

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID L. FARR,

Defendant-Appellant.

UNPUBLISHED

January 22, 1999

No. 204420

Muskegon Circuit Court

LC No. 97-140148 FH

Before: Hood, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right his bench trial conviction for third-degree criminal sexual conduct, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c) (sexual penetration with a physically helpless victim). Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to a term of 156 to 270 months' imprisonment. We affirm.

Defendant first argues that the examining magistrate abused its discretion in binding defendant over for trial where the evidence presented at the preliminary examination was insufficient to support a finding of probable cause. Specifically, defendant alleges that the prosecutor did not establish the corpus delicti of the offense before defendant's incriminating statements were entered into evidence. We disagree.

At the preliminary examination, the victim, who was 68 years old and was a widow since 1987, testified that in 1996, defendant lived with her in her home¹ from around Easter until November. During this time, the victim was on medication that caused her to sleep very deeply. On November 17th or 18th, the victim woke up "wet and sloppy" in her genital region. She noticed that this had occurred on approximately three or four prior occasions. The victim had not been sexually active for ten years and could not think of any medical reason for this to happen. She douched and called her doctor to inquire whether the medication would cause this side effect or whether she had a yeast infection. She did not see a physician, however. A few days later, the victim began to notice that defendant was avoiding her, and would not look at her. The victim testified that she asked defendant why he could not look at her, and defendant responded, "I raped you. I'm sorry." After this admission, the victim heard defendant call his pastor and confess his conduct once again. The victim never consented to sexual relations with

defendant and had never suspected that he was capable of such conduct. The court found that sufficient probable cause existed based on the victim's testimony alone to bind defendant over on the charges.

Historically, the corpus delicti rule was used to ensure that a defendant's confession, absent any other evidence, would not be used to convict him of a crime that never occurred. *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995); *People v Cotton*, 191 Mich App 377, 389; 478 NW2d 681 (1991). While the rule was generally applied to murder cases, it has now been applied to other crimes. *Cotton, supra*. A prosecutor must present evidence, independent of a defendant's confession, of the corpus delicti of a crime. *People v Brasic*, 171 Mich App 222, 226; 429 NW2d 860 (1988).

[T]he corpus delicti rule is satisfied and a defendant's confession may be admitted into evidence when the prosecutor presents direct or circumstantial evidence, independent of the confession, establishing (1) the occurrence of the specific injury and (2) some criminal agency as the source of the injury. Once this showing is made, a defendant's confession may be used to establish identity, intent, or aggravating circumstances. [*Cotton, supra* at 394.]

Here, the victim was unable to specifically recall the crime. In fact, the victim admitted that, had defendant not confessed his crime to her, she would never have suspected that she had been sexually violated or that defendant had violated her. We believe, however, that the prosecution presented sufficient circumstantial evidence at the preliminary examination to establish the corpus delicti of the crime. *Cotton, supra*. Until defendant moved in with the victim, she lived alone and had never experienced waking up with the wetness in her genital region before. The victim was obviously aware that something was not normal. This problem never existed before defendant moved in with the victim, and defendant was the only other individual in the house when these events occurred. Such circumstantial evidence was sufficient to show that an injury existed and that some criminal element was involved. Therefore, the district court did not abuse its discretion in finding that probable cause existed to believe that defendant was guilty of third-degree criminal sexual conduct. *People v Justice (On Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997).

Defendant next argues that the trial court erred in permitting the victim to testify about defendant's statement to the victim before the prosecution established the corpus delicti of the crime. We disagree. At trial, the victim testified to exactly the same things as she did at the preliminary examination. As noted above, the prosecution established the corpus delicti of the crime through the victim's testimony absent defendant's statement. Therefore, because the corpus delicti of third-degree criminal sexual conduct had been established, the trial court did not abuse its discretion in admitting defendant's confession to the victim into evidence. See, generally, *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Defendant further argues that the trial court erred in failing to grant his motion for directed verdict where the corpus delicti of the offense had not been established. We disagree. As discussed above, the court did not err in finding that the prosecutor established the corpus delicti of the crime. The victim's testimony at trial presented circumstantial evidence that defendant had engaged in sexual penetration with the victim while he knew she was physically incapacitated in contravention of MCL

750.520d(1)(c); MSA 28.788(4)(1)(c) (sexual penetration with a helpless victim). Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). In addition, the prosecution presented testimony of two other individuals to whom defendant had confessed his crime. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of third-degree criminal sexual conduct were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

Defendant also argues that there was insufficient evidence presented at trial to support his conviction. We disagree. To prevail on a charge of third-degree criminal sexual conduct, the prosecution must show that the defendant engaged in sexual penetration with the victim while she was physically helpless. MCL 750.520d(1)(c); MSA 28.788(4)(1)(c); *People v Hutner*, 209 Mich App 280, 283; 530 NW2d 174 (1995).

The victim testified that she woke up with a wet feeling in her genitals similar to how she used to feel after having sex with her husband and that such a sensation had never occurred before defendant came to live with her. Defendant also confessed his crime to the victim, his pastor and a police officer. To rebut her testimony, defendant argues that the trial court erroneously admitted into evidence defendant's confession to a police officer during a custodial interrogation. Contrary to defendant's assertions, the court did not previously rule that the confession was inadmissible. Taking into consideration the victim's testimony, the pastor's testimony and the officer's testimony, a rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could find the elements of the crime were proven beyond a reasonable doubt. *Jolly, supra* at 466.

Finally, defendant argues that the sentence imposed was disproportionate to the crime. We disagree. If the court considers permissible factors when sentencing a defendant, review is limited to whether the sentencing court abused its discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality by imposing a sentence that is disproportionate to the seriousness of the circumstances surrounding the crime and the defendant. *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995).

MCL 750.520d(1)(c); MSA 28.788(4)(1)(c) (sexual penetration with a physically helpless victim) provides that a conviction of third-degree criminal sexual conduct is punishable by imprisonment of not more than fifteen years. MCL 769.10; MSA 28.1082 allows, however, for an increased maximum term not to exceed one and one-half times the longest term prescribed in the statute. Thus, the trial court was able to sentence defendant to a maximum term of twenty-two and one-half years, which it properly did in light of defendant's criminal history. Indeed, defendant was recently placed on parole for a prior criminal sexual conduct conviction involving his six-year-old niece. Within six months of being released, defendant was arrested for the instant offense.

The instant crime stemmed from defendant's exploiting the vulnerability of his victim who was in a drug induced sleep, unable to consent or to defend herself. Defendant was living with the victim by her own generosity and took advantage of the situation. The court did not abuse its discretion when it

imposed a sentence that was proportionate to the seriousness of the circumstances surrounding the crime and the defendant. *Paquette, supra*.

We affirm.

/s/ Harold Hood

/s/ Janet T. Neff

/s/ Jane E. Markey

¹ Defendant, who did odd jobs for her and her father, asked the victim if he could move in with her when defendant's father became ill and defendant had to move to a rescue mission.