STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES KEVIN BROUSSARD,

Defendant-Appellant.

UNPUBLISHED
June 24, 1997

No. 191016
Ingham Circuit Court
LC No. 95 069003 FH

Before: Reilly, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by jury of three counts of criminal sexual conduct (CSC) in the second degree, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and one count of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1); MSA 28.788(7)(1). Defendant was sentenced as an habitual offender to concurrent terms of 15 to 22½ years on the three CSC convictions and 7 to 15 years on the assault conviction. We affirm but remand for correction of the judgment of sentence..

Defendant first argues that the trial court erred in admitting several pornographic magazines into evidence, asserting that they were unnecessary to establish defendant's "sexual purpose" or intent and that they were more prejudicial than probative. Defendant does not dispute that the pornographic magazines were probative of his intent as well as the credibility of the young victims. Rather, defendant argues that his "sexual purpose" could have been established through testimony and, thus, that the court should have avoided the possibility of prejudice and refused to admit the magazines. As the Michigan Supreme Court has held, however, photographs which are admissible for a proper purpose are not rendered inadmissible simply because they "may tend to arouse the passion or prejudice of the jurors." *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972). Moreover, we are satisfied that the probative value of the magazines was not substantially outweighed by the danger of unfair prejudice. *People v Mills*, 450 Mich 61, 74-77; 537 NW2d 909 (1995). The presentation of evidence at trial was done in a manner which minimized the risk of prejudice. In fact, the record does

not indicate that the jurors ever actually viewed the magazines. It is thus difficult to imagine how the evidence might have created circumstances of undue prejudice. Giving deference to the trial court's assessment, we cannot say that an abuse of discretion occurred. See *People v Bahoda*, 448 Mich 261, 289-291; 531 NW2d 659 (1995).

Defendant next contends that there was insufficient evidence to support his conviction of assault with intent to commit criminal sexual conduct involving penetration. The essential elements of this crime are: (1) an assault; (2) a sexual purpose; (3) the intent to penetrate another person's genital or anal openings or some oral sexual act; and (4) some aggravating circumstances (e.g., the use of force or coercion). *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982). Defendant argues that there was no assault because he did not grab the victim or threaten to use force. We disagree. From the testimony presented at trial, viewed in a light most favorable to the prosecution, *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979), a reasonable jury could find that defendant did "assault" the victim with the intent to perform fellatio on him. An "assault" may consist of either an attempt to commit a battery or an unlawful act which places another person in fear of receiving an imminent battery. *People v Laster*, 169 Mich App 768, 770; 426 NW2d 806 (1988). The victim's own testimony indicates that he was in fear of an immediate, harmful touching, and that he thought defendant was going to force him to submit to fellatio. His testimony also indicated that defendant, while masturbating, cornered him behind a portable bed and attempted to approach him. Although a jury might have found that defendant did not use or threaten force, the victim's testimony was sufficient to establish that defendant's actions placed him in fear. Accordingly, we conclude that there was sufficient evidence to support defendant's conviction of assault with intent to commit criminal sexual conduct involving penetration.

Finally, defendant argues that his sentences of 15 to 22½years for the CSC convictions, enhanced based on his habitual offender status, violates the principle of proportionality because the crime engendered no death, serious injury, or sexual penetration, and because defendant has little education or work experience. A sentence must be proportionate to the offense as well as the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Since defendant was sentenced as an habitual offender, our review is limited to consideration of whether the sentence violates the principle of proportionality, without reference to the sentencing guidelines. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Our review of the record indicates that the trial court clearly articulated the criteria considered and the reasons for imposing a lengthy sentence. Neither the court's analysis nor its reasoning appears inappropriate when the circumstances are taken into account. Defendant has a prior conviction for CSC involving one of the same victims and was on probation when the present offense occurred. The trial court carefully reviewed the likelihood of recidivism, rehabilitation, and deterrence, balanced against the need to protect society, and determined that a lengthy sentence was appropriate in the present case. Although the court did not comment on the fact that defendant does not have a high school diploma or work experience, or that he has a drinking problem, these factors do not suggest that defendant's sentence was unfair. If anything, defendant's personal history reinforces the court's conclusion that the likelihood of recidivism is high. Given the

circumstances, we conclude that the sentence was proportionate to the offender and the seriousness of the offense. *People v Milbourn*, *supra*.

Because there is a discrepancy between the sentence stated in the transcript for Count V and the sentence entered in the judgment of sentence, we remand for correction of the judgment of sentence.

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Maureen Pulte Reilly
/s/ Harold Hood
/s/ William B. Murphy