

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LYNN ALLEN KIMBALL,

Defendant-Appellant.

UNPUBLISHED

September 13, 1996

No. 179650

LC No. 94-2839

Before: Hoekstra, P. J., and Michael J. Kelly and J.M. Graves, Jr.,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (sexual contact of a person under thirteen years of age). Defendant was sentenced to ten to fifteen years' imprisonment. Defendant appeals his conviction and sentence as of right. We affirm.

On March 10, 1994, Norma Wetzel, the victim's mother, was attending evening adult education classes when defendant called her into the hallway. He asked her for change to make a phone call and then asked if he could wait at her apartment until his ride came, as he had been kicked out of his class. She agreed and gave him her key. After her class, Wetzel stopped at her baby-sitter's home to pick up her three daughters. The baby-sitter told her that defendant had picked the girls up, saying he was doing so at Wetzel's request. Wetzel denies asking him to do so. Wetzel returned to her apartment to find defendant laying on the couch underneath a blanket. She asked him where her daughters were and he said they were sleeping. Wetzel went into the bedrooms to check on the girls, but saw only her younger two children. When she returned to the living room, she saw her oldest daughter, the victim, sitting up on the couch, under the blanket, next to defendant. Wetzel became concerned and took the victim into the bathroom to ask if everything was fine. The victim indicated that nothing was wrong. The next day, Wetzel asked a family friend, Darcy Cobe, to talk to the victim to make sure she was all right. Cobe took the victim to McDonalds and explained there was "good touch" and "bad touch." Cobe went on to ask if the victim had ever been "bad touched." The victim became very agitated and without mentioning any names, simply said he had slapped her because she would not take her panties

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

down in the bathroom. When she tried to get away, he pulled her hair. The victim repeated the story to her mother after they returned from McDonalds, this time indicating that it was defendant who had done this. Wetzel took the victim to the hospital where a physical exam revealed trauma consistent with sexual contact.

Defendant's first argument is that the trial court abused its discretion in admitting the testimony of Darcy Cobe pursuant to MRE 803A. Specifically, defendant argues that the statement made by the victim to Cobe was not sufficiently spontaneous to meet the requirements of MRE 803A(2) because the statement was made during the course of a conversation in response to questions by Cobe. Having reviewed the record, we find no abuse of discretion in the trial court's decision to admit this evidence. *People v Hammon*, 210 Mich App 554; 534 NW2d 183 (1995). Here, although the purpose of Cobe's conversation with the victim was to determine on the mother's behalf whether her daughter had been sexually abused, the setting where the conversation occurred and the question that evoked the response from the victim were not improperly suggestive. Cobe asked the victim if she had ever been "bad touched." In response, the victim did not directly answer the question; instead, she described what defendant did to her. This response of the victim was free of any prompting, completely spontaneous and without indication of manufacture, MRE 803A(2).

Defendant's second argument is that his sentence is disproportionate and violates the principles of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Because defendant's sentence is within the minimum guidelines range of ten to fifteen years, it is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Here, defendant failed to present any unusual circumstances to overcome the presumption of proportionality. Therefore, defendant's sentence is proportionate.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Michael J. Kelly

/s/ James M. Graves, Jr.