

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALON RICHARD BRITTEN,

Defendant-Appellant.

UNPUBLISHED

December 10, 2002

No. 233496

Kalamazoo Circuit Court

LC No. 00-001284-FC

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

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for two counts of first-degree criminal sexual conduct [CSC], MCL 750.520b(1)(a), and one count of second-degree CSC, MCL 750.520c(1)(a). Defendant was sentenced to 180 to 360 months' imprisonment on the CSC I convictions and 108 to 180 months' imprisonment on the CSC II conviction. We affirm.

First, defendant argues a due process violation for having to defend a case that is several years old involving acts alleged to have happened over a two-year period. Defendant did not object *before trial* that the information lacked a specific time for the offenses charged. The issue is not preserved, MCL 767.76. In criminal cases when an issue is not preserved, the "plain error" rule applies. Under that rule, the error must be apparent, clear or obvious and must have affected the defendant's substantial rights by affecting the outcome at the lower court proceedings. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

MCL 767.45(1)(b) states that an information must contain "[t]he time of the offense as near as may be. No variance as to the time shall be fatal unless time is of the essence of the offense." In CSC cases, especially in cases like this case involving a child victim, "time is not usually of the essence or a material element." *People v Sabin*, 223 Mich App 530, 532; 566 NW2d 677 (1997), rev'd on other grounds 463 Mich 43; 614 NW2d 888 (2000); *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987).

The information charged defendant "on or about 1995-1996 in the City of Kalamazoo" and the court found that the CSC occurred in 1995-1996, most likely early 1996. A court may at any time before, during or after the trial amend an information in respect to any defect, imperfection or omission in form or substance of the information or to cure a variance between the information and proof. MCL 767.76.

All witnesses testified that there was a period of time, most likely in early 1996 before the victim and her mother went to live in Tennessee, that defendant and the victim lived together in the Deruyscher home. The victim is defendant's daughter. She was about six years old in 1996 and ten years old at trial. Although young, the victim was able to testify with precision as to the nature of the assaults and testified they happened in the Deruyscher home. Defendant admitted to sleeping in the same room with the victim at the Deruyscher home. Defendant confessed to one act of oral sex with the victim. There was no error by the trial court.

Defendant next claims that there was insufficient evidence to support his conviction. Sufficiency of evidence to sustain a criminal conviction is reviewed in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). That same standard also applies where a defendant is convicted after a bench trial. *People v Legg*, 197 Mich App, 131, 132; 494 NW2d 797 (1992). Findings of fact by the trial court may not be set aside unless clearly erroneous. MCR 2.613(C).

Defendant asserts that the victim should not have been believed because her testimony was "inexact" and "inconsistent." Questions of credibility are for the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Although the victim was unable to place the criminal activity in a time frame, the court found her to be a very credible witness able to testify about the CSC in explicit terms and able to describe surroundings and circumstances. There was some variation among the witnesses about dates involved, but after hearing all the testimony, the court concluded that the events occurred in early 1996.

Defendant confessed to actions sufficient to establish first-degree CSC, stating that he had engaged in oral sex with the victim and attributing his actions to alcohol abuse. There were similarities in the victim's testimony to defendant's confession. The trial court evaluated the credibility of the witnesses and found the victim to be credible and that defendant was inconsistent and not believable. The trial court ruled there was no reasonable doubt about defendant's guilt, and when viewing this evidence in a light most favorable to the prosecution, no error can be found.

Finally, defendant claims that his sentence of fifteen to thirty years is disproportionate and unjustified. The Supreme Court's sentencing guidelines apply to offenses committed before January 1, 1999. MCL 769.34(1), *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

Sentence issues are reviewed by this Court for an abuse of discretion by the trial court. *People v Coles*, 417 Mich 523, 537; 339 NW2d 440 (1983); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). A trial court abuses its discretion when it imposes a sentence that is not proportional to the seriousness of the circumstances surrounding the offense and that offender. *People v Merriweather*, 447 Mich 799, 806; 527 NW2d 460 (1994); *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

Defendant's minimum sentence of 180 months was within the recommended guidelines range of 96 to 180 months. A sentence imposed within an applicable judicial sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Nevertheless, a sentence within a guidelines range can

conceivably violate proportionality in unusual circumstances. *Milbourn, supra*, 661; *People v Hadley*, 199 Mich App 96, 105; 501 NW2d 219 (1993), aff'd sub nom *People v Morris*, 450 Mich 316; 537 NW2d 842 (1995). A defendant must present unusual circumstances to the court before sentence is imposed, or he waives the issue for appeal. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

The only circumstance defendant asked the court to consider (apart from his protestations of innocence) was his lack of criminal history. However, a defendant's lack of criminal history is not an unusual circumstance which overcomes the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Therefore, defendant's sentence is presumptively proportionate and thus, the trial court did not abuse its discretion in sentencing defendant at the upper end of the guidelines.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot