STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2000
v	No. 222551 Marquette Circuit Court
JOHN ALLYN JORDAN, Defendant-Appellant.	LC No. 98-034570-FC

Before: Gribbs, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by jury of eight counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and twelve counts of child sexually abusive activity (CSAA), MCL 750.145c(2); MSA 28.342a(2). Defendant was convicted of sexually abusing six children, four of whom were his grandchildren and two of whom were the children of his son's girlfriend. The allegations included engaging in multiple acts of sexual penetration with the children, directing the children to engage in acts of sexual penetration with each other, and taking sexually explicit photographs of the children. Defendant was sentenced to concurrent prison terms of twenty-five to fifty years each for the CSC I convictions and ten to twenty years each for the CSAA convictions. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in excluding evidence that one of the victims had learned about sexual matters from a little girl. The defense theory was that the children instigated the sexual activity and that defendant only took photographs in order to induce the children to cooperate with him in returning pornographic materials and a gun that they had taken from him. One of the victims testified at the preliminary examination that he had learned about sex from a girl, and defendant asserted that the victim's mother had once found him naked in bed with a girl. Defendant insisted that this evidence was relevant to show the jury that this victim was knowledgeable about sex and had instigated the sexual activity at defendant's house, as well as to explain to the jury that this victim's ability to testify about sexual abuse in detail stemmed not from any actual abuse, but from his age-inappropriate sexual knowledge. The trial court held that the evidence was barred under the rape-shield law.

The rape-shield law generally bars evidence of specific instances of a victim's sexual conduct, subject to two exceptions that are inapplicable to the instant case. MCL 750.520j(1); MSA 28.788(10)(1); MRE 404(a)(3). However, courts must determine, on a case-by-case basis,

whether application of the rape-shield law to a specific set of facts unconstitutionally denies a defendant the right to confront adverse witnesses or to present a defense. *Michigan v Lucas*, 500 US 145, 149; 111 S Ct 1743; 114 L Ed 2d 205 (1991); *People v Hackett*, 421 Mich 338, 346; 365 NW2d 120 (1984).

Here, despite the trial court's ruling, defendant elicited testimony from the victim at trial that he had learned about sex from a little girl. Thus, to the extent defendant sought to show that one of the victims knew about sex and therefore instigated the sexual activity at defendant's house, defendant was not denied the right to present a defense. The details of this victim's sexual knowledge were not relevant. Moreover, this victim's past sexual conduct was not sufficiently similar to the instant allegations to allow admission to explain the victim's ability to testify in detail about the sexual abuse. See *People v Arenda*, 416 Mich 1, 11-13; 330 NW2d 814 (1982); *People v Morse*, 231 Mich App 424, 426, 437; 586 NW2d 555 (1998). Defendant failed to demonstrate that this one victim's past sexual conduct with a little girl was significantly similar to the instant allegations of sexual abuse by an adult man. Thus, exclusion of the evidence did not violate defendant's constitutional rights.

Defendant also argues that the trial court erred in refusing to admit this same evidence that one of the children had previously acquired sexual knowledge from a prior experience in connection with the CSAA charges because the rape shield law does not allow it. Defendant argues, and we agree, that the plain language of the rape-shield law establishes that it applies to criminal sexual conduct (CSC) cases only. Nevertheless, defendant is not entitled to a new trial because we find that the excluded evidence was not relevant. MRE 402.

According to the CSAA statute, MCL 750.145c(2); MSA 28.342a(2),

> [a] person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in child sexually abusive activity for the purpose of producing any child sexually abusive material . . . is guilty of a felony . . . .

"Child sexually abusive activity" includes sexual intercourse and erotic nudity, and "child sexually abusive material" includes photographs. MCL 750.145c(1)(e), (h), and (i); MSA 28.342a(1)(e), (h), and (i). Here, defendant acknowledged that he allowed the children to engage in sexual activity and that he took photographs of them. This conduct satisfies the requirements of MCL 750.145c(2); MSA 28.342a(2). Defendant testified that the purpose for allowing the children to participate in this activity was to obtain the return of missing items and not his own sexual gratification. Defendant's explanation of his motivation affords defendant no legal defense to the charge of CSAA because a sexual purpose or intent is not an element of the offense. Further, the excluded evidence bears no logical connection to this supposed defense. The past sexual experiences of one of defendant's victims cannot possibly explain why defendant would allow six young children to engage in sexual activity and photograph it. Consequently, because the trial court's ruling was correct, albeit for a different reason, we find no error. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998).

Defendant next argues that it was error to allow him to be convicted of CSC I on the theory that he directed one child to sexually penetrate another child. Counts one through three alleged that defendant directed an eleven-year-old boy to sexually penetrate his nine-year-old

sister three times with his penis, once orally, once vaginally, and once anally. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) provides that a person is guilty of CSC I if he or she engages in sexual penetration with a person under thirteen years of age. Defendant argues that, because he did not actually engage in the penetration himself, he cannot be guilty as a principal. We disagree because a defendant may be culpable as a principal where the defendant uses one child as the instrumentality through which to accomplish a sexual penetration with another child. *People v Dilling*, 222 Mich App 44, 50-51; 564 NW2d 56 (1997); *People v Hack*, 219 Mich App 299, 302-304; 556 NW2d 187 (1996) (Sawyer, P.J.). We decline defendant's invitation to declare this rule incorrect. We find the rule announced in *Hack*, and followed in *Dilling*, to be well-founded. Hence, defendant was properly charged in counts one through three. Moreover, in light of *Hack* and *Dilling*, and viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant also argues that the trial court incorrectly instructed the jury on this theory of culpability by stating that the prosecutor had to prove that defendant "caused, instructed, or coerced" the children to engage in sexual penetration. Defendant claims that this was akin to an instruction on accomplice liability, when he was charged as a principal and not an accomplice. We disagree. Here, the instructions given were substantially different from the standard accomplice instructions. See CJI2d 8.1 and 8.4. Moreover, the instructions given adequately reflected the theory under which defendant was charged as a principal. In *Hack*, *supra* at 302-304, the defendant was guilty as a principal where he forced one child to perform fellatio on another child. In the instant case, the instruction at issue clarified what it meant to "force" someone to commit a sexual act. Even if somewhat imperfect, the instructions fairly presented the issues to the jury and sufficiently protected defendant's rights. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998).

Next, defendant argues that his sentences are disproportionately harsh. We disagree and find that defendant's sentences are proportionate. Sentences must be proportionate to the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant's sentences for the CSC I convictions were within the sentencing guidelines and are therefore presumptively proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Further, the court appropriately considered the severity and nature of the crimes defendant committed and the circumstances surrounding their commission. *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). Although defendant had no criminal history, the crimes he committed were abhorrent. Defendant abused his trust as a grandfather to force the children to engage in incestuous sexual activity with each other, and he sexually penetrated them, causing them physical pain and permanent emotional scars. The psychological damages that sexual abuse can have on children is an appropriate factor to consider in sentencing. *People v Girardin*, 165 Mich App 264, 266-267; 418 NW2d 453 (1987). Our review of the record indicates that the trial court took into account defendant's age, employment history, and lack of criminal record, and balanced those factors against the circumstances surrounding the sexual abuse. Defendant's sentences were tailored to the circumstances of the offenses and the offender, and the trial court was within its broad sentencing discretion. *People v Rockey*, 237 Mich App 74, 79; 601 NW2d 887 (1999).

Finally, we find without merit defendant's argument that he should receive the benefit of the new legislative sentencing guidelines. The legislative guidelines are not applicable to the instant case. *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra