STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 12, 1999
v	No. 210033 Recorder's Court
ROGER SMOUTHERS, Defendant-Appellant.	LC No. 97-006607

Before: Cavanagh, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court sentenced defendant to a term of three to fifteen years' imprisonment. We affirm.

I

Defendant argues that the trial court erred in changing its verdict to guilty of second-degree CSC after first stating that it found defendant guilty of third-degree CSC, MCL 750.520d(1); MSA 28.788(4)(1). This issue presents a question of law which we review de novo. See *People v Tracey*, 221 Mich App 321, 323-324; 561 NW2d 133 (1997).

Defendant asserts that the trial court's action was based on a mistake of law. Specifically, defendant contends that the prosecutor misled the trial court by stating that it could not find defendant guilty of third-degree CSC as a lesser offense because the complainant was not between the ages of thirteen and sixteen. Defendant points out that, pursuant to MCL 750.520d(1); MSA 28.788(4)(1), a conviction of third-degree CSC can be based on the use of force or coercion or the victim's mental or physical incapacity, as well as the fact that the victim is between the ages of thirteen and sixteen.

We find no error requiring reversal. The evidence presented at trial did not support a conviction of third-degree CSC because the complainant was nine years old at the time of the incident, and no evidence was presented that would support a finding of either defendant's use of force or coercion or the complainant's mental or physical incapacity. The complainant testified that defendant came into the

room, pulled her nightgown up and her panties down, and performed cunnilingus on her. There was no testimony that defendant used physical force, that the complainant felt threatened by defendant, or that she asked him to stop. See *People v Kline*, 197 Mich App 165, 166; 494 NW2d 756 (1992). Furthermore, as noted by the trial court, it was not clear whether the victim was awake or asleep at the time. Consequently, the prosecutor correctly informed the court that the evidence supported a conviction of the lesser offense of second-degree CSC, but not third-degree CSC.

II

Next, defendant argues that the trial court's verdict was inconsistent with the facts presented at trial because the evidence indicated that he performed cunnilingus on the complainant. Thus, defendant reasons, he could not be convicted of second-degree CSC, which requires sexual contact and not penetration. See MCL 750.520c(1)(a); MSA 28.788(3)(1)(a).

This Court has stated, "An act of cunnilingus, by definition, involves an act of sexual penetration." *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). The *Legg* Court further explained, "Defendant's touching with his mouth of the urethral opening, vaginal opening, or labia establish cunnilingus." *Id*. at 133. In the present case, the complainant testified that defendant "licked [her] vagina." Thus, as defendant asserts, the evidence indicates that defendant performed an act of sexual penetration.

Defendant argues that his conviction must be reversed because the only evidence presented established penetration and, in a case tried by a judge, inconsistent verdicts are not permitted. However, the inconsistent verdict rule applies only where the defendant has been charged with two or more counts. See, e.g., *People v Burgess*, 419 Mich 305, 310; 353 NW2d 444 (1984); *People v Fairbanks*, 165 Mich App 551, 554; 419 NW2d 13 (1987); see also Anno: *Inconsistency of criminal verdict as between different counts of indictment or information*, 18 ALR3d 259, 269. In the present case, defendant was charged with a single count of first-degree CSC, and the trial court chose to convict him of the lesser offense of second-degree CSC.

Defendant's argument is essentially that the trial court should have convicted him of first-degree CSC, rather than the cognate lesser offense of second-degree CSC.[1] Under the circumstances, we conclude that defendant has suffered no prejudice. The right to due process of law merely requires that a defendant cannot be convicted of an offense unless each element of the offense has been proved beyond a reasonable doubt. *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997). Because, as discussed more fully in the following issue, every element of second-degree CSC was proved beyond a reasonable doubt, we find no error requiring reversal.

III

Defendant next argues that there was insufficient evidence to convict him of second-degree CSC. When ascertaining whether sufficient evidence was presented at trial to support a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable

doubt. Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Pursuant to MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), a person is guilty of second-degree CSC if the person engages in sexual contact with another person and that other person is under 13 years of age. It is undisputed that the complainant was nine years old at the time of the incident. The complainant testified that defendant "licked [her] vagina." The Legislature has defined "sexual contact" as touching that "can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(k); M.S.A. 28.788(1)(k). Defendant's conduct, when viewed objectively, could reasonably be construed as touching for the purpose of sexual arousal or gratification. See *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997). Thus, viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented at trial to support defendant's conviction of second-degree CSC.

Defendant challenges the complainant's credibility. However, the trial court specifically found that the complainant's testimony was credible. The court recognized that there were some inconsistencies in her story, but noted that the inconsistencies did not go to the elements of the crime. Questions of credibility are left to the trier of fact and will not be resolved anew by this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

IV

Finally, defendant argues that his sentence is disproportionately severe. A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant's sentence is at the upper end of the guidelines. A sentence imposed within the sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). However, a sentence within the guidelines can conceivably violate proportionality in unusual circumstances. *Milbourn*, *supra* at 661.

Where a sentence is within the guidelines range, an abuse of sentencing discretion is shown upon a demonstration of "unusual circumstances" that make the sentence disproportionate. *People v Piotrowski*, 211 Mich App 527, 533; 536 NW2d 293 (1995). Defendant notes he has only one prior misdemeanor conviction, he was employed at the time of the incident, and he has a long work history. However, a defendant's employment and lack of criminal history do not constitute unusual circumstances that overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). We conclude that defendant's sentence is

proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *Milbourn*, *supra* at 636.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

[1] Second-degree CSC requires proof of an intent not required by first-degree CSC, i.e., that the defendant intended to seek sexual arousal or gratification. Thus, it is possible to commit first-degree CSC without first having committed second-degree CSC. Accordingly, second-degree CSC is a cognate lesser offense of first-degree CSC. *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997).