STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2011
v	No. 300836 Muskegon Circuit Court
PHILLIP PAIGE BISHOP, Defendant-Appellant.	LC No. 10-059088-FC

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). The trial court sentenced defendant to 35 months to 15 years' imprisonment, with credit for 194 days. For the reasons stated in this opinion, we affirm.

I. FACTS

Defendant's conviction is the result of an incident occurring in the summer of 2000, when the victim was ten years old. Defendant was the victim's gymnastics coach at the time. After gymnastics practice one evening, defendant invited the victim to spend the night at his trailer with his daughter, who was the victim's friend. The victim obtained permission from her mother, and defendant drove the victim from the gymnasium to his trailer. Defendant's daughter was not at the trailer when the victim arrived, leaving her and defendant alone. The victim and defendant began watching a movie. Defendant asked the victim if she wanted a massage, and instructed her to lie on her stomach so that he could massage her back. After massaging the victim's upper back, defendant touched her buttocks and then pulled down her underwear. The victim testified that defendant put his fingers inside the lips of her labia, but did not penetrate her vaginal canal. After a few minutes of touching the victim, defendant went into his bedroom where he remained until the next morning. The next morning defendant told the victim he "went too far." Defendant instructed the victim not to tell anyone what happened.

The victim was coaching gymnastics at the gymnasium where defendant was the head coach, and in the fall of 2009, the victim observed defendant inappropriately touching some of the younger girls during gymnastics practice. The victim voiced her concerns to her direct supervisor and told her direct supervisor that she was sexually abused by defendant. The victim's supervisor encouraged her to see a counselor, and in the winter of 2009, the victim started receiving counseling. The victim's counselor encouraged her to report the sexual abuse

to Child Protective Services (CPS), and the victim agreed to talk to CPS. CPS referred the case to the police. The police questioned defendant twice about the sexual abuse allegations. The first time defendant was questioned by police he denied that the victim was ever at his trailer that night; however, the second time he was questioned, defendant confirmed everything about the victim's account except that he denied touching her buttocks or genital area.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to support his conviction of CSC II. Specifically, defendant argues that there was insufficient evidence because his testimony contradicted the victim's testimony and he did not confess to the crime when interviewed by the detectives.

"[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Moreover, "when reviewing claims of insufficient evidence, this Court must make all reasonable inferences and resolve all credibility conflicts in favor of the jury verdict." *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

Defendant is guilty of CSC II if the prosecution proves that defendant intentionally touched the intimate parts of a person under the age of 13, and that the touching can reasonably be construed as being for a sexual purpose. *In re Wentworth*, 251 Mich App 560, 562; 651 NW2d 773 (2002); MCL 750.520c(1)(a); MCL 750.520a(q). In this case, the victim testified that defendant intentionally touched her buttocks, put his hand between her legs, and put his fingers inside the lips of her labia. Such conduct constitutes touching the victim's "intimate parts" as required by the CSC II statute. MCL 750.520c(1)(a); MCL750.520a(e).

Further, circumstantial evidence supported the jury's conclusion that defendant's touching was for the purpose of sexual arousal or gratification. "Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). The jury could reasonably infer that defendant was sexually aroused from the victim's testimony that she felt something hard pressed against her leg right before defendant left her alone and went into his room. Accordingly, the jury could reasonably construe defendant's touching "as being for the purpose of sexual arousal or gratification" as required by the CSC II statute. MCL 750.520c(1)(a); MCL 750.520a(q).

Defendant's argument that there was insufficient evidence because his testimony contradicted the victim's testimony is unavailing. "It is a well established rule that a jury may convict on the uncorroborated evidence of a CSC victim." *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1998). See also MCL 750.520h ("The testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g."). Further, the fact that defendant did not confess to the crime does not negate the evidence supporting his conviction. A confession is not required in order for the jury to find defendant guilty beyond a reasonable

doubt. Accordingly, we conclude that there was sufficient evidence to support defendant's conviction of CSC II.

III. SCORING OF OFFENSE VARIABLES

Defendant challenges the scoring of offense variable (OV) 4, MCL 777.34, OV 8, MCL 777.38, and OV 11, MCL 777.41. The trial court scored ten points for OV 4 (psychological injury), 15 points for OV 8 (asportation), and 25 points for OV 11 (criminal sexual penetration).

Defendant preserved this issue for appeal by objecting to the scoring of OVs 4, 8, and 11 at the sentencing hearing. *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). We review preserved scoring issues for an abuse of discretion. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

A trial court properly scores ten points for OV 4 where it finds that the victim suffered a "serious psychological injury requiring professional treatment." MCL 777.34(1)(a); *Waclawski*, 286 Mich App at 681. Defendant specifically argues that OV 4 was improperly scored because the victim's mother testified that the victim's negative behavior change was the result of the victim's new friends. Defendant also notes that the victim was not afraid of defendant because she continued to frequent the gymnasium where defendant worked. Accordingly, defendant argues that the victim did not have psychological problems as a result of the sexual abuse.

We find that the trial court's conclusion that the evidence indicated that the victim suffered a serious psychological injury was not an abuse of discretion. The victim received professional treatment from a counselor to cope with the sexual abuse, and engaged in negative behavior because of the sexual abuse. Further, she testified that she was uncomfortable and unable to sleep the night of the abuse and that she blamed herself for what happened. Finally, the victim was visibly upset during her testimony. The victim's testimony provided sufficient evidence for the trial court to conclude that the victim suffered a serious psychological injury. This Court has found that OV 4 is properly scored at ten points based on a victim's testimony of fearfulness. See *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009) (The "victim's expression of fearfulness is enough to satisfy the statute"); *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004) ("Because the victim testified that she was fearful during the encounter with defendant, we find that the evidence presented was sufficient to support the trial court's decision to score OV 4 at ten points). Further, this Court has recognized that a victim's demeanor while testifying is a factor the trial court may consider when determining whether the victim suffered serious psychological injury. *People v Wilkens*, 267 Mich App 728, 740-741; 705 NW2d 728 (2005). On the basis of the evidence presented in this case, we cannot conclude that the trial court's decision to score OV 4 at ten points was outside the range of reasonable and principled outcomes. *Babcock*, 469 Mich at 269.

A trial court properly scores 15 points for OV 8 where it finds that defendant asported the victim to another place of greater danger in furtherance of the sexual contact. MCL 777.38(1)(a); *People v Spanke*, 254 Mich App 642, 647-648; 658 NW2d 504 (2003). A location is a "place of greater danger" under MCL 777.38 where discovery of the sexual contact becomes less likely. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). Defendant specifically argues that his trailer was not a place of greater danger as compared to the gymnasium because the gymnasium was closed for the night and the victim and defendant were alone there too. We disagree.

A location is a place of greater danger if it is a place "where others were less likely to see defendant committing crimes." *Id.* at 490-491. The evidence indicated that defendant was not the only person with access to the gymnasium. Consequently, defendant's trailer was more dangerous than the gymnasium because there was virtually no possibility of another person observing defendant sexually abusing the victim at his trailer. There was also evidence that defendant, on a separate occasion, had invited another young gymnastics student to watch movies alone with him at his trailer. This supported the trial court's finding that defendant transported the victim to his trailer in furtherance of his sexual contact. Accordingly, the trial court's decision to score OV 8 at 15 points was not outside the range of reasonable and principled outcomes. *Babcock*, 469 Mich at 269.

A trial court properly scores 25 points for OV 11 where it finds that defendant committed one act of "criminal sexual penetration." MCL 777.41(1)(b). "'Sexual penetration' means 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). In this case, the victim testified that defendant put his fingers inside the lips of her labia, which constitutes sexual penetration. *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981). Defendant argues that the trial court abused its discretion in finding penetration by a preponderance of the evidence. The jury found defendant not guilty of CSC I, which requires penetration, but guilty of CSC II, which does not require penetration. However, "the standard of proof applicable to the guidelines scoring process differs from the reasonable doubt standard underlying conviction of an offense." *Osantowski*, 481 Mich at 111. Thus, "although the factfinder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing." *People v Ratkov*, 201 Mich App 123, 126; 505 NW2d 886 (1993). Here, the trial court found the victim's testimony to be credible and that the preponderance of the evidence supported a finding that defendant penetrated the victim. We conclude that the trial court's finding that there was one criminal sexual penetration did not fall outside the range of reasonable and principled outcomes. *Babcock*, 469 Mich at 269.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering