STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 5, 2009
v	No. 280196 Oakland Circuit Court
JEFFREY LYNN REID, Defendant-Appellant.	LC No. 2006-211456-FC

Before: Servitto, PJ, and Owens and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(i) (victim between 13 and 16 years of age and perpetrator is member of the same household). Defendant was sentenced to 11 months in jail and five years' probation. Because the trial court properly denied defendant's motion for judgment notwithstanding the verdict and did not abuse its discretion in refusing to admit certain evidence, we affirm defendant's conviction and sentence. However, we remand for correction to the Judgment of Sentence and the Sentence Information Report.

On appeal, defendant first argues that the trial court clearly erred in denying his motion for judgment notwithstanding the verdict ("JNOV"), as the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. Specifically, defendant argues that the victim's testimony was patently incredible, and that the prosecution did not prove that defendant's touching of the victim's breasts could reasonably be construed by the jury to be for a sexual purpose, as required by the statute. We disagree.

A trial court's decision on a motion for JNOV is reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). In considering such a motion, the evidence is viewed in the light most favorable to the non-moving party. *Id.* Reversal of the trial court's denial is proper only if the evidence, viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646 (2005). If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

The elements of second-degree criminal sexual conduct are that: (1) the defendant intentionally touched (2) the intimate parts of another person or the clothing covering those parts,

(3) the touching was done for a sexual purpose or could reasonably be construed as being for a sexual purpose, (4) the other person was at least thirteen years of age but less than sixteen, and (5) the other person was a member of the defendant's household. See *People v Phillips*, 251 Mich App 100, 102; 649 NW2d 407 (2002), aff'd 469 Mich 390 (2003); MCL 750.520c(1)(b)(i); CJI2d 20.2; CJI2d 20.4. At the time the defendant touched the victim, he or she need not actually have specifically acted with the purpose of deriving sexual arousal or gratification. *People v Piper*, 223 Mich App 642, 646-647; 567 NW2d 483 (1997). It is sufficient that the conduct, when viewed objectively, could reasonably be construed as being for such a purpose. *Id.* at 647.

Viewing the evidence in the light most favorable to the prosecution, we are satisfied that a reasonable jury could conclude that all of the elements necessary to convict defendant of second degree CSC were met. The victim testified that on several occasions when she and defendant were in the basement of her home, defendant reached underneath her shirt, pushed up her bra, and fondled her breasts. She testified that these incidents took place at night, when no one else was around and no lights were on. Breasts are undisputedly intimate parts, and the fact that this took place late at night, in a secluded portion of the house with almost no lights could lead one to reasonably construe the touching as being for a sexual purpose. The victim also testified that she was 13 years old at the time of the assault, and it is undisputed that defendant was living in her household at that time, making him a member of the household. While defendant's argument rests primarily on the claim that the victim's testimony is patently incredible, this Court will not interfere with the function of the jury to listen to testimony and weigh the evidence and credibility of the witnesses. *People v Wolfe,* 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Because a reasonable juror could have found the essential elements of the crime were proven beyond a reasonable doubt, the trial court did not err in denying defendant's motion for JNOV.

Next, defendant argues that the trial court abused its discretion by not admitting evidence of the victim's alleged ongoing sexual activity. We disagree.

A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999). An "abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006), quoting *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Michigan's rape-shield statute bars evidence of specific instances of a victim's sexual conduct unless the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

> (a) Evidence of the victim's past sexual conduct with the actor.
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
> MCL 750.520j(1).

In certain situations, however, evidence that would otherwise be excluded under the rape-shield statute "may not only be relevant, but its admission may be required to preserve a

defendant's constitutional right to confrontation." *People v Morse*, 231 Mich App 424, 432; 586 NW2d 555 (1998), quoting *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). For example, evidence of a victim's past sexual conduct may be admissible to show bias, or to show an ulterior motive for making a false charge. *Morse*, *supra* at 432. "[A]pplication of the rape-shield statute must be done case by case and . . . the balancing between the rights of the victim and the defendant must be weighed anew in each case." *Id*. at 433.

Defendant contends that evidence concerning the victim's alleged sexual activity should have been admitted as it was relevant and probative of her ulterior motive for fabricating allegations of sexual abuse by defendant. The victim asked a question of her father regarding pregnancy, several years after the incident with defendant, and that apparently led to a disclosure of the abuse by defendant. According to defendant, the victim was educated enough to know that she could not be pregnant from a sexual contact that occurred years prior and that, as a result, the allegations against defendant may have been an effort to hide the victim's alleged sexual activity from her parents. However, there is nothing to suggest that when the victim asked her father this question about pregnancy she was referring to her own sexual activity and then became too embarrassed to discuss it with her father, deciding then to fabricate the allegations of abuse against defendant (from two years prior) as a cover story for why she asked about pregnancy in the first place. There is nothing to link the ideas, making her alleged ongoing sexual behavior in 2005 irrelevant to her allegations of abuse by defendant. Moreover, the danger of unfair prejudice that would result from the introduction of this evidence was very high. See *Hackett*, *supra* at 345. The trial court was within its discretion to exclude evidence of the victim's alleged ongoing sexual activity and this decision did not violate defendant's constitutional right to confrontation.

Defendant next argues that references to first-degree criminal sexual conduct allegations against him, of which he was exonerated, and the probation agent's opinion, that because of defendant's "unwillingness to accept responsibility for the same he is assessed a danger to the community," should be stricken from his Presentence Investigation Report (PSIR). Defendant argues that the references are inaccurate and irrelevant because the trial court did not take the information into account at sentencing. We disagree.

"This Court reviews a trial court's response to a defendant's challenge to the accuracy of a PSIR for an abuse of discretion." *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008). A trial court must respond to a defendant's challenge of the accuracy of the information contained in a PSIR. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). However, the court has wide latitude in its response. *Id.* In its response, the court may make a finding of the accuracy of the information, accept the defendant's version, or disregard the challenged information. *Uphaus*, *supra* at 182. Whenever a sentencing court either disregards the allegations of inaccurate information or determines that the information was in fact inaccurate, it must strike or correct the disputed information before sending the PSIR to the Department of Corrections. *Spanke*, *supra* at 649; MCL 771.14(6); MCR 6.425(E)(2). When alleged inaccuracies would have no determinative effect on the sentence, the trial court's failure to respond to an objection may be considered harmless error. *People v McAllister*, 241 Mich App 466, 473-474; 616 NW2d 203 (2000), remanded on other grounds 465 Mich 884 (2001).

While the trial court did not specifically respond to defendant's alleged inaccuracies, any error in is harmless because the information was properly included in defendant's PSIR, and thus, there would be no determinative effect on defendant's sentence. A PSIR must include "a complete description of the offense and all the circumstances surrounding it." *Morales v Parole Board*, 260 Mich App 29, 45-46; 676 NW2d 221 (2003); MCR 6.425(A)(2). When sentencing, a court "may consider evidence offered at trial, including other criminal activities established even though the defendant was acquitted of the charges, and the effect of the crime on the victim." *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998) (internal citations omitted). The references to defendant being charged with first-degree criminal sexual conduct are a part of the circumstances surrounding the offense of which defendant was convicted and the PSIR noted that defendant was only found guilty of one count of second-degree criminal sexual conduct. Moreover, the probation agent's discussion, that defendant failed to take responsibility, is in reference to the offense defendant was convicted of. The agent referred to the "instant offense" in the section defendant quotes from. The agent calls the crime "the instant offense" throughout, and there is no ambiguity that the singular reference referred to the crime defendant was convicted of. Therefore, the trial court did not err in failing to correct defendant's PSIR.

Next, defendant contends that his judgment of sentence should be corrected to reflect the scoring changes the trial court ordered at sentencing, and typographical errors. We agree.

Defendant objected to the scoring of OV 11 and OV 13 at 25, each. The trial court agreed with defendant and scored each at zero. This altered defendant's guidelines range to 0 to 17 months. Because the record is clear that the trial court ordered these changes, the sentencing information report should be corrected to reflect these scoring changes. MCR 6.435(A).

The judgment of sentence should also be corrected to reflect that the first count of first-degree criminal sexual conduct was dismissed, that defendant was found not guilty on the sixth count, that Lynn Pargo was defendant's counsel at the time of resentencing, and that defendant was not related to the victim, but was charged under the "member of the same household" section of the criminal sexual conduct statute (MCL 750.520c(1)(b)(i)). Based on the record, the first count of first-degree criminal sexual assault was, in fact, dismissed, defendant was found not guilty of the sixth count, and Lynn Pargo was representing defendant at the time of resentencing. Also, based on the preliminary examination and the jury instructions, which both reference that the charges were under the member of the same household section, as well as the felony complaint, which has two handwritten and initialed notations indicating the section under which defendant was charged, it is clear defendant was charged as a member of the same household as the victim.

Affirmed, but remanded to the trial court for the ministerial task of correcting the SIR and judgment of sentence. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly