

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELVIN STOCKLEY, a/k/a
KEVIN STOCKLEY,

Defendant-Appellant.

UNPUBLISHED
October 2, 1998

No. 202334
Calhoun Circuit Court
LC No. 96-002720 FH

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

PER CURIAM.

Defendant was convicted by a jury of two counts of criminal sexual conduct, third degree, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c). The trial court sentenced defendant as an habitual offender to a term of twenty-five to fifty years' imprisonment. Defendant appeals as of right. We affirm.

This case arose from a sexual encounter between defendant and the victim on the night of July 8 or early morning of July 9, 1996. At that time, defendant worked at the nursing home where the sixty-seven-year-old victim resided. The victim testified that defendant came into her room and assaulted her vaginally and orally. The victim's daughter testified the victim was not mentally capable of making decisions for herself.

Defendant first contends that his sentences violate the principle of proportionality. We disagree. The trial court based its sentences in part on defendant's extensive criminal record. A trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Moreover, the trial court considered the fact that defendant assaulted a mentally incapacitated, elderly woman in a nursing home where he was employed. We find no abuse of discretion. See *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). 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).

Defendant next contends that the trial court abused its discretion in admitting evidence of a probate court order appointing a guardian for the victim. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Defendant first argues that the order was irrelevant because it had not been entered until a month after the assault. Evidence is relevant if it has any tendency to make the existence of a fact of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v VanderVliet*, 444 Mich 52, 60; 520 NW2d 338 (1993). In the present case, the victim's mental state was at issue. The guardianship order was relevant to the issue of the victim's mental capacity. Where the victim's daughter testified that the victim was unable to care for herself or make decisions for herself before the incident, the date of the order went to the weight, rather than the admissibility of the order. Furthermore, as the guardianship order was cumulative of other testimony regarding the victim's mental capacity, the probative value of the evidence was not substantially outweighed by the potential for unfair prejudice. See MRE 403.

Finally, defendant claims that the order was inadmissible because the prosecution did not inform him of the existence of this document until the day of trial, even though defendant requested all documents the prosecution intended to introduce at trial. However, there is no evidence that the prosecutor intentionally withheld the evidence. In addition, because the probate court order was cumulative of other evidence regarding the victim's mental capacity, defendant was not prejudiced by its admission into evidence. In the absence of prejudice, defendant is not entitled to relief. See *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997); *People v Taylor*, 159 Mich App 468, 485-487; 406 NW2d 859 (1987).

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Helene N. White