STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY JUNIOR ARQUETTE,

Defendant-Appellant.

UNPUBLISHED
December 10, 1996

Nos. 185614, 185616
LC Nos. 94-003457-FC,
94-003471-FC

Before: McDonald, P.J., and Bandstra and C.L. Bosman,* JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2). Thereafter, he pleaded *nolo contendere* to third-degree criminal sexual conduct (CSC III), MCL 750.520d; MSA 28.788(4). Defendant was sentenced to concurrent terms of twenty-five to fifty years' imprisonment for CSC I and ten to fifteen years for CSC III. The CSC I conviction was based on a charge that defendant engaged in sexual penetration with his niece who was ten years old at the time of trial and apparently eight years old at the time of the offense. The CSC III plea was based on an allegation that defendant engaged in penile-rectal intercourse with his brother who was between the ages of thirteen and fifteen at the time of the offense. Defendant appeals as of right, challenging his CSC I conviction and the sentences imposed on both convictions.

Defendant first argues that under MCL 600.2163; MSA 27A.2163, the court was required to sua sponte examine his niece to determine whether she should have been allowed to testify. By its plain language, however, this statute did not require the trial court to sua sponte examine the niece because she was ten years old at the time of her testimony. Accord *People v Burch*, 170 Mich App 772, 775; 428 NW2d 772 (1988). Defendant cites no authority holding that a trial court is obligated to sua sponte examine a proffered witness who is aged ten or older to determine if that person is competent to testify. Defendant asserts that the complainant was developmentally disabled. However, a witness is presumptively competent to testify. *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991). Also, a mentally disturbed witness is not, on that basis alone, incompetent to testify. *People v*

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

Lapsley, 26 Mich App 424, 428, n 2; 182 NW2d 601 (1970). Accordingly, we conclude that the trial court committed no error by not sua sponte examining the complainant to determine her competency to testify.

Defendant next argues that trial counsel denied him effective assistance of counsel by failing to object to the niece being allowed to testify without a competency examination. However, the niece promised to tell the truth and responded understandably to some non-leading questions about defendant and the asserted incident of sexual penetration. Accordingly, she probably would have passed a competency examination. Thus, defendant has not established a reasonable probability that had trial counsel requested a competency determination, the niece would have been barred from testifying.[1] Furthermore, defendant's ex-wife also testified that she saw defendant having sexual intercourse with the niece, thereby establishing that the result of the proceeding would probably not have been different even without the niece's testimony. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Defendant has failed to show that counsel's performance was below an objective standard of reasonableness. *Pickens*, *supra* at 302-303; *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant next contends that his sentences were disproportionate. The trial court had little hope that defendant would be deterred or rehabilitated and believed that, among the traditional objectives of the criminal justice system, only punishment and the protection of society could be served by the sentence. While defendant's ten to fifteen year sentence for CSC III was the highest possible, "the archetype 'no abuse of discretion' case is the imposition of a maximum sentence in the face of compelling aggravating factors." *People v Merriweather*, 447 Mich 799, 807; 527 NW2d 460 (1994). Defendant's brother provided an account of defendant engaging in repeated sexual acts with him while he was a child, including acts that involved defendant's ex-wife. The familial relationship between the brother and defendant was also an aggravating factor. *People v Houston*, 448 Mich 312, 325; 532 NW2d 508 (1995). The CSC III sentence was proportionate because it was based on these aggravating factors and, further, served to protect children generally from defendant. *People v Brzezinski (After Remand)*, 196 Mich App 253, 255-256; 492 NW2d 781 (1992). While defendant's CSC I sentence was severe, it was far below the highest level sentence that could have been imposed inasmuch as CSC I is punishable by life imprisonment or imprisonment for any term of years. MCL 750.520b(2); MSA 28.788(2)(2). Defendant's CSC I sentence was also based on compelling aggravating factors. We have reviewed the lower court record and the trial court's reasons for imposing the twenty-five to fifty year sentence, and conclude that defendant's CSC I sentence was not disproportionately severe when compared to the seriousness of the crime. *People v Milbourn*, 435 Mich 630, 657; 461 NW2d 1 (1990). While defendant indicates that he suffers mental handicaps that may mitigate his moral culpability, retribution is not the only permissible goal in sentencing. Rather, the trial court properly considered whether defendant had demonstrated an inability to reform and the protection of society. See, e.g., *People v Smith*, 152 Mich App 756, 765; 394 NW2d 94 (1986).

Finally, the trial court was not required to score the sentencing guidelines for defendant's CSC III conviction because defendant was sentenced for both convictions at the same proceeding and the guidelines were scored for CSC I, which carries a higher statutory maximum sentence. *People v*

Eberhardt, 205 Mich App 587, 590-591; 518 NW2d 511 (1994). A sentencing court may rely upon a sentencing information report for the offense with the highest statutory maximum sentence in passing sentence for multiple crimes. *People v Gonzalez*, 197 Mich App 385, 401; 496 NW2d 312 (1992).

We affirm.

/s/ Gary R. McDonald
/s/ Richard A. Bandstra
/s/ Calvin L. Bosman

[1] While we recognize that the complainant was nonresponsive to many questions, once a trial court is satisfied that a child is competent to testify, a later showing of the child's inability to testify truthfully reflects on credibility, not competency. *Coddington, supra*. Thus, although defendant's niece had some difficulty with actually testifying, that does not establish that she would or should have been found incompetent to testify.