STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 3, 2008
v	No. 276997 Oakland Circuit Court
SAM REYNOLD MCCARTY, Defendant-Appellant.	LC No. 2006-210821-FC

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(a), and his sentence of 40 months to 20 years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On an unspecified evening in June 2006, complainant, then 12 years old, was at defendant's shed with a friend. While there, complainant consumed two alcoholic drinks provided by defendant. At some point, complainant and her friend joined defendant in the upstairs portion of the shed. Complainant's friend subsequently returned to the downstairs portion of the shed, leaving complainant and defendant alone.

Complainant testified that at some point defendant's pants were pulled down and his penis was in her mouth for a period of less than ten minutes. Complainant could not remember how the incident happened. Defendant used one of his hands to hold his penis while it was in her mouth, and never told her to stop or pushed her away.

At the sentencing hearing, over the objection of defendant's counsel, the trial court scored 10 points for Offense Variable (OV) 4, MCL 777.34, after finding that there had been some psychological damage to complainant as a result of the incident. This determination changed the recommended minimum guidelines range from 21 to 35 months to 27 to 45 months. The trial court imposed a minimum term of 40 months.

Defendant first contends that there was insufficient evidence to support his conviction. We disagree.

In reviewing a sufficiency of the evidence claim, we apply a de novo standard to examine 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." *People v Osantowski*, 274 Mich App 593, 612-613; 736 NW2d 289 (2007).

To establish the offense of CSC I, the prosecution was required to prove beyond a reasonable doubt that: (1) defendant engaged in an act of sexual penetration with complainant, and (2) complainant was under 13 years of age at the time. MCL 750.520b(1)(a). Fellatio is included in the definition of sexual penetration. MCL 750.520a(o).[1]

It well established that a defendant may be convicted on "the uncorroborated evidence of a CSC victim." MCL 750.520h; *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1998). Whether a complainant's testimony is credible is a matter for the factfinder, not a reviewing court, to determine. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

At trial, the prosecution's evidence established that complainant was 12 years old at the time of the incident, and that defendant's penis was in her mouth for a short period of time. Although complainant's testimony was at times confusing and contradictory, she asserted that she was positive that the incident happened. Therefore, complainant's testimony was sufficient to establish the essential elements of the crime.

In light of the inconsistencies and contradictions present in the 12-year-old complainant's testimony, it was for the trier of fact to determine the credibility of proofs presented. *Avant, supra* at 506. Clearly, by returning a verdict against defendant, the jury found complainant's testimony credible. We will not disregard the well-established principle that a reviewing court should not usurp the factfinder's role of determining the credibility of witnesses and their testimony. *Id*.

Defendant next contends that the trial court erred in imposing a minimum prison term of 40 months, and that he is entitled to resentencing. We disagree.

We review a sentencing court's decision for an abuse of discretion, and we must determine whether the record evidence adequately supports a particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). Questions of statutory interpretation are reviewed de novo. *People v Schaub*, 254 Mich App 110, 114-115; 656 NW2d 824 (2002).

"A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). Scoring decisions for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). If a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for

[1] MCL 750.520a was subsequently amended by 2006 PA 171, which went into effect on August 28, 2006. The subsections were amended such that subsection (o) became subsection (p).

resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10).

Defendant's claim is based on two arguments. First, defendant asserts that his sentence violates *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 403 (2004), because it was based on factual findings or conclusions that had not been submitted and proved to a jury beyond reasonable doubt or admitted to by defendant. Our Supreme Court has repeatedly held that *Blakely* does not apply to Michigan's indeterminate sentencing system. *People v McCuller*, 479 Mich 672, 682-683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004). The maximum sentence is set by statute, not determined by the trial court. The sentencing guidelines create a range within which the trial court must impose a minimum sentence, and the sentence imposed by the trial court will always fall within the range authorized by the jury's verdict. *Drohan*, *supra* at 161.

Defendant next contends that, even if it was permissible to consider facts not proven by a jury, the trial court erred in scoring OV 4 at 10 points because there was no evidence that complainant had obtained psychological treatment. Defendant further contends that since OV 4 was improperly scored, the sentence imposed represents a departure from the guidelines.

However, MCL 777.34(2) specifically states that, "the fact that treatment has not been sought is not conclusive." Instead, the statute provides for the scoring of points if there is serious psychological injury that may require treatment. "[T]he fact that treatment is not sought is not conclusive when scoring the variable." *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005).

The trial court determined that 10 points should be scored under OV 4, even though complainant had undergone no treatment to date, based on its finding that complainant's testimony revealed that the incident had impacted her life. In addition, the testimony of both complainant and her mother revealed that complainant still found it difficult to talk about the incident. Finally, complainant's mother provided a written statement at the sentencing hearing that set forth that counseling would likely be sought down the road. Therefore, the trial court had a sufficient basis to score 10 points under OV 4.

The correct guidelines range was 27 to 45 months, and defendant's minimum sentence of 40 months was within that range. Therefore, defendant's argument that there was a departure from the guidelines is without merit.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette