STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICK WAYNE GILLUM,

Defendant-Appellant.

UNPUBLISHED
May 14, 1996

No. 169566
LC No. 93-722-FC

Gribbs, P.J. and Hoekstra and C. H. Stark*, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), involving an eleven year old boy. He was sentenced to a term of forty to eighty years. We affirm.

Defendant argues that his convictions must be reversed because the jury found him "guilty but mentally ill or mentally retarded." When the prosecutor suggested the wording for the verdict form, defense counsel responded "I don't care", and "I have no objection". Accordingly, defendant waived any issue concerning an improper verdict form. In any case, defendant was not prejudiced by the verdict form. The jury was properly instructed on the verdict of guilty but mentally ill, and on the verdict of not guilty by reason of insanity. The jury unanimously found beyond a reasonable doubt that defendant had committed three counts of first-degree criminal sexual conduct, and that he was sane at the time of the acts. Defendant suffered no harm from the modified jury verdict in this case.

The trial court did not err when it denied defendant's motion to suppress evidence of defendant's statements to police on the ground that the videotape of the interview had been purposely destroyed. This Court will not disturb a trial court's ruling at a suppression hearing unless that ruling is found to be clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). We find no clear error here.

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* Circuit judge, sitting on the Court of Appeals by assignment.

At the suppression hearing, the interviewing officer testified concerning the accidental destruction of the evidence which occurred when the tape was rewound and then used to tape another interview. There was evidence to support the trial court's factual finding that the taped interview had been unintentionally destroyed. In addition, there is no evidence that the taped interview would have been exculpatory. The police interviewer testified that defendant admitted some sexual activity and denied other, and that defendant made essentially the same statements both before and during the recorded interview. Defendant claimed both innocence and insanity as defenses, and testified that he made up a story and did not remember what he said, but that he knew he never admitted to sexual contact. The issue was one of credibility, and, after the trial court determined that there had been no bad faith or gross negligence on the part of the police, evidence of the police destruction of the tape was submitted to the jury. We find no error.

The trial court did not abuse its discretion by prohibiting defendant from examining the juvenile complainant about his prior thefts. There had been no conviction or adjudication of the alleged thefts in this case and, in any event, such evidence is inadmissible. MRE 608(b), 609(e). Defendant declined the opportunity to ask witnesses about complainant's reputation for being truthful after the trial court ruled that defendant could offer opinion or reputation evidence. We find no abuse of discretion.

Finally, defendant contends that his sentence is disproportionate. The guidelines range in this case was 120 to 300 months (ten to twenty five years) , and defendant was sentenced to a minimum term of forty years. The trial court indicated that the guidelines range did not adequately reflect consideration of defendant's two prior sexual convictions, the "escalating seriousness" of defendant's sex offenses, or the need to protect society. We believe the reasons articulated by the trial court justify its departure from the sentencing guidelines in this case. We find defendant's sentence proportionate to the offender and the offense. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Joel P/ Hoekstra
/s/ Roman S. Gribbs
/s/ Charles H. Stark