STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED February 9, 2001
v	No. 215805 Oakland Circuit Court
ROBERT DAVID KULP, Defendant-Appellant/Cross-Appellee.	LC No. 97-156364-FC

Before: Sawyer, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was thereafter sentenced to consecutive terms of 3 to 4 ½ years' imprisonment for each count. Defendant appeals as of right. The prosecutor cross-appeals as of right from the sentences imposed. We affirm in all respects.

Defendant first argues that there was insufficient evidence to support his convictions. When determining whether sufficient evidence has been presented to sustain a conviction, this Court views the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

A defendant is guilty of first-degree criminal sexual conduct if he engages in sexual penetration with another person, and the other person is under the age of thirteen. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a); *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). Sexual penetration is defined as "sexual intercourse, *cunnilingus*, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body. . . ." MCL 750.520a(l); MSA 28.788(1)(l); *People v Reid*, 233 Mich App 457, 479; 592 NW2d 767 (1999) (emphasis added). This Court has previously held that cunnilingus, in and of itself, constitutes penetration for the purposes of § 520b(1)(a) and that no separate intrusion or act of penetration need exist in order for cunnilingus to be performed. *People v Legg*, 197 Mich App 131, 132-134; 494 NW2d 797 (1992); *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987).

Sufficient evidence existed at trial to support defendant's convictions of first-degree criminal sexual conduct. The victim (who was eight years old at trial) told her father that defendant "put his thing in her" and testified that he put his "private spot" inside her. She also told a doctor that defendant put his "thing" in her "peepee." Moreover, she testified that defendant touched her "bottom" with his tongue and that her bottom is where she "goes pee." The victim's father saw defendant with his face "buried" between her legs when she was not wearing any pants or underwear, and she told the doctor that defendant put his tongue in her "private spot" where she "pees." The above evidence, without more, was sufficient to establish the act of cunnilingus. *Legg, supra* at 132-134; *Harris, supra* at 470. Therefore, sufficient evidence existed at trial to support both of defendant's convictions.

Defendant also argues that the evidence was insufficient because the victim's testimony was inconsistent, weak, and insubstantial. However, the credibility of a witness is a matter of weight and not a matter of sufficiency, and credibility determinations are to be made by the trier of fact. *People v Sharbnow*, 174 Mich App 94, 105; 435 NW2d 772 (1989). Moreover, in light of the above evidence, sufficient evidence existed at trial to support defendant's convictions notwithstanding the victim's testimony.

Defendant next argues that the trial court improperly admitted into evidence the victim's statements to the doctor and a medical report containing the statements. The decision whether to admit evidence is within the discretion of the trial court and will be reversed only where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Under MRE 803(4), a statement that otherwise constitutes hearsay is admissible if it is reasonably necessary for the purposes of medical treatment or diagnosis, and it describes a person's medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury. See also, *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). This exception to the hearsay rule may be applicable in cases involving a child's statement if the statement is sufficiently established as trustworthy. *Id*. at 322, 331-334. Factors to consider when determining the trustworthiness of a child's statement are: (1) the age and maturity of the child, (2) the manner in which the statement was elicited, (3) the manner in which the statement is phrased, (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination, (6) the timing of the examination in relation to the assault, (7) the timing of the examination in relation to the trial, (8) the type of examination, (9) the relation of the declarant to the person identified, and (10) the existence of or lack of motive to fabricate. *Id*. at 324-325.

Applying the above factors to the present case, the victim was seven years old during the examination, and there is no indication that she was immature for her age. The doctor asked her open-ended questions, such as why she was at the hospital and what happened to her that day, as well as asking her whether any ejaculation, intercourse, or oral intercourse had occurred. As such, her statements were not elicited in a manner that would undermine her credibility. *People v McElhaney*, 215 Mich App 269, 281; 545 NW2d 18 (1996). Moreover, the manner in which her statements were phrased and her terminology indicate that she was not coached into making the statements. She used terms such as "private part," "thing," and "peepee," rather than proper terms for human anatomy. In addition, her negative responses to the doctor's questions regarding

ejaculation, intercourse, and oral intercourse indicate that she probably did not understand those terms and that her statements were not induced by an adult. *Meeboer, supra* at 324-325; *McElhaney, supra* at 280-282.

Furthermore, the victim's father initiated the examination by taking her to the hospital immediately after leaving the police station. Although a police detective told the victim's father to take her to the hospital, there is no indication that the purpose of the examination was for any reason other than concern for her health. The examination was not conducted to gather evidence to support defendant's arrest because he was arrested based solely on the detective's discussion with the victim and her father. The examination occurred within hours after the victim's father observed defendant with the victim and nearly eleven months before trial. The victim's statements were given during a physical examination as opposed to a psychological examination, and her relation to defendant negates the possibility of misidentification. In addition, defendant acknowledged that he did not know of any motive that either the victim or her father would have to fabricate their story. *Meeboer, supra* at 324-325; *McElhaney, supra* at 280-282. Therefore, we find that the victim's statements to the doctor were trustworthy.

Further, although defendant argues that the victim's statements were not necessary for treatment or diagnosis, the statements allowed the doctor to structure his examination to address the particular harms that she claimed to have suffered. *Id.* at 283. In particular, the doctor conducted an abdominal examination to ensure that no injury had occurred to her internal organs. In addition, as recognized in *Meeboer,* and, here, by the trial court, identification of defendant in the victim's statements to the doctor was reasonably necessary considering the possibility that she could have contracted a sexually transmitted disease during the assault. *Meeboer, supra* at 328-329. For the foregoing reasons, the trial court properly admitted the victim's medical records and her statements into evidence pursuant to MRE 803(4).

Defendant next argues that the trial court erred by failing to ensure that the victim was competent before allowing her to testify. The determination of the competency of a witness is within the trial court's discretion and will not be reversed absent an abuse of discretion. *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998).

Defendant contends that the trial court's brief questioning of the victim before her testimony was inadequate to ensure her competency to testify pursuant to MCL 600.2163; MSA 27A.2163. However, this statute was repealed before trial. Rather, MRE 601 provides that every person is competent to testify unless a court finds that he or she does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably. Therefore, under MRE 601, a witness is presumed competent to testify. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997); *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991).

The victim was presumed competent to testify, and, in the absence of the statute, the trial court was not obligated to inquire about her intelligence or sense of obligation to tell the truth. Therefore, the presumption of competency under MRE 601 was not rebutted. *Coddington, supra* at 597. Furthermore, once a trial court is satisfied regarding to a child witness' competency, a later showing of the child's inability to testify truthfully reflects only on credibility, not competency. *Id*.; *People v Jehnsen*, 183 Mich App 305, 308; 454 NW2d 250 (1990). The trial

court instructed the jury regarding the factors to consider when weighing the credibility of a witness, and, apparently, the jury chose to believe the victim's testimony. *Id.* Therefore, the trial court was under no obligation to strike her testimony as defendant requested and did not abuse its discretion by allowing her to testify at trial.

On cross-appeal, the prosecutor first argues that the trial court erred by scoring zero points, as opposed to twenty-five points, for offense variable (OV) 12. In *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997), our Supreme Court stated:

> [B]ecause this Court's [sentencing] guidelines do not have the force of law, a guidelines error does not violate the law. Thus, the claim of a miscalculated variable is not in itself a claim of legal error.

This holding was reaffirmed in *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998). Additionally, "[t]here 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." *Id.* at 497, quoting *Mitchell, supra* at 176-177.

> On postsentence review, guidelines departure is relevant solely for its bearing on the . . . claim that the sentence is disproportionate. Thus, application of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate.
>
> Appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied. [*Raby, supra* at 497-498, quoting *Mitchell, supra* at 177-178.]

Thus, as our Supreme Court has clearly stated, "[a] putative error in the scoring of the sentencing guidelines is simply not a basis upon which an appellate court can grant relief." *Raby, supra* at 499.[1]

Here, the scoring of OV 12 is not based on a factual predicate that is wholly unsupported or materially false. The sentencing guidelines directs the sentencing court to not score the one penetration that forms the basis of the conviction offense in a first-degree criminal sexual conduct case. Moreover, defendant's sentence is not disproportionate. Because defendant's sentence is within the guidelines range of thirty-six to ninety-six months, it is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). The trial court based defendant's sentence on the need to punish him and to protect society, and these objectives were proper sentencing considerations. *People v Rice*, 235 Mich App 429, 446; 597 NW2d 843 (1999). The trial court also considered defendant's health, his age, the fact that he had no prior

[1] These statements describe sentencing principles applicable to crimes committed before January 1, 1999. MCL 769.34(1); MSA 28.1097(3.4)(1). For crimes committed on or after January 1, 1999, the new sentencing guidelines are statutory and require adherence absent substantial and compelling reasons for departure. MCL 769.34(3); MSA 28.1097(3.4)(3).

criminal record, and the likelihood that he would be unable to participate in a counseling program required for parole eligibility for a lengthy period of time. The prosecutor has not established the existence of any unusual circumstances that would render defendant's sentence disproportionate. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Accordingly, we find no abuse of discretion on the part of the trial court.

Lastly, the prosecutor next argues that the trial court abused its discretion when it sentenced defendant by limiting the authority of the Michigan Parole Board to determine when he should be paroled. More specifically, the prosecutor contends that the trial court erred by sentencing defendant to a maximum sentence only eighteen months longer than his minimum sentence because it interferes with the authority of the Michigan Parole Board to determine when he should be paroled and under what terms.

There is no error because the sentence of thirty-six to fifty-four months comports with the concept of indeterminate sentencing set forth in *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), where our Supreme Court held that, when an indeterminate sentence is imposed, the minimum sentence may not exceed two-thirds of the maximum sentence. Because defendant's minimum sentence does not exceed two-thirds of his maximum sentence, the prosecutor's argument that defendant's sentence interferes with the authority of the parole board fails. *Tanner, supra* at 687-688, 690; see also *People v Legree*, 177 Mich App 134, 143; 441 NW2d 433 (1989); *People v Leighty*, 161 Mich App 565, 580-581; 411 NW2d 778 (1987). Moreover, our Supreme Court has recognized that parole eligibility is a proper consideration when determining a defendant's sentence. *People v Lemons*, 454 Mich 234, 258; 562 NW2d 447 (1997); *People v Merriweather*, 447 Mich 799, 809-811; 527 NW2d 460 (1994).

Accordingly, the prosecutor has not identified an issue on which to conclude that defendant's consecutive sentences of 3 to 4 ½ years are invalid and, therefore, the sentences cannot be set aside. MCR 6.429(A).

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Hilda R. Gage