STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHESTER VINCENT,

Defendant-Appellant.

UNPUBLISHED
November 1, 1996

No. 176524
LC No. 93-009268

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

After a jury trial, defendant was convicted of second-degree criminal sexual conduct in violation of MCL 750.520(c)(1)(a); MSA 78.788(1)(a). Defendant was sentenced to three to fifteen years in prison. Defendant appeals as of right from his conviction and sentence. We affirm.

Defendant lived across the street from the complainant who, at the time of the incident, was approximately eleven years old. From time to time, the complainant would ask defendant to fix her bike or would borrow defendant's headphone stereo set. On the date in question, the complainant went over to defendant's home to return the headphone set she had borrowed because the earphone was broken. The complainant entered the house and went into the kitchen where she showed defendant the broken earphone. While looking at the headphone, defendant reached over and started feeling the complainant's stomach. He then moved his hand down to her vaginal area. The complainant left defendant's home and immediately told her mother. The complainant also testified that on a previous occasion when she brought her bike to defendant for repair, he reached under her shirt and touched her breasts. Defendant was arrested and charged with two counts of criminal sexual conduct second degree, sexual conduct with a person under thirteen years of age. The first count related to the incident where Kristen claimed defendant reached under her shirt and the second related to the incident which took place at defendant's home. Defendant was convicted on one count.

On appeal, defendant first argues that the trial court erred in denying his motion for new trial because the prosecution failed to produce a res gestae witness.

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

Under the current res gestae witness statute, MCL 767.40a; MSA 28.980(1), the prosecutor's duty to endorse all res gestae witnesses on the information is replaced with a lesser duty to list the names of known res gestae witnesses on the information. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). The prosecution is further obligated to provide to the defendant, upon request, reasonable assistance, in locating and serving process upon a witness. MCL 767.40a(5); MSA 28.980(1)(5).

Defendant alleges that error occurred because the prosecution failed to produce a female police officer or cadet/scout who allegedly reported to the scene with the investigating police officers. We disagree. First, we find that the witness in question is not a res gestae witness. A res gestae witness is one who witnessed some event in the continuum of a criminal transaction and whose testimony would aid in developing a full disclosure of the facts. *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989). This alleged witness did not arrive at the scene until after the completion of the offense and thus is not a res gestae witness. Furthermore, even if we were to conclude that the alleged witness was a res gestae witness, no violation of the statute occurred. The statute requires that the prosecutor list the res gestae witnesses known to the prosecutor or investigating officers. *Burwick, supra* at 287-291. Here, the evidence indicates that the prosecutor and investigating officers were unaware of the existence of the alleged witness. Finally, the prosecution was under no obligation to assist defendant in locating and producing the alleged witness because defendant, who was aware of the alleged witness' presence, failed to make a request for assistance as required by MCL 767.40a(5); MSA 28.980(1)(5). Under these circumstances, no violation of the statute occurred, and the trial court therefore did not err in denying defendant's motion for new trial.

Next, defendant challenges his sentence. First, defendant contends that the sentence penalized him for demanding a jury trial and for refusing to admit guilt. This issue raises a question of law with regard to consideration of improper factors. This court reviews questions of law de novo. *People v Medlyn,* 215 Mich App 338, 340-341; 544 NW2d 759 (1996). First, defendant claims that at sentencing the trial court improperly considered defendant's choice not to go through with a plea bargain and hold a jury trial. At sentencing, a trial court may not consider a defendant's exercise of his right to a jury trial. *People v Mosko,* 190 Mich App 204, 211; 475 NW2d 866 (1991). At sentencing, the trial judge made no mention of defendant's refusal to go through with a previous plea bargain. Moreover, the trial judge was never bound to sentence defendant as indicated in the plea bargain sentencing evaluation report. There is therefore no indication that the sentenced actually imposed was different from what defendant would have received if he had accepted the plea bargain. We find that the trial court did not penalize defendant for exercising his right to a jury trial.

In addition, defendant claims that the trial court improperly penalized defendant for his refusal to admit guilt. We disagree. While it is true that a sentencing court may not consider a defendant's refusal to admit guilt, there is a fine line between a proper consideration of lack of remorse and the impermissible consideration of refusal to admit guilt. See *People v Wesley,* 428 Mich 708; 411 NW2d 159, cert den 484 US 967 (1987). At sentencing, the trial court noted defendant's cavalier attitude and his lack of concern for the complainant. We find that the trial court properly considered defendant's lack of remorse rather than his refusal to admit guilt.

Defendant also contends that the trial court erred in assessing him fifteen points under offense variable (OV) 7. Under OV 7 a trial court may assess fifteen points if the offender exploits the victim due to a physical disability, mental disability, youth, agedness, or abuse of authority status. Defendant contends that the trial court improperly double scored defendant regarding the complainant's age as this was an element of the crime for which defendant was convicted.

This Court has already rejected defendant's argument. See *People v Nantelle*, 215 Mich App 77, 84-85; 544 NW2d 667 (1996); *People v Cotton*, 209 Mich App 82, 84; 530 NW2d 495 (1995). In addition, testimony showed that the complainant had learning disabilities. Accordingly, the trial court properly assessed points under this variable as defendant was not only much older than the complainant, but the complainant also suffered from a mental disability.

Finally, defendant argues that his sentence was disproportionate to the seriousness of the crime and to defendant's background. Defendant's sentence fell within the minimum guidelines range and is therefore presumed to be proportionate. *Cotton, supra* at 85. In addition, defendant fails to set forth unusual circumstances to illustrate that a sentence within the guidelines would violate the principle of proportionality. Defendant argues that this was his first offense, that he had a family and a job, and that he only had minimal culpability in relation to the offense. However, a defendant's employment, lack of criminal history, and minimum culpability are not unusual circumstances which overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Consequently, we find that defendant's sentence is proportionate.

Affirmed.

/s/ Myron H. Wahls
/s/ Mark J. Cavanagh
/s/ John F. Kowalski