

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER PATRICK,

Defendant-Appellant.

UNPUBLISHED

December 16, 2004

No. 244312

St. Clair Circuit Court

LC No. 01-002014-FH

Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions on three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (under thirteen years of age). We affirm.

Defendant first argues on appeal that his convictions were not supported by sufficient evidence. After viewing the evidence in a light most favorable to the prosecution, we disagree. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). A rational trier of fact could find that the essential elements of second-degree CSC were proven beyond a reasonable doubt. See *id.*

Defendant claims that the victim’s testimony was not credible because it was not detailed enough since she “could not remember approximate dates that these incidents occurred, and offered little more than generic details to support these three specific charges.” Defendant also claims that the testimony was uncorroborated since “there were no other witnesses nor evidence to support this incident and [defendant] denied ever touching her inappropriately.” Both claims merely challenge the weight and credibility of the victim’s testimony and, since these are issues left to the trier of fact in the absence of exceptional circumstances, none of which are present here, they are without merit. See *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). The evidence, including the victim’s testimony, was sufficient to support the verdict.

Next, defendant argues that the trial court abused its discretion in admitting the prior trial testimony of the victim’s friend who was erroneously deemed “unavailable” under MRE 804. We disagree. Evidentiary issues are reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

MRE 804(b)(1) governs the admission of former testimony if a witness is unavailable for trial. MRE 804(a)(5) defines “unavailable” to include a situation where the witness “is absent

from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." Due diligence is the attempt to do everything that is reasonable, not everything that is possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). The focus is on whether diligent, good-faith efforts were made to procure the testimony and not on whether more stringent efforts would have produced it. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). This Court reviews a trial court's determination that due diligence was established for an abuse of discretion, *id.*, and the findings of fact that underlie that decision for clear error, *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

Here, on June 13, 2002, the prosecutor served a subpoena on the fourteen-year-old witness through her father for the July 9, 2002, trial. On July 8, 2002, the witness was telephoned and her father indicated that she was on a camping trip out of state and could not be contacted by any means. At his appearance at trial, the witness' father explained that he had accidentally calendared the court appearance for the wrong month which is the reason he allowed the witness to go on the camping trip. Defendant argues that since the witness was on "vacation" she could not be deemed "unavailable" under MRE 804. Defendant failed to cite apposite law to support his position and we are unable to find such support. The witness was absent from the hearing and the prosecutor was unable to procure her attendance despite the successful service of a subpoena. See MRE 804(a)(5). Notwithstanding his diligent good-faith efforts, the prosecutor was still unable to produce the witness whose camping whereabouts were unknown and whose father was mistaken about the trial date. See *Bean*, *supra*. Further, the previous trial testimony was given in compliance with the law, and defendant had an opportunity and similar motive to develop the testimony. See MRE 804(b)(1). In sum, the admission of the testimony was not erroneous.

Next, defendant argues that resentencing is required because his sentence of seven to fifteen years represents a departure sentence which was unsupported by a substantial and compelling reason since he was entitled to be sentenced under the legislative sentencing guidelines, not the judicial guidelines under which he was sentenced. We disagree.

The offenses for which defendant was convicted occurred between the years 1996 and 1999. The victim could not testify as to the exact dates of the incidents, but there is some evidence suggesting that the last incident may have occurred on January 6, 1999. The trial court noted that the offenses spanned both the judicial and legislative guidelines, but that the conduct occurred almost entirely before January 1, 1999. The court concluded that the judicial guidelines were the proper guidelines to use under the circumstances. Defendant is correct that under MCL 769.34 the judicial guidelines do not apply to certain felonies committed on or after January 1, 1999. It seems clear that the trial court concluded that only one of the offenses occurred after January 1, 1999, and thus, the legislative guidelines would apply to the sentencing for that offense alone. However, as the prosecutor argues, even if defendant should have been sentenced under the legislative guidelines with respect to the third offense, because his sentences run concurrent to each other, he would not be entitled to resentencing since sentencing under the judicial guidelines was appropriate for the two other counts, i.e., defendant cannot demonstrate that any error affected the outcome of his sentencing.

Finally, defendant argues that the sentences imposed under the judicial guideline scheme were disproportionate to the offense and the offender. After review for an abuse of discretion,

we disagree. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000). An abuse of sentencing discretion occurs where the sentence imposed is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Here, while acknowledging that his minimum sentences were within the guidelines range, defendant claims that his sentences were disproportionate because the case was a credibility contest, without physical evidence or corroborating witnesses. However, we agree with the trial court's assessment that the guidelines were appropriate—defendant began abusing the victim, who considered him to be her father, when she was only eight years old and continued to do so over the next six years, taking advantage of her love and trust for years. We cannot conclude that the trial court abused its discretion in imposing the recommended minimum sentence. See *Milbourn, supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood