

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN TORRES GOMEZ,

Defendant-Appellant.

UNPUBLISHED

May 18, 1999

No. 206628

Wexford Circuit Court

LC No. 97-004988 FH

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). He was sentenced to a term of five to fifteen years' imprisonment. We affirm.

We turn first to two related arguments raised by defendant: that the trial court erred in failing to give a specific act unanimity instruction where more than one act of sexual contact was presented as evidence of the actus reus of the single charged offense and that the trial court erred in denying defendant's motion for mistrial for lack of specificity in the information.

The information charging defendant with a single count of CSC II stated that between March 1996 and January 1997, defendant engaged in sexual contact with the victim, a thirteen-year-old child living in the same household as defendant. The information was amended at trial, changing the date of March 1996 to July 8, 1996, the date of the victim's thirteenth birthday. At trial, testimony was offered by the victim regarding several instances of improper sexual contact by defendant: (1) defendant allegedly came into her bedroom prior to her thirteenth birthday, touched her vagina and possibly inserted his finger into her vagina; (2) defendant allegedly came into the victim's bedroom after her thirteenth birthday, pulled up her bra and sucked on her breast; (3) defendant allegedly came into the victim's bedroom, sat down on top of her and began "humping" her; and (4) defendant allegedly came into the victim's bedroom and massaged her buttocks. There was also testimony from the victim that on at least one occasion, defendant attempted to have intercourse with her. Defendant offered a general denial to all these allegations.

With regard to the alleged instructional error, defendant failed to preserve this issue for appeal by making the appropriate request in the trial court. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993) (which involved a single CSC count and testimony of multiple acts of penetration and a general denial by the defendant that the sexual assault ever occurred). Because manifest injustice would not result from our failure to review this issue, we decline to do so. *Id.*

Turning to the issue of the denial of the mistrial for lack of specificity in the charge, we are not persuaded that defendant's challenge was timely. As we noted in *People v Reno*, 85 Mich App 586, 589; 272 NW2d 144 (1978), the time to challenge the specificity of the charges is prior to trial. Indeed, in *Reno* the Court held that a challenge brought at the close of the prosecutor's proofs was untimely; in the case at bar, defendant did not raise the issue until after the defense had rested as well. Accordingly, the trial court did not err in denying defendant's motion for mistrial.

Next, defendant argues that the trial court erred in admitting into evidence the testimony of Deputy Dennis Anderson regarding the victim's reaction to being told that defendant was in a vehicle outside the house where she was staying. Anderson testified that the victim became aware of defendant's presence outside the house and became very upset, began to shake and went into a fetal position. Although defendant did object, the objection was not raised until after a series of questions were asked and answered and defense counsel objected to the "whole line of questioning." Accordingly, the objection was untimely and the issue is not preserved for appeal. See *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997).

Defendant also argues that the trial court erred in considering a prior no contest plea in sentencing defendant. Whether defendant's previous no contest plea could be considered in sentencing defendant is a question of law that is reviewed de novo. *People v Parker*, 230 Mich App 337, 342; 584 NW2d 336 (1998). We note that the rules of evidence do not apply to a sentencing hearing. MRE 1101(b)(3). Presentence reports, as well, are not governed by the rules of evidence. *People v Books*, 95 Mich App 500, 503; 291 NW2d 94 (1980). Moreover, a sentencing court may use a broad range of information when weighing the factors of sentencing, *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988), including facts underlying uncharged offenses, pending charges and acquittals. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Because the information regarding defendant's no contest plea concerned an incident very similar to the one defendant had just been convicted of, it allowed the sentencing court to fashion a proper and informed individualized sentence. See *People v Fisher* 442 Mich 560, 577; 503 NW2d 50 (1993). The sentencing court therefore will not be precluded from considering this information at sentencing if defendant is again convicted.

Defendant also argues that his sentence, which was within guidelines, was disproportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). In light of the circumstances surrounding this offense and this offender, we are satisfied that the sentence imposed was proportionate.

Affirmed.

/s/ Gary R. McDonald
/s/ David H. Sawyer
/s/ Jeffrey G. Collins