

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT TIMOTHY PUTMAN,

Defendant-Appellant.

UNPUBLISHED

November 12, 2002

No. 235129

Otsego Circuit Court

LC No. 00-002576-FH

Before: Owens, P.J., and Talbot and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of child sexually abusive activity, MCL 750.145c(2). He was sentenced to a prison term of sixteen months to twenty years and a fine of \$1000 in addition to the ordinary \$60 assessment for Crime Victim Rights Fund.¹ He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first challenges the sufficiency of the evidence to support his conviction. Sufficiency of the evidence claims are reviewed de novo to determine whether there was evidence, viewed in the light most favorable to the prosecution, that would warrant a reasonable trier of fact to find guilt beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

In April 2000, defendant contacted a website development company to construct an adult-oriented website. Defendant told the developer that defendant would provide the content for the site and then charge a fee for viewing the site. According to the developer, adult-oriented sites typically begin with photographs of individuals clothed in bathing suits or lingerie and then progressed into hard-core pornography. Defendant provided “practice shoots” that included erotic fondling. Defendant also gave the developer a draft of an advertisement for female models “16 to 40,” which the developer submitted to a newspaper at defendant’s request. Defendant created a modeling contract that included increasing hourly pay rates for categories of modeling, designated “Sexy,” “Near Nude,” “Nude,” and “Hard-core.” Additional lists indicated the

¹ MCL 769.12

compensation for “softcore,” and “hardcore” videos, and “entertainment service,” including lap dances.

The complainant testified that she responded to defendant’s advertisement for models, ages 16 to 40. She mentioned her age when she spoke to defendant’s wife on the phone.

The complainant, then seventeen years old, and her older sister met defendant at a restaurant on July 8, 2000. The complainant verbally told defendant her age. He asked her to complete a questionnaire that included a section for the applicant to select types of modeling (“sexy swimwear,” “lingerie,” “nude” and “hard-core”) she was willing to do. The questionnaire indicated that “hard-core” meant “masturbation, anal lesbian and orgy.” He told her that she could do anything on the list, but if she checked it off, she could not “uncheck” it. The complainant indicated that she was interested in the first two categories. Defendant provided her with a contract and went over it with her. Defendant told her that if and when she was ready, she could do nude and hard-core. He pointed out that there were advantages to doing that type of modeling, such as more money. He told her that she could start slowly and when she became more comfortable, she could move to that and add it at any time. The complainant believed that defendant wanted her to do that type of modeling because he kept returning to that subject during the conversation. Even after she indicated that she would not do nude modeling, he specifically asked her if she would. Defendant did not indicate that her options were limited because of her age, except with respect to providing “entertainment services.”

Defendant wanted the complainant to sign the contract at that time, but agreed to let her take it home to review it further. The following day, the complainant and her sister contacted the police.

Defendant later told police that the original advertisement contained a mistake concerning the ages of the people he sought. He admitted interviewing one person under the age of eighteen, but lied about providing her a copy of the contract and about altering the contract for individuals under eighteen.

In challenging the sufficiency of the evidence, defendant argues that the evidence did not show any attempt or preparation to take illegal photographs of the seventeen-year old complainant. Rather, defendant argues, the evidence at most showed that he suggested that she could do nude and “hard-core” modeling at an undefined time in the future, which could be construed to mean that she may be able to do that type of modeling once she reached the age of majority.

We reject defendant’s contention. Viewed in the light most favorable to the prosecution, defendant’s advertisement and attempt to persuade the seventeen year-old complainant to participate in nude and hard-core modeling for a pornographic website showed that defendant “attempt[ed] or prepare[d] or conspire[d] to arrange for, produce, [or] make . . . child sexually abusive activity or child sexually abusive material” MCL 750.145c(2).

Defendant challenges the scoring of offense variable (OV) 10, which concerns exploitation of a vulnerable victim. His argument is two-fold.

First, defendant contends that where the conviction reflects the victim's youth, points for exploitation of the youth should only be awarded under special circumstances, which defendant contends, are not present in the instant case. However, this challenge to the scoring of OV 10, which is first raised on appeal, is not preserved for appellate review. MCR 6.429(C); MCL 769.34; *People v McGuffey*, 251 Mich App 155, 164-166; 649 NW2d 801 (2002). In any case, defendant's position is contrary to *People v Gibson*, 219 Mich App 530, 534-535; 557 NW2d 141 (1996). This argument does not persuade us that the scoring constituted "plain error affecting defendant's substantial rights." *People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002).

Defendant's second argument concerning the scoring of OV 10 is that a mere attempt to manipulate or exploit the complainant is inadequate to support the scoring. Pursuant to MCL 777.40(1)(b), OV 10 is scored ten points if the offender "exploited a victim's . . . youth . . ." "Exploit" is defined as "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). "The mere existence of one or more of the factors described in subsection (1) does not automatically equate with victim vulnerability." MCL 777.40(2). Defendant enticed the victim to respond to the advertisement by promising "\$1,000 per week or more." He manipulated her during the interview by pointing out the advantages of nude and hard-core modeling and presenting a contract with increased financial incentives for these activities. He pressured her to sign the contract. The fact that the victim in this case deferred making a decision on whether to sign the contract does not negate a finding of "exploitat[ion.]" We conclude that defendant's activities support the sentencing court's scoring decision of this variable. A sentencing court's determination in scoring an offense variable will be upheld if there is any evidence in the record to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Finally, defendant argues that the trial court's sentence was based in part on defendant's refusal to admit guilt. A court cannot base a sentence even in part on a defendant's refusal to admit guilt. *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977). However, evidence of a lack of remorse can be considered in determining an individual's potential for rehabilitation. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995); *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987). To determine whether sentencing was improperly influenced by the defendant's failure to admit guilt, this Court focuses on three factors: "(1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." *Id.* 713. "[I]f there is an indication of the three factors, then the sentence was likely to have been improperly influenced by the defendant's persistence in his innocence." *Id.* In this case, the trial court did not attempt to elicit an admission of guilt from defendant. The court's comments related directly to defendant's failure to take responsibility for his actions. The court appropriately considered defendant's lack of remorse as it bore on his potential for rehabilitation.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Patrick M. Meter