STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY SCOTT PETRIE,

Defendant-Appellant.

UNPUBLISHED
May 24, 1996

No. 180077
LC No. 187019

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was sentenced to three to fifteen years' imprisonment. He appeals as of right. We affirm.

Defendant was baby-sitting the ten year-old victim and her brother at his home. Late in the evening, defendant woke the victim, took her into another room, pulled down her clothing and kissed her vagina. The incident ended when the victim began crying and she was able to get away from defendant and go back to bed.

On appeal, defendant challenges his conviction on numerous grounds. First, he argues that there was insufficient evidence of his guilt to support his conviction. Viewing the evidence in the light most favorable to the prosecution, *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994), we find sufficient evidence of defendant's guilt to uphold his conviction. The elements of defendant's crime are: (1) sexual contact with another person (2) who is under thirteen years of age. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The victim's testimony sufficiently established defendant's sexual contact with her. The victim's mother's testimony sufficiently established the victim's age.

Second, defendant argues that the trial court erroneously admitted inadmissible hearsay evidence of his bad character. At trial, plaintiff elicited testimony from the victim's mother that she quit work because defendant was always waiting for her in the parking lot after work, sitting in his tractor rig

and smiling "real big . . . like, you know, it was so funny." Defendant's claim of error is unpreserved because defendant did not object to this testimony at trial. Therefore, this alleged error will not result in reversal unless it is both (1) plain and (2) prejudicial enough to have been outcome-decisive. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). The above testimony need not be thought of exclusively as hearsay or bad acts character evidence. It could also be seen as a nonverbal assertion by defendant of consciousness of his own guilt, constituting a nonhearsay party admission fully admissible under MRE 801(d)(2)(A). Therefore, there was no plain error in the trial court's decision to permit this testimony.

Third, defendant argues that his trial counsel rendered ineffective assistance by not objecting to the above testimony at trial. Defense counsel committed unprofessional error by not making an objection under MRE 403 that he probative value of the harassment testimony was substantially outweighed by its prejudicial value. However, given the fact that the court could have allowed this evidence in anyway, we find no reasonable probability that the result of this proceeding would have been different had defense counsel objected. *People v Pickens*, 446 Mich 298, 326; 521 NW2d 797 (1994

Fourth, defendant argues that the trial court erred by admitting testimony of the victim's mother that the victim told her she had been molested. We disagree. On our review of the record, we conclude that the mother's testimony was not barred by the hearsay rule because it was admitted for a nonhearsay purpose. The mother never testified to the substance of her daughter's statement; she merely testified that a statement was made. The victim's mother then testified that following the statement, she called the police and took the victim to the hospital. Accordingly, we conclude the statement was offered to indicate the effect of the statement on the mother, and the reasons for her course of action following the statement. See *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995).

Fifth, defendant argues that the trial court did not consider appropriate factors in imposing sentence and did not sufficiently articulate its reasons for imposing the sentence that it did. The trial court sentenced defendant within the guidelines and at sentencing referred to the guidelines before imposing sentence on defendant. This constituted sufficient justification for defendant's sentence. *In re Dana Jenkins*, 438 Mich 364, 375-376; 475 NW2d 279 (1991).

Sixth, defendant argues that his sentence is disproportionate to the offense and to the offender. We find that defendant's sentence is proportionate. Defendant was sentenced within the guidelines and his sentence is therefore presumptively proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Defendant is unable to overcome this presumption here where defendant might have done more to his victim had she not been able to get away and where the possibility existed that defendant could continue to target his neighbors' children for similar actions.

Finally, defendant argues that the trial court committed a scoring error by assigning 10 points for PRV 2 based on defendant's military criminal record. We find no error. When challenging a scoring

decision, defendant bears the burden of going forward with an effective challenge. *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994). Here, although defendant's counsel questioned whether the court could rely on defendant's previous military record, he stated that he was unfamiliar with the manner in which the military conviction was obtained, and failed to support the allegation that defendant's conviction was obtained without counsel, or a valid waiver of counsel, by submitting affidavits or other documentary evidence. Defendant also failed to request such evidence. *Id.* Because defendant failed to present an effective challenge to the scoring of PRV 2, we find no error in the trial court's scoring decision.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald