

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN BRUCE CORBIN,

Defendant-Appellant.

UNPUBLISHED

July 23, 2009

No. 284302

Isabella Circuit Court

LC No. 07-001269-FC

Before: Fort Hood, P.J., and Cavanagh and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions on five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age), and five counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age). We affirm.

On appeal, defendant first argues that the trial court erroneously failed to sua sponte give a special jury instruction on unanimity with regard to the CSC I counts because the acts of penetration charged, i.e., digital penetration and cunnilingus, were materially distinct but the jury was not instructed that its verdict had to be unanimous as to the specific act or acts committed. We disagree. Defendant neither requested a special unanimity jury instruction nor objected to the instructions read to the jury; therefore, this issue was forfeited and our review is for plain error affecting the outcome of the case, i.e., substantial rights. See MCL 768.29; *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

To protect a criminal defendant's right to a unanimous jury verdict, the trial court is required to properly instruct the jury regarding the unanimity requirement. MCR 6.410(B); *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). A general unanimity instruction to the jury is adequate, even when alternative acts are presented as evidence of the actus reus of a single criminal offense, unless:

- 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or

2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt. [*Id.* at 524.]

Defendant claims that digital and oral penetration are materially distinct acts simply because one involves penetration with his finger and the other with his mouth. We disagree. Defendant cites to *United States v Gipson*, 553 F2d 453 (CA 5, 1977) in support of his argument, but he fails to set forth any analysis with respect to its application to his case. Briefly, in *Gipson*, the defendant was convicted of violating 18 USC 2313, which prohibited the selling *or* receiving of stolen vehicles. The selling of stolen vehicles is conceptually different from the receiving of stolen vehicles thus, the *Gipson* Court held, the unanimity rule required that jurors be in substantial agreement as to just which act the defendant did to support the guilty verdict. *Id.* at 457-458.¹

Here, defendant was convicted under MCL 750.520b(1)(a), which provides that a defendant is guilty of criminal sexual conduct in the first degree if he engaged in sexual penetration with a person under 13 years of age. MCL 750.520a(r) defines "sexual penetration" to include cunnilingus or any other intrusion, "however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body" Sexual penetration by defendant's finger is not conceptually different from sexual penetration by defendant's mouth—the act of penetration violates MCL 750.520b(1)(a) and supports the guilty verdict. In other words, the alternative acts are mere means of satisfying the penetration element of the offense. Further, defendant claimed that no acts of sexual penetration occurred at all. Thus, the specific number or acts of sexual penetration were not in dispute and there is no reason to believe that the jurors were confused about the factual basis of defendant's guilt. See *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993). Accordingly, the unanimity rule does not require a special instruction and defendant has failed to establish plain error affecting his substantial rights.

Next, defendant argues that the trial court abused its discretion when it permitted three prosecution witnesses to testify that defendant engaged in acts of sexual touching with them when they were children. We disagree.

Citing *People v Watkins*, 277 Mich App 358; 745 NW2d 149 (2007), the court determined that the evidence was admissible under MCL 768.27a(1), which provides:

Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the

¹ We note that, although the *Gipson* unanimity analysis was not utilized by the United States Supreme Court in *Schad v Arizona*, 501 US 624, 635; 111 S Ct 2491; 115 L Ed 2d 555 (1991), the Michigan Supreme Court held that the *Gipson* test provided an analytical framework that was instructive. *Cooks, supra* at 515-516.

defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.

Thus, to the extent that defendant is implying that the evidence could not come in under MRE 404(b), his argument is misdirected. The contested evidence was relevant because it had a tendency to make it more probable that defendant committed all ten counts of CSC, particularly the five counts of CSC II. See *Watkins, supra* at 364-365. MCL 768.27a allows relevant evidence regarding prior sexual assaults committed by defendant against a minor to be admitted in a CSC prosecution, even if that evidence goes to the character of the accused. Cf. *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007).

Defendant argues, in part, that the evidence should not have been admitted because he never contested that he was guilty of CSC II. It is true that defendant admitted to inappropriately touching the victim. But the testimony from the three challenged witnesses that defendant sexually touched them when they were younger supports the inference that he had a pattern of sexually abusing young children, which in turn supported the victim's testimony and the charges filed.

Further, defendant's challenge to the constitutionality of MCL 768.27a is based solely on the grant of leave by our Supreme Court in *People v Watkins*, 480 Mich 1167; 747 NW2d 226 (2008). However, the Court later vacated that order in *People v Watkins*, 482 Mich 1114; 758 NW2d 267 (2008). Accordingly, this argument is without merit. See, also, *Pattison, supra* at 619 (concluding that MCL 768.27a does not violate the separation of powers doctrine).

Next, defendant argues that he is entitled to resentencing because the trial court failed to provide substantial and compelling reasons for an upward departure from the recommended minimum sentence range set forth by the sentencing guidelines with regard to his CSC I convictions. We disagree.

A trial court may depart from the sentencing guidelines for a substantial and compelling reason that is "objective and verifiable." MCL 769.34(3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A substantial and compelling reason exists only in exceptional cases. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). The reason should keenly or irresistibly grab the court's attention and should be of considerable worth in deciding the length of a sentence. *Id.* The departure cannot be based on an offense or offender characteristic already considered in determining the appropriate sentence range, unless the court finds from the facts in the court record that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *id.*

This Court reviews for clear error the sentencing court's factual determination that a particular departure factor exists. *Babcock, supra* at 265. Whether that factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* Whether the objective and verifiable factor constitutes a substantial and compelling reason to depart from the recommended sentence range is reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes. *Id.* at 269-270.

Here, in support of its upward departure, the trial court clearly indicated that the sentencing guidelines did not adequately account for the circumstances of this offender and this offense. The court noted the numerous incidents of sexual abuse testified to by the prior child victims, as well as defendant's own admissions to the police. Defendant had been molesting children under the age of thirteen for over twenty years, including the daughter of defendant's friend, a mentally-disabled child, defendant's adopted daughter, defendant's grandson by marriage, and the victim in this case. The court noted that the victim was once defendant's patient, which enhanced defendant's prospects of taking advantage of her. Further, defendant admitted to molesting the victim in this case more than twenty times. All of these circumstances are capable of verification, and exemplify the type of circumstances that can irresistibly grab the attention of the court when deciding the appropriate sentence to impose. Accordingly, no error has been shown.

Finally, it appears defendant may be arguing that his equal protection rights were violated because the "touching" he committed against the victim would not be considered penetration if the victim had been a male. We disagree. "The equal protection clause demands only that the government not impose differences in treatment on persons similarly situated except on the basis of some reasonable differentiation fairly related to the object of the law." *People v Darwall*, 82 Mich App 652, 661; 267 NW2d 472 (1978). Here, defendant is not similarly situated to another defendant who molested a male victim. As stated above, MCL 750.520a(r) defines penetration as any intrusion, "however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." Defendant admitted to performing "oral sex" on the victim. The fact that a male victim's penis protrudes out and away from his body is of no moment when deciding whether a defendant penetrated a female victim. Accordingly, defendant's equal protection argument must fail.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly