

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY ERNEST McCARY,

Defendant-Appellant.

UNPUBLISHED

June 17, 1997

No. 196810

Recorder's Court

LC No. 95-005986

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

PER CURIAM.

Defendant appeals by right from his bench trial conviction for second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (sexual contact with another person under age thirteen). Defendant was sentenced to three to fifteen years' imprisonment. We affirm.

Defendant first argues that he is entitled to resentencing because the trial court failed to respond to his challenge regarding the accuracy of the presentence report by either ordering that a new report be prepared or by striking the "disputed entries." Our review of the record indicates, however, that defendant's objection at sentencing was limited to a claim that the probation officer was biased. Thus, defendant's contention that he challenged the accuracy of the presentence report at sentencing but that the trial court failed to respond is simply not supported by the record. To the extent defendant now claims for the first time on appeal that the presentence report contains factual inaccuracies, he has waived appellate review of the issue because defendant failed to object at sentencing. *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996); MCR 6.429(C).

We further conclude that the trial court, by holding a short evidentiary hearing in which it questioned the probation officer and one of her co-workers, adequately responded to defendant's concerns about the probation officer's impartiality. In addition, the trial court was not required to resolve the dispute over the probation officer's suggestion concerning defendant's motive in committing the prior fourth-degree child abuse offense against the victim's brother. This is because defendant's objection was not to an alleged factual inaccuracy but to a conclusion drawn from undisputed facts. *People v Weybrecht*, ___ Mich App ___, ___ NW2d ___ (No. 185248, issued 3/7/97), slip op at 6;

see also *People v Greene*, 116 Mich App 205, 210-211; 323 NW2d 337 (1982), rev'd on other grounds 414 Mich 896 (1982). Accordingly, the trial court did not abuse its discretion in responding to defendant's claim of bias. See *People v Harrison*, 119 Mich App 491, 496; 326 NW2d 827 (1982).

Defendant next contends that the prosecution failed to present sufficient evidence to convict him. We disagree. In reviewing a defendant's challenge to the sufficiency of the evidence supporting his conviction pursuant to a bench trial, this Court must view the evidence presented in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

In order to convict a defendant of second-degree criminal sexual conduct, the prosecution must prove the following elements: (1) defendant engaged in sexual contact with another person; and (2) that the person was under thirteen years of age. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a); *People v Crayne*, 163 Mich App 19, 22-23; 413 NW2d 721 (1987). "Sexual contact" is defined by statute:

"Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification. [MCL 750.520a(k); MSA 28.788(1)(k).]

The testimony of a complainant need not be corroborated in prosecutions for criminal sexual conduct. MCL 750.520h; MSA 28.788(8); see, e.g., *People v Smith*, 149 Mich App 189, 195; 385 NW2d 654 (1986). Moreover, witness credibility is a matter for the trier of fact to ascertain and will not be resolved anew on appeal. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

In this case, evidence was presented that the victim was under thirteen years of age. The victim testified in detail that defendant made her lie on the floor, that he removed her underwear, lay on top of her, and penetrated her vagina with his penis. She also testified that when defendant stopped moving he ejaculated on her face and chest. Under these circumstances, the trial court could reasonably construe this sexual penetration as being for the purpose of sexual arousal or gratification. Hence, the victim's testimony that sexual penetration occurred provides evidentiary support for the conclusion that sexual contact also occurred. See *People v Garrow*, 99 Mich App 834, 839-840; 298 NW2d 627 (1980). Viewed in a light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to find the elements of second-degree criminal sexual conduct proven beyond a reasonable doubt.

Defendant's final argument is that his sentence is disproportionate. Appellate review of sentencing decisions is limited to whether the trial court abused its discretion under the principles of proportionality announced in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *People v Tolbert*, 216 Mich App 353, 355-356; 549 NW2d 61 (1996). Defendant's minimum sentence of

three years falls within the guidelines range and is therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996). Furthermore, the factors cited by defendant, i.e., his employment, high school education, family support, and lack of prior felony convictions, are not unusual circumstances rendering his presumptively proportionate sentence disproportionate. See *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Also, considering the severity of the offense, its psychological impact on the victim, and defendant's prior history of violence, the trial court did not abuse its discretion in sentencing defendant to the maximum minimum sentence recommended by the guidelines. The sentence is proportionate considering the circumstances surrounding this offense and this offender. For these same reasons, it is also not cruel or unusual. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

Affirmed

/s/ Barbara B. MacKenzie
/s/ Janet T. Neff
/s/ Jane E. Markey