STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ERWIN WOLF,

Defendant-Appellant.

UNPUBLISHED
January 14, 1997

No. 188331
LC No. 94-002881-FC

Before: MacKenzie, P.J., and Wahls and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was sentenced to a term of 25 to 50 years. Defendant appeals as of right and we affirm.

The complainant, aged nine at the time of the crime, testified that while she was staying at defendant's house on the night of June 27, 1994, she was awakened by defendant rubbing his hand along her leg. She claimed defendant then made penile and digital penetration of her vagina. Defendant presented an alibi defense.

First, defendant asserts that there was insufficient evidence to sustain his conviction because he presented alibi witnesses and there was some variance between the testimony of the victim and her mother. However, these considerations go to the weight, not the sufficiency, of the evidence. Credibility is in the province of the jury, which was free to disbelieve the alibi witnesses. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). Despite defendant's alibi witnesses, the victim's testimony in this case was sufficient, if believed by the jury, to establish the elements of the crime. Notably, where a child is the victim in a CSC case, time is not of the essence or a material element. *People v Taylor*, *supra*; *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987).

Although defendant frames this as a question regarding the sufficiency of the evidence, a more apt presentation would have been whether this conviction went against the great weight of the evidence. However, defendant did not move for a new trial and so he has waived any issue regarding the weight of the evidence. *People v Johnson*, 168 Mich App 581, 585; 425 NW2d 187 (1988).

Second, defendant asserts that the court erred in scoring twenty-five points in the offense variable (OV) 2 category for finding that the victim was subjected to terrorism. Appellate review of guidelines calculations is very limited. *People v Johnson*, 202 Mich App 281, 288; 508 NW2d 509 (1993). A sentencing judge has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score. *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). Scoring decisions for which there is evidence in support will be upheld. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). Instruction C for the scoring of OV 2 states: "Terrorism is conduct that is designed to increase substantially the fear and anxiety that the victim suffers during the offense." Michigan Sentencing Guidelines, 2d ed, p 44. The presentence investigation report indicates that in her interview with the police, the victim said that during the assault defendant told her to shut up or he would hurt her more. This appears to be conduct designed to increase the victim's fear during the crime, and was referenced by the court in scoring the OV 2. The court followed the recommendation of the probation officer for twenty-five points in this category, finding that someone of the victim's age would likely feel terrorized in such circumstances. Regarding defendant's claim that there was no evidence that the victim actually experienced terror, this Court held in *People v Kreger*, 214 Mich App 549, 552; 543 NW2d 55 (1996), that such a showing is unnecessary. The focus is on whether the conduct was "designed to substantially increase fear and anxiety," not on whether "the victim actually [was] terror-stricken." *Id*. We do not find that the trial court abused its discretion in scoring the OV 2 category.

Defendant also asserts that the court erred in scoring the OV 7 category. Citing *People v Parlor*, 184 Mich App 235; 457 NW2d 55 (1990), defendant claims that vulnerability based on youth would be characteristic of all victims of the crime for which defendant was convicted, so it would be improper to tally points based on the victim's youth. Here, defendant fails to note that the trial court agreed on this point, declining to score fifteen points based on the victim's youth. The court instead scored five points for this category, based on exploitation by a difference in size and strength between the victim and defendant. The presentence investigation report indicates that during her interview with the police, the victim said that defendant used one hand to hold her down, and that defendant continued his assault after being struck by the victim. We do not find that the trial court abused its discretion in scoring the OV 7 category.

The trial court's sentence is within the guidelines range and so it is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant did not present evidence of unusual circumstances that would rebut the presumption of proportionality. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Myron H. Wahls
/s/ Jane E. Markey