STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LOUIS BISZALIK,

Defendant-Appellant.

UNPUBLISHED
January 10, 1997

No. 190959

Recorder's Court
No. 94-007804

Before: Griffin, P.J., and T.G. Kavanagh* and D.B. Leiber,** JJ.

PER CURIAM.

Defendant appeals from his jury trial convictions of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and two counts of indecent exposure, MCL 750.335a; MSA 28.567(1). Defendant was sentenced to concurrent sentences of 30 to 180 months' imprisonment for the second-degree criminal sexual conduct conviction, and nine months' imprisonment for each indecent exposure conviction. We affirm.

I

Defendant first argues that the trial court abused its discretion in denying defendant's motion to cross-examine complainant about complainant's exposure to sexual acts his birth mother engaged in with other men, and that defendant was thus denied his right of confrontation. Defendant argues that he should have been permitted to cross-examine the complainant as to other possible sources of his sexual knowledge, because it would have affected the reliability of complainant's testimony and aided the jurors in weighing whether defendant, as opposed to others, molested complainant. Defendant also argues that the trial court's denial of his request to present evidence as to other potential perpetrators of

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.
** Circuit judge, sitting on the Court of Appeals by assignment.

criminal sexual conduct on the complainant violated his rights to a fair trial and effective assistance of counsel. We disagree.

The rape-shield law, with certain specific exceptions, was designed to exclude evidence of the victim's sexual conduct with persons other than defendant. *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982). The prohibitions contained in the rape-shield law represent a legislative determination that, in most cases, such evidence is irrelevant, and that inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury. *Id*. In *Arenda, supra,* the defendant sought to introduce evidence of the victim's possible sexual conduct with others to explain the victim's ability to describe the sexual acts that allegedly occurred and to dispel any inference that this ability resulted from experiences with defendant. *Id.* at 11. The trial court had granted the prosecution's motion in limine based on the rape-shield statute to prohibit the admission of any evidence of sexual conduct between the victim and any person other than the defendant. *Id*. at 6. On appeal, the defendant argued that the rape-shield statute's prohibitions infringed his Sixth Amendment right of confrontation. *Id.* at 7. The Supreme Court held that the trial court properly excluded the evidence under the rape-shield statute without denying the defendant his constitutional rights of confrontation and cross-examination. *Id.* at 13. The Court concluded that the defendant's argument was insufficient to allow admission and that, generally, the relevancy of evidence of the source of a criminal sexual conduct victim's knowledge of specific sexual acts will be minimal and the potential for prejudice great. *Id.* at 12-13.

Although this Court has held that evidence of a child rape victim's sexual contact with those other than the defendant may at times be more probative than prejudicial, *People v Haley*, 153 Mich App 400, 406; 395 NW2d 60 (1986), the facts of the instant case do not lend themselves to such a holding. In the instant case, there was no evidence that anyone but defendant had abused complainant, unlike in *Haley*. Moreover, this Court has held that a trial court considering admission of evidence of a rape victim's past sexual experience should favor exclusion as long as exclusion does not abridge the defendant's right of confrontation. *People v Byrne*, 199 Mich App 674, 678; 502 NW2d 386 (1993).

Defendant's right to confrontation was not abridged by the trial court, as the court only precluded cross-examination regarding the victim's sexual conduct with those other than defendant, ruling that such evidence was more prejudicial than probative. Defendant was free to cross-examine complainant about his observations of others' sexual behavior, as long as the questions did not concern sexual conduct between complainant and persons other than defendant. We conclude that the trial court did not abuse its discretion in prohibiting the admission of evidence of complainant's sexual contact with persons other than defendant as more prejudicial than probative, and that defendant's right to confrontation was not abridged. *Arenda, supra* at 11.

II

Defendant next argues that the trial court erred in failing to give a specific unanimity instruction. Defendant argues that there was no instruction that the jury had to be unanimous as to which transaction

was the basis of each conviction and that the instruction given misdirected the jury as to what they must find concerning the basic element of penetration.

Defendant failed to properly preserve this issue by requesting that the trial court give a specific unanimity instruction or by objecting to the trial court's failure to give one, limiting our review to the prevention of manifest injustice to defendant. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Juries in criminal cases are required to return a unanimous verdict. Const 1963, art 1, §14; MCR 6.410(B). In order to protect a defendant's right to a unanimous verdict, it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement. *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). A specific unanimity instruction is not required in all cases in which more than one act is presented as evidence of the actus reus of a single criminal offense, however. The critical inquiry is whether either party has presented evidence that materially distinguishes any of the alleged multiple acts from the others. *Id.* at 512. Where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice. *Id.* at 512-513.

Defendant was charged with three counts of first-degree criminal sexual conduct, one involving sodomy and two involving fellatio. Although we believe that materially identical evidence was presented with respect to each charge, even if that were not the case, we would not find error requiring reversal. Because defendant was convicted of second-degree criminal sexual conduct, which does not require a showing of penetration, he was not prejudiced by the trial court's failure to give a more specific instruction regarding the element of penetration and thus defendant cannot establish manifest injustice. *Cooks*, 446 Mich at 529 n 33.

III

Defendant next argues that the trial court incorrectly scored Offense Variable (OV) 12 and Offense Variable (OV) 7 when computing defendant's sentencing guidelines, resulting in an impermissibly high sentence.

Appellate review of guidelines calculations is very limited. *People v Ayers*, 213 Mich App 708, 723; 540 NW2d 791 (1995). A sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score. *Id.*

Because the prosecution must prove controverted factual assertions underlying the scoring of the sentencing guidelines by a preponderance of the evidence rather than beyond a reasonable doubt, situations may arise wherein although the factfinder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing. *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993), remanded on other grounds 447 Mich 984 (1994). From our review of the victim's testimony

we conclude that the sentencing court's determination was well supported by the record, and we thus find no error. *Id.*

In *People v Raby*, 218 Mich App 78, 82-83; 554 NW2d 25 (1996), this Court held, in resolving a conflict on the issue whether evidence of prior instances of sexual penetration between a defendant and a victim constitutes the "same criminal transaction" for purposes of scoring OV 12, that evidence of prior penetrations may be used as arising out of the same criminal transaction if the acts occurred in a continuous time sequence and displayed a single intent or goal. I*d.* at 82.

Because complainant testified to a continuing pattern of abuse over several years that included similar acts of penetration, with defendant's sexual gratification the apparent goal over the entire period, we conclude that the prosecution presented sufficient evidence of penetrations arising out of the same criminal transaction to support a score of fifty points for OV 12. *People v Ayers*, 213 Mich App 708, 723; 540 NW2d 791 (1995).

We also disagree with defendant's contention that the trial court incorrectly scored OV 7 at fifteen points because complainant's age was an element of second-degree criminal sexual conduct. The age of the victim may be taken into account in scoring OV 7 even where the victim's age is an element of the conviction offense. *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). Further, as in *Nantelle*, the trial court's scoring of OV 7 in the instant case was supported by defendant's abuse of his authority over complainant. *Nantelle*, supra at 84-85. Defendant was complainant's foster father.

We conclude that the prosecution presented sufficient evidence to adequately support the trial court's scoring of OV 7 at fifteen points. *Ayers, supra* at 723.

IV

Defendant's last argument, that the trial court erred in ordering indeterminate sentences of nine to twelve months for defendant's two misdemeanor indecent exposure convictions because no authority exists allowing indeterminate sentences for misdemeanors, is moot because the trial court corrected any error in this respect before defendant's appeal reached us by amending defendant's sentences for the indecent exposure convictions to terms of nine months.

Affirmed.

/s/ Richard Allen Griffin
/s/ Thomas G. Kavanagh
/s/ Dennis B. Leiber