STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL THOMAS,

Defendant-Appellant.

UNPUBLISHED
May 30, 1997

No. 191594
Macomb Circuit Court
LC Nos. 94-001358-FH;
94-001459-FC

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted as charged in two separate lower court files. In LC No. 94-001358-FH, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and was sentenced to two to four years' imprisonment and two years' consecutive imprisonment, respectively. In LC No. 94-001459-FC, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b; MSA 28.788(2), one count of second-degree CSC, MCL 750.520c; MSA 28.788(3), and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to ten to twenty years' imprisonment for each first-degree CSC conviction and three to fifteen years' imprisonment for the second-degree CSC conviction, to be served consecutive to a sentence of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

The evidence presented at trial established that defendant's daughter and her girlfriend spent the night at defendant's residence on April 8, 1994. After the girls went to bed, defendant entered his daughter's bedroom and told the girlfriend to leave the room so that he could speak with his daughter. While alone with his daughter, defendant pulled out a gun and feloniously assaulted her. Upon leaving his daughter's bedroom, defendant motioned his daughter's girlfriend into his bedroom with the gun and then engaged in acts of sexual contact and penetration with the girlfriend.

I

On appeal, defendant contends that the trial court erred in granting the prosecution's motion for joinder of the two separate lower court files stemming from the charges involving his daughter and her

girlfriend. We disagree. Severance was not mandatory under MCR 6.120(B) because the offenses were based on a series of connected acts or acts constituting part of a single scheme or plan. Further, the trial court did not abuse its discretion in permitting the joinder under MCR 6.120(C). See *People v Daughenbaugh*, 193 Mich App 506; 484 NW2d 690 (1992), modified on other grounds 441 Mich 867 (1992); *People v Miller*, 165 Mich App 32, 45; 418 NW2d 668 (1992), remanded on other grounds 434 Mich 915 (1990).

We find unpersuasive defendant's contention that the files were consolidated so that the prosecution could bring defendant's character into question.[1] We note that the purpose of the evidentiary rule that defendant relies upon as support for his contention is to protect against the introduction of extrinsic act evidence which is offered solely to prove character. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). MRE 404(b) does not preclude evidence of criminal activity on the part of a defendant when the act or conduct evidence is introduced for the purpose of explaining the circumstances leading up to the charged offense. *People v Bowers*, 136 Mich App 284, 294; 356 NW2d 618 (1984).

In light of the evidence in the case at bar that defendant's felonious assault on his daughter was one of the circumstances which led up to and made it possible for defendant to separate the girlfriend from his daughter so that he could commit the CSC offenses, we reject defendant's argument that the evidence on the felonious assault served only a character purpose in relation to the CSC offenses. Examining defendant's argument in the context of the standards for joinder in MCR 6.120(C), we uphold the trial court's decision to join the files for trial because fairness warranted having the jury apprised of what occurred during the continuum of the criminal transaction.

II

Defendant next challenges the sufficiency of the evidence for the three CSC convictions. With regard to the two first-degree CSC convictions, defendant argues that the victim's testimony was insufficient to establish the "sexual penetration" element for these convictions. With regard to the conviction for second-degree CSC, we note that defendant's argument goes beyond the scope of this issue by attacking the prosecution's charging decision, rather than the sufficiency of proofs for second-degree CSC.

In any event, defendant's assertion that the prosecution could not lawfully obtain convictions for both first-degree CSC and second-degree CSC, based on the proofs presented at trial, is incorrect. The different degrees for CSC reflect a legislative intent to differentiate between sexual acts which only affect body surfaces of the victim and those which involve intrusion into the body cavities. *People v Whitfield*, 425 Mich 116, 135 n20; 388 NW2d 206 (1986). First-degree CSC focuses on sexual penetration, i.e., "sexual intercourse . . . or any other intrusion, however slight, of any part of the person's body or any object into the genital or anal openings of another person's body." MCL 750.520a(l); MSA 27.788(1)(l). Each completed sexual penetration is a separate punishable offense. *People v Wilson*, 196 Mich App 604, 608; 493 NW2d 471 (1992).

Unlike first-degree CSC, which focuses on sexual penetration and requires no sexual purpose, *People v Norman*, 184 Mich App 255, 259-260; 457 NW2d 136 (1990), the focus of second-degree CSC is on sexual contact. "Sexual contact" includes the "intentional touching of the victim's . . . intimate parts or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(k); MSA 28.788(1)(k). "Intimate parts" includes the "primary genital area, groin, inner thigh, buttock or breast of a human being." MCL 750.520a(c); MSA 28.788(1)(c). As with sexual penetrations, each completed sexual contact would be a separate punishable offense. See *Wilson, supra*.

In the case at bar, the victim testified that defendant rubbed her upper thigh area immediately before the first assault. In addition, between the two penetrations defendant rubbed her vagina with a lubricant. Either of these actions is sufficient to constitute a completed act of sexual contact. Because penetration was not part of these acts, we reject defendant's claim that the prosecution divided a first-degree CSC offense into two components in order to attain multiple convictions.

Viewed in a light most favorable to the prosecution, we find that the victim's testimony on the two intrusions to her vagina by defendant's penis was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that defendant committed two acts of sexual penetration. We will not weigh the proofs or determine credibility in deciding the sufficiency of the evidence. See *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993).

Based on the above, we hold that the evidence was sufficient to sustain two convictions for first-degree CSC and one conviction for second-degree CSC. Although all three convictions arose out of the same criminal transaction, the convictions were lawful because each was based on a separate act for which our Legislature intended separate punishment. Because all three convictions were lawful, it follows that defendant's newly raised challenge to the prosecution's decision to charge him with second-degree CSC must also fail, inasmuch as the prosecution did not act at in contravention of the constitution or the law. See *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996).

III

Defendant next contends that he was denied a fair trial by the trial court's granting of the prosecution's motion to strike the examining physician from its witness list over a defense objection. However, defendant has waived this issue by failing to support his argument with the transcript of the proceeding where this motion was considered by the trial court. See *Wilson, supra* at 615. Moreover, to the extent that defendant argues that a nurse included on the witness list should have been produced at trial, we need not consider this argument because it is not identified in the statement of this issue. See *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992).

In any event, defendant failed to preserve the issue of prejudice with respect to the physician or the nurse because he did not move for a new trial on this ground. See *People v Lawton*, 196 Mich App 341, 356; 492 NW2d 810 (1992). We are not persuaded that defendant has established any

basis for relief under the standard for unpreserved, plain error in *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

IV

Defendant next contends that the trial court erred by failing to give limiting instructions from the second edition of the Michigan Criminal Jury Instructions on the use of evidence on impeachment by prior inconsistent statements and the use of uncharged acts in child criminal sexual conduct cases. However, the use of the Michigan Criminal Jury Instructions is not required, and defendant has failed to preserve this issue by requesting the limiting instructions. Therefore, appellate review is foreclosed absent manifest injustice. See *People v Ullah*, 216 Mich App 669, 676-677; 550 NW2d 568 (1996). We are not persuaded that manifest injustice occurred.

Defendant further argues that he was denied the effective assistance of counsel because defense counsel did not request the instructions. Limiting our review to the existing record, we hold that defendant has not met his burden to establish either the requisite deficient performance or prejudice. See *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

V

Defendant next raises several issues related to his sentence.

A

Defendant claims that the trial court failed to consider established sentencing factors and standards in imposing the sentences. We hold that the trial court's reliance on the sentencing guidelines for first-degree CSC was a sufficient articulation of the reasons for the sentences. See *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991).

B

With regard to defendant's challenge to the scores for four offense variables of the sentencing guidelines, the Supreme Court has recently held that "there is no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables." *People v Mitchell*, 454 Mich 145, 176-177; ___ NW2d ___ (1997). On appeal, a defendant may only challenge the factual basis on which the trial court calculated the guidelines or the proportionality of the sentence. Appellate courts may not interpret the guidelines or score and rescore the variables for offenses and prior record to determine whether they were correctly applied. *Id*. at 178. Accordingly, we can offer defendant no relief.

C

Finally, having considered defendant's arguments on the proportionality of his sentences and, specifically, the sentences of ten to twenty years' imprisonment for the first-degree CSC convictions, we

find no basis for resentencing. Defendant's sentences are within the guidelines and are therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has not presented the sentencing court and this Court with any mitigating factors sufficient to overcome the presumption of proportionality. *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). We conclude that defendant's sentences are proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Helene N. White

[1] In this regard, we note that defendant's assertion that the prosecution made improper "propensity" arguments during opening statements and in summation to the jury is not properly before us because it has not been identified in the statement of this issue. *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992). In any event, defendant has abandoned this claim by neglecting to identify the particular prosecutorial remarks that he believes were improper. A defendant may not leave it to this Court to search for a factual basis to sustain or reject his position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).