor's conduct. *McElhaney, supra*.

II

Next, defendant contends that the trial court abused its discretion by imposing on him a sentence disproportionate to his crime. We disagree.

A sentence must be proportionate to the seriousness of the crime and defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentence imposed within an applicable sentencing guidelines range is presumed proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Spicer*, 216 Mich App 270, 276; 548 NW2d 245 (1996). Nevertheless, a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances. *Milbourn, supra* at 661.

Defendant received three concurrent sentences of sixty to 180 months' imprisonment, well within the sentencing guidelines range of twenty-four to ninety-six months' imprisonment. Defendant presents no unusual circumstances which would overcome the presumption of proportionality. *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995). Defendant's sentence is therefore proportionate.

III

Third, defendant claims that his sentence violates the Michigan constitutional prohibition against cruel or unusual punishment, and the United States constitutional prohibition against cruel and unusual punishment. This Court has held that a proportionate sentence is neither cruel nor unusual. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993). Because defendant's sentence is proportionate, it is neither cruel nor unusual.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Michael J. Talbot