

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMIE LEE TURNIPSEED,

Defendant-Appellant.

UNPUBLISHED

September 13, 1996

No. 185785

LC No. 94-037352-FH

Before: Taylor, P.J., and Jansen and Smolenski, JJ.

PER CURIAM.

Defendant pleaded guilty as charged to one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was subsequently sentenced to twenty-five to fifty years' imprisonment. Defendant appeals as of right and we affirm.

Defendant raises three issues on appeal, all of which concern only his sentence. He claims that the trial court erred in its scoring of Offense Variable (OV) 12 and OV 25. He also claims that his sentence violates the principle of proportionality.

The trial court scored OV 12 (criminal sexual penetrations) at fifty points (two or more criminal sexual penetrations). We held this case in abeyance pending the special conflict panel's decision in *People v Raby*, ___ Mich App ___; ___ NW2d ___ (Docket No. 173809, issued 7/30/96). The opinion in *Raby* now having been released, we dissolve the order holding this case in abeyance and find that the trial court properly scored OV 12 at fifty points based on the authority of *Raby*. In *Raby*, slip op, p 3, this Court held that "a defendant's ongoing penetrations of a victim over an extended period of time can constitute acts that occurred in a continuous time sequence and displayed a single intent or goal." The sentencing guidelines require that all penetrations involving the offender arise out of the same transaction. However, in a first-degree criminal sexual conduct and third-degree criminal sexual conduct conviction, the one penetration that forms the basis of the conviction cannot be scored.

In the present case, there is record evidence to support the score of fifty points for OV 12. The presentence report indicates that the victim, defendant's twelve-year-old stepdaughter, stated that defendant had been "sucking on her breast and inserting his fingers into her vagina over a long period of

time” before the instant offense. Accordingly, because there is evidence indicating that there were more than two penetrations arising out of the same criminal transaction, the trial court properly scored OV 12 at fifty points.

Next, defendant argues that OV 25 (contemporaneous criminal acts) was improperly scored at fifteen points (three or more contemporaneous criminal acts). The sentencing guidelines indicate that a criminal act is contemporaneous if it occurs within twenty-four hours of the offense or within six months if the offense is identical to or similar in nature, and the act has not and will not result in a separate conviction. In this case, it is true that the victim’s statement that defendant penetrated her over a long period of time does not give a specific time period. However, even if OV 25 was scored at zero points, it would reduce the offense severity level to ninety-five points, but would not change the guidelines range. Therefore, any error in scoring of OV 25 is harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Last, defendant claims that his sentence of twenty-five to fifty years violates the principle of proportionality. It does not. The sentence is within the guidelines range of ten to twenty-five years and is, therefore, presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Here, defendant raped his twelve-year-old stepdaughter. As a result, the victim became pregnant and had an abortion. DNA testing on the fetus indicated 99.82% that defendant was the father. Further, the victim indicated in the presentence report that defendant had been molesting her over a long period of time just before the instant offense. Under these circumstances, we cannot conclude that the trial court abused its discretion in sentencing defendant. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Houston*, 448 Mich 312, 320-321; 532 NW2d 508 (1995).

Affirmed.

/s/ Clifford W. Taylor
/s/ Kathleen Jansen
/s/ Michael R. Smolenski