STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2015
v	No. 323078 Wayne Circuit Court
GILBERT LEVARIE JOHNSON III, Defendant-Appellant.	LC No. 14-000368-FC

Before: RONAYNE KRAUSE, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Gilbert Levarie Johnson III, appeals by right his jury convictions of two counts of first-degree criminal sexual conduct. MCL 750.520b(1)(a). The trial court sentenced Johnson to serve 25 to 40 years in prison for each conviction, which sentences were to be served consecutively. Because we conclude there were no errors warranting a new trial or resentencing, we affirm.

Ten-year-old AS, her brother, and Johnson were playing video games in the basement of a relative's house. AS fell asleep on the couch. She later awoke to Johnson "pull[ing] down [her] pants." He "licked his finger," and "put it in [AS's] private part." Johnson again licked his finger and then "put it on his . . . private part," and proceeded to "put his private part" in AS's vagina. AS did not remember how long the sexual assault occurred.

AS reported the sexual assault the following day. At the hospital, a physician performed an examination and preserved the evidence in a rape kit. The physician concluded that AS had been sexually assaulted. Testing conducted on AS's underwear revealed the possible presence of saliva and male DNA, and further testing revealed a YSTR DNA[1] match between the biological material found on the underwear and a sample from Johnson.

[1] An expert testified at trial that YSTR DNA testing searches for Y-chromosomes in a given sample. YSTR testing is different from autosomal DNA testing in that autosomal DNA testing can precisely pinpoint the DNA to a specific person (except identical twins), while YSTR only searches for the Y-chromosome, which only males possess, and are passed down paternally

Johnson first argues that the prosecution failed to prove beyond a reasonable doubt that he sexually assaulted AS; specifically he maintains that the prosecutor only presented AS' inconsistent testimony, inconclusive medical testimony, and largely irrelevant YSTR DNA test results. This Court reviews de novo challenges to the sufficiency of the evidence. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). We view the evidence in "the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt." *Id.* Furthermore, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The prosecutor charged Johnson with engaging in sexual penetration with another person where that person was under 13 years of age in violation of MCL 750.520b(1)(a). Thus, the prosecutor had to prove that Johnson engaged in sexual penetration with AS and that AS was under 13 years of age at the time. See *People v Duenaz*, 306 Mich App 85, 106; 854 NW2d 531 (2014). Sexual penetration means, in relevant part, "sexual intercourse . . . or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." MCL 750.520a(r).

At trial, AS clearly testified that Johnson sexually penetrated her digitally and with his penis. Her testimony was sufficient to establish that Johnson twice engaged in sexual penetration with her as defined under MCL 750.520a(r). See MCL 750.520h. While she may have testified inconsistently as to where she was sitting on the couch during the incident, the jury chose to believe her account notwithstanding any inconsistencies. See *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). Moreover, her account was bolstered by the physician's medical testimony, which corroborated that AS had been sexually penetrated. The physician testified that AS's injuries were consistent with those seen in sexual assaults. Additionally, while the YSTR DNA testing itself may not have conclusively established that Johnson was indeed the individual who committed the sexual assault, a rational jury could find beyond a reasonable doubt that Johnson was in fact the person who committed the sexual penetration on the basis of the test results and testimony by AS and the physician. There was also evidence that AS was under 13 years of age at the time of the sexual assault. Viewed in the light most favorable to the prosecution, there was sufficient evidence to support the verdict.

Johnson next contends that his consecutive sentences violate the principle of proportionality because the trial court elected to sentence him to a minimum of 50 years in prison despite the fact that he has no prior criminal record and has a learning disability. Our review is limited to whether the lower court abused its discretion in imposing consecutive sentences. *People v Ryan*, 295 Mich App 388, 401 n 8; 819 NW2d 55 (2012). An abuse of discretion occurs when a court's "decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

Therefore, a father and his biological sons would possess the same Y-chromosome makeup, in addition to all the sons' biological male offspring.

The principle of proportionality requires that "sentences imposed by the trial court be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). In determining whether consecutive sentences are proportionate in criminal sexual conduct cases, this Court examines the egregiousness of the act and its surrounding circumstances. See *Ryan*, 295 Mich App at 401 n 8. This Court has held that consecutive 25-year sentences for two criminal sexual conduct convictions for a defendant who had vaginal intercourse and engaged in fellatio with his then 11-year-old daughter were proportionate. *Id.* The Court noted that "[t]he 50-year minimum term of imprisonment that results from the consecutive sentencing is proportionate to the offenses and the offender; the victim suffered horrific abuse at the hands of her father." *Id.* When a defendant receives consecutive sentences and neither individual sentence exceeds the maximum punishment allowed, the aggregate of the sentences does not violate the principle of proportionality. *Id*. Similar to the defendant in *Ryan*, Johnson attacked a vulnerable family member: he sexually penetrated his then 10-year-old niece first with his finger and then with his penis. Under the circumstances, we cannot conclude that the trial court abused its discretion when it ordered Johnson to serve his sentences consecutively; his sentences were proportionate. *Id.*

Johnson finally argues that his sentences amounted to cruel and unusual punishment contrary to the United States Constitution and Michigan Constitution, because the sentences are essentially life terms imposed upon a defendant with a learning disability and no prior criminal history, and founded upon improper convictions based on insufficient evidence. To preserve an issue of unconstitutionally cruel or unusual sentences, Johnson must "advance a claim below that his sentences were unconstitutionally cruel or unusual." *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). Although Johnson's trial lawyer argued that the sentencing judge should not sentence Johnson to consecutive sentences, Johnson's lawyer did not raise a specific objection as to the constitutionality of the sentences. Accordingly, the issue is unpreserved. This Court reviews unpreserved claims that a sentence is unconstitutionally cruel or unusual for plain error affecting substantial rights. *Id.*

This Court has held that, for purposes of the protection against cruel or unusual punishment in Michigan's constitution, "[i]f a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011) (citation and quotation marks omitted). To determine whether a punishment is cruel or unusual under Michigan's constitution, this Court employs a three-part test: it examines "the severity of the sentence imposed and the gravity of the offense," it compares "the penalty to penalties for other crimes under Michigan law," and it compares "Michigan's penalty and penalties imposed for the same offense in other states." *Id.* at 204.

In *Benton*, this Court approved the 25-year mandatory minimum sentence provision stated under MCL 750.520b(2)(b). See *id.* at 205-207. In response to the first factor, the *Benton* Court held that, as a matter of policy, considering the grievousness of child rape, the Legislature's purpose in enacting the mandatory 25-year minimum was to focus on the exploitation of the child. *Id.* at 205. Regarding the second factor, this Court stated that child rape cannot be qualitatively compared with other crimes for which Michigan law imposes mandatory minimums—rape of a child has "unique ramifications" that "violate[] deeply

ingrained social values of protecting children from sexual exploitation." *Id.* at 206. Finally, this Court noted that numerous other states have enacted similar mandatory minimum statutes for sexual assault against children. *Id.* at 206-207.

Johnson cannot prevail on his claim that his sentences are cruel or unusual under the Michigan Constitution, and accordingly, cruel and unusual under the United States Constitution. This Court has held that the 25-year mandatory minimum provision does not constitute cruel or unusual punishment. *Id.* at 205-207. Nevertheless, Johnson contends that his consecutive sentences amount to a life sentence. This Court has, however, held that a sentence of life without the possibility of parole for a second conviction of first-degree criminal sexual conduct with a person under 13 years of age is not cruel or unusual. *People v Brown*, 294 Mich App 377, 389-392; 811 NW2d 531 (2011). Although this is not Johnson's second conviction, he did engage in two separate acts of sexual penetration, which each warrant punishment. Finally, he remains eligible for parole. Under these circumstances, we cannot agree that his sentences amount to cruel and unusual punishment.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Jane E. Markey
/s/ Michael J. Kelly