

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLEN JONES,

Defendant-Appellant.

UNPUBLISHED

July 24, 2003

No. 239026

Ingham Circuit Court

LC No. 00-075600-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of third-degree criminal sexual conduct, MCL 750.520d. He was sentenced to concurrent terms of 96 to 180 months in prison. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant provided two girls, ages fourteen and fifteen, with alcohol and took them to a house where they drank and smoked marijuana. Once they were under the influence of these substances, he took them to another house where he sexually assaulted them. He penetrated both girls vaginally and anally against their will.

Defendant first argues that allowing one complaining witness' preliminary examination testimony to be read into evidence violated his right of confrontation. This was not squarely the focus of defendant's objection below and therefore, the issue can only be reviewed for plain error affecting a substantial right. MRE 103(d). MRE 804(b)(1) allows admission of former testimony if the witness is unavailable. MRE 804(a)(4) defines "unavailable" to include a situation where the witness "is unable to be present or to testify . . . because of . . . then existing . . . mental illness or infirmity." Defendant acknowledges that the witness' psychologist had determined that the witness was emotionally unstable and that it would be emotionally harmful for her to testify. However, defendant argues that this did not establish that the witness would be *unable* to testify. In *People v Murry*, 106 Mich App 257, 260; 307 NW2d 464 (1981), this Court concluded that a witness was unable to testify where the evidence showed it would be "detrimental to her health." Accordingly, we find no plain error in the trial court's determination.

Defendant also challenges admission of the preliminary examination testimony on grounds that it was not reliable. He asserts that prior counsel had no reason to develop testimony

relating to the witness' mental fitness since the issue had not yet arisen, and that if she had post traumatic stress disorder on the day of trial she may have been suffering from the same disorder at her preliminary examination. Defendant has not demonstrated that the testimony was unreliable. Moreover, he did not object on these bases and has failed to show any error affecting a substantial right.

Further, defendant asserts that a videotaped deposition or testimony by closed circuit television would have better protected his right to confrontation. However, defendant did not request this accommodation. The failure to offer it is not grounds for reversal.

Defendant next argues that Offense Variable 7 of the sentencing guidelines was improperly scored at fifty points. Under MCL 777.37(2)(a), the score is proper if the court finds evidence of "sadism" which is defined as "conduct that subjects a victim to extreme or prolonged pain and humiliation and is inflicted to produce suffering or for the offender's gratification." The sentencing court has discretion in determining the number of points to be scored if evidence of record adequately supports a particular score. Scoring decisions for which there is any supporting evidence will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Here, the court found that this was not the nominal penetration needed to commit the crime but that the penetration was extreme. The assaults on these girls, one of whom weighed ninety-one pounds, included defendant repeatedly thrusting himself inside the victims. This resulted in discernable trauma and lacerations. Thus, it cannot be said that there was no evidence to support this score.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens