

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELBURN KEITH CHURCH,

Defendant-Appellant.

UNPUBLISHED

December 20, 1996

No. 185524

LC No. 94-007401-FH

Before: Fitzgerald, P.J., and Holbrook, Jr. and E.R. Post,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct involving his fourteen-year-old niece, MCL 750.520c; MSA 28.788(3). He was sentenced to a prison term of two to fifteen years. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion when it determined that the prosecution had exercised due diligence in attempting to find a witness, when it declared the witness to be unavailable, and when it admitted the witness' preliminary examination testimony at trial. We disagree. The evidence revealed that the prosecution began attempting to serve the witness immediately after the trial date was noticed, that it obtained a more recent address from the witness' wife after the initial attempts failed, and that service was attempted on numerous occasions at the new address. This was all done before the trial date. The prosecutor also contacted the witness' divorce attorney, ascertained that the witness was likely working in Indiana, and left messages for the witness that were not returned. After review of the entire record, we are not left with a definite and firm conviction that a mistake was committed regarding the due diligence determination and, thus, we find no clear error. MCR 2.613(C); *People v Gunnett*, 182 Mich App 61, 67; 451 NW2d 863 (1990).

Defendant next argues that his two to fifteen year sentence is disproportionate to the offense. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. Defendant's sentence falls within the range suggested by the sentencing guidelines and is therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Given the family relationship of

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

the parties, defendant's abuse of a position of trust, and the detrimental effect of defendant's action on the entire family, we find no abuse of discretion in the sentence imposed.

Defendant also argues that the evidence established only that he was in the same mobile home as the victim on the night of the incident and that the evidence was therefore insufficient to support his conviction. We disagree. There was evidence, including the victim's testimony, to establish that she was fourteen years of age at the time of the incident, that defendant was her uncle, and that defendant touched and sucked on her breasts. Viewed in the light most favorable to the prosecution, the evidence was sufficient to permit a rational finder of fact to conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Edward R. Post