

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNIE RAY RUFFIN,

Defendant-Appellant.

UNPUBLISHED

November 29, 2007

No. 273147

Wayne Circuit Court

LC Nos. 05-006143-01;

05-006144-01

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

A jury convicted defendant of five counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(i), three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) and (b)(i), and two counts of child sexually abusive activity, MCL 750.145c(2). The trial court sentenced defendant as an habitual-offender, second offense, MCL 769.10, to life imprisonment for one of the first-degree CSC convictions and 25 to 50 years' imprisonment for each of the remaining first-degree CSC convictions, 10 to 22-1/2 years' imprisonment for each second-degree CSC conviction, and 15 to 30 years' imprisonment for each child sexually abusive activity conviction, all sentences to run concurrently. Defendant appeals his conviction and sentence and, for the reasons stated below, we affirm.

I. Defense Witnesses

Defendant contends that the trial court denied him his constitutional right to present a defense when it refused to delay trial to allow him to present three additional witnesses.

“A criminal defendant has a state and federal constitutional right to present a defense.” *People v Kurr*, 253 Mich App 317, 326; 654 NW2d 651(2002). But the defendant must “comply with ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’ ” *People v Hayes*, 421 Mich 271, 279; 364 NW2d 365 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038, 1049; 35 L Ed 2d 297 (1973).

Among others, defendant intended to call three of his family members to testify and, before the lunch break on the second day of trial, defense counsel knew that the witnesses would testify that afternoon. Defense counsel advised the trial court that the witnesses were scheduled to appear at 2:00 p.m. and, shortly thereafter, the court took a lunch recess until 2:00 p.m. When

trial resumed, the witnesses had not arrived and they also failed to appear after the last witness testified at 3:10 p.m. Thereafter, the trial judge refused to delay the trial after he confirmed that the testimony of the missing witnesses would be cumulative of testimony already presented by other defense witnesses.¹

The trial court is responsible for controlling the proceedings, MCR 6.414(B), and, here, the record does not support defendant's claim that he was unable to present a defense. Defendant presented other witnesses who testified regarding the nature of the relationship between defendant and the two complainants, and defense counsel conceded that the missing witnesses would merely have "corroborated" the other defense witnesses. By definition, to corroborate is simply "to confirm." Random House Webster's College Dictionary, 2nd edition, 1997. Thus, as the trial court concluded, the testimony would have been cumulative and defendant has failed to show that the trial court violated his right to present a defense.

II. Sentence

A. Offense Variable Score

Defendant argues that the trial court erroneously scored 50 points for offense variable (OV) 11, criminal sexual penetrations, though he concedes that he did not preserve this issue by objecting to the scoring of OV 11 at sentencing. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). A "trial court's scoring of the sentencing guidelines will be upheld if there is evidence to support the score." *People v Garner*, 215 Mich App 218, 219; 544 NW2d 478 (1996).

A trial court should score 50 points for OV 11 if there were two or more criminal sexual penetrations arising out of the sentencing offense, MCL 777.41(1)(a) and (2)(a), but the court may not score points for the one penetration that forms the basis for the offense. MCL 777.41(2)(c).

Sexual penetration includes cunnilingus, fellatio, or any intrusion, however slight, of one person's body or object into the genital or anal openings of another person's body. *People v Wilkins*, 267 Mich App 728, 738; 705 NW2d 728 (2005). The jury convicted defendant of five counts of first-degree CSC. Two of the convictions involved single instances of cunnilingus, and two of the convictions involved single instances of fellatio. The jury also convicted defendant of a count of penile/genital penetration. At trial, the complainant testified that just after she finished giving defendant oral sex, she and defendant started "rubbing," which the complainant described as defendant placing his penis "inside the lips" of her vagina. The complainant explained that, on the same occasion, as part of the same incident, defendant "stood his penis up and put it like in my hole." When the complainant told defendant that it hurt, he had her "just keep rubbing it." This testimony supports a finding that defendant engaged in an act of fellatio and at least two acts of penile/vaginal penetration during a single criminal episode. Because the

¹ Thus, contrary to defendant's argument, the trial court did not prevent him from calling *any* witnesses, but merely refused to delay the trial when the missing witnesses did not appear.

prosecutor presented evidence of at least two additional criminal sexual penetrations involved in at least one of the charged offenses, the trial court correctly scored 50 points for OV 11.

B. Sentencing Guidelines

Defendant complains that the trial court improperly departed from the sentencing guidelines range without substantial and compelling reasons. A trial court must impose a minimum sentence within the sentencing guidelines range unless it has “substantial and compelling reasons for that departure and states those reasons on the record.” *People v Lowery*, 258 Mich App 167, 169-170; 673 NW2d 107 (2003). A substantial and compelling reason must be “objective and verifiable,” must “‘keenly’ or ‘irresistibly’ ” grab a court’s attention, and must be of “considerable worth” in deciding the length of a sentence. *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003), quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). We review the existence of a particular factor for clear error, we review the determination that a factor is objective and verifiable as a matter of law, and we review for an abuse of discretion the determination that the objective and verifiable factors in a particular case constitute substantial and compelling reasons for departure. *Babcock, supra* at 264-265.

A trial court may not base a departure on a characteristic that is already taken into account in the guidelines, unless it finds that “the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b). Here, we agree with the trial court that the vast number of offenses defendant committed over a period of years were far in excess of anything contemplated by the guidelines. Additionally, defendant created a permanent pictorial record of the abuse. These were objective and verifiable factors and they are of “considerable worth” in deciding the length of defendant’s sentence. Giving appropriate deference to the trial court’s extensive knowledge of the facts and its familiarity with the circumstances and the offender, *Babcock, supra* at 270, the trial court did not abuse its discretion when it ruled that substantial and compelling reasons justified a departure from the guidelines range.²

C. *Blakely* Challenge

Defendant cites *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) and claims that he is entitled to resentencing because the trial court relied on facts not found by the jury at sentencing. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant’s maximum sentence on the basis of facts that were not reflected in the jury’s verdict or admitted by the defendant. However, our Supreme Court has held that *Blakely* does not apply to Michigan’s indeterminate sentencing scheme, in which a defendant’s maximum sentence is set by statute and the sentencing guidelines affect only the

² We disagree with defendant’s claim that the trial court punished him for exercising his right to trial. The trial court expressly stated that it was not punishing defendant for going to trial and agreed that no one should ever be punished for choosing to go to trial.

minimum sentence. *People v Drohan*, 475 Mich 140, 143; 715 NW2d 778 (2006). Accordingly, defendant's argument is without merit.³

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Jane E. Beckering

³ Defendant also asserts that defense counsel was ineffective for failing to object to the scoring of OV 11 and for failing to challenge the scoring of the remaining offense variables on the basis that the facts supporting the scoring decisions were not decided by a jury, contrary to *Blakely, supra*. Having concluded that the record supports the trial court's scoring of OV 11 and that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, there is no basis for concluding that defense counsel was ineffective. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).