

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MANUEL CHAVARRIA,

Defendant-Appellant.

UNPUBLISHED

June 20, 2000

No. 217350

Ottawa Circuit Court

LC No. 98-022024-FH

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b(1); MSA 28.788(2)(1), and sentenced to three concurrent terms of fifteen to thirty years' imprisonment. He appeals as of right. We affirm.

Defendant contends that the trial court erred in its instructions to the jury on Count III. Defendant did not object to the jury instructions. As a result, his claim of error has been forfeited unless he can show plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The jury was instructed to find defendant guilty if it found beyond a reasonable doubt that he had touched "the Complainant's genital openings with the Defendant's mouth or tongue."

Defendant claims that something additional in the form of penetration is required to establish cunnilingus, which formed the basis of Count III. We disagree. This Court has determined that an act of cunnilingus, *by definition*, involves an act of sexual penetration. MCL 750.520a(1); MSA 28.788(1)(1); *People v Legg*, 197 Mich App 131, 132-133; 494 NW2d 797 (1992), citing *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987). Our Supreme Court also reached this conclusion in *People v Lemons*, 454 Mich 234, 255; 562 NW2d 447 (1997). The Court in *Lemons* further stated that, although in *People v Johnson*, 432 Mich 931; 442 NW2d 625 (1989), it held that penetration for the purpose of establishing fellatio required actual penetration, the same did not hold true for cunnilingus. *Id.* at 254-255.

In the instant case, the victim testified that defendant kissed her vagina and performed oral sex on her. This was sufficient to establish cunnilingus. *Lemons, supra*; *Legg, supra*. The trial court did not err in its instruction to the jury.

Defendant contends that his sentences were disproportionate. We disagree. We review sentencing decisions for abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). The sentencing guidelines recommended a minimum sentence range of 180 to 360 months or life. In imposing sentence on defendant, the trial court articulated that it was imposing a sentence within the guidelines, which was a sufficient explanation for the sentence imposed. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Defendant's sentences, which are within and at the extreme low end of the guidelines, are presumed to be proportionate, *Broden, supra*, and defendant has failed to present any unusual circumstances to overcome that presumption. See *Milbourn, supra* at 661. On the contrary, the circumstances surrounding the instant offenses were serious—repeated assaults involving sexual penetration of a minor by a person in a position of trust, who lived in the same household as the victim. In addition, defendant had one prior felony and five prior misdemeanor convictions, including a conviction for domestic violence in December, 1997. The sentences imposed on defendant are proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra*.

Respondent also contends that his sentences constitute cruel and unusual punishment. Because defendant's sentences are proportionate, they are not cruel or unusual. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997), citing *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993). Defendant is not entitled to resentencing.

We affirm.

/s/ Richard A. Bandstra

/s/ Kathleen Jansen

/s/ William C. Whitbeck