

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN O. BELL,

Defendant-Appellant.

UNPUBLISHED

September 21, 2001

No. 222174

Wayne Circuit Court

LC No. 98-009839

Before: Collins, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (sexual penetration with a person under the age of thirteen), for which he was sentenced to life imprisonment. We affirm the conviction, but remand for further proceedings.

Defendant first challenges the sufficiency of the evidence. This Court reviews issues regarding sufficiency of the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found all the necessary elements of the offense beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268; 380 NW2d 11 (1985).

For conviction on the charge of first-degree criminal sexual conduct the prosecution must prove “sexual penetration.” MCL 750.520b(1); *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). “Sexual penetration” is defined 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.” MCL 750.520a(1)¹; *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995).²

Here, the nine-year-old victim testified that defendant grabbed her by the back of her neck, dragged her across her back yard, pulled her down to the ground, pulled down her pants

¹ Now MCL 750.520a(m).

² In addition, under the subsection here at issue, the prosecution had to prove that the victim was under the statutory age. MCL 750.520b(1)(a). This element is not in dispute.

and underwear, and placed something inside her private parts. Within hours of the attack the victim provided police with defendant's description, indicating that she recognized him from around the neighborhood. She subsequently picked defendant out of a lineup at the police station that night, and identified defendant at trial as the man who assaulted her. A victim's testimony need not be corroborated. MCL 750.520h; *People v Smith*, 149 Mich App 189, 195; 385 NW2d 654 (1986). Furthermore, this Court defers to the jury's determination regarding the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, modified 441 Mich 1201 (1992). Accordingly, viewed in a light most favorable to the prosecution, the evidence was sufficient for the jury to find defendant guilty.

Defendant next argues that he was denied a fair and impartial trial, alleging that the prosecutor withheld relevant information from defendant and vouched for defendant's guilt during closing argument. We disagree.

To determine whether a prosecutor has committed misconduct, this Court must review the relevant portions of the record and consider the prosecutor's remarks in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test of prosecutorial misconduct is whether the defendant has been deprived of his right to a fair and impartial trial. *Id.*

With regard to defendant's first contention, the law requires a prosecutor to disclose evidence which is (1) favorable to the defendant, and (2) material to the determination of guilt. *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). Evidence is material only if there is a reasonable probability that the trial result would have been different, had the evidence been disclosed. *Id.* In this instance defendant was not denied a fair and impartial trial because the alleged information withheld by the prosecutor was, in fact, neither relevant nor material to his guilt. As to the second claim, having reviewed the prosecutor's closing argument comments in context we are satisfied that defendant was not denied a fair and impartial trial.

Defendant lastly argues that the trial court abused its discretion in departing from allegedly erroneously scored sentencing guidelines and that his sentence is disproportionate to the seriousness of the offense.

This Court reviews sentencing proportionality issues for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). Under the principle of proportionality, this Court must determine if a defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the specific offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). The policy of this state favors individualized sentencing for every defendant. *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988). The trial court's discretion in imposing a sentence is broad, and the court is permitted to tailor each sentence to the circumstances of the case. *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000). In determining an appropriate sentence for a defendant, the trial court is permitted to consider many factors; for example, it is permissible for a court to consider the severity of the crime committed. *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). Likewise, the trial court can consider the nature of the crime and surrounding circumstances of the criminal behavior. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). "[T]he 'key test' of proportionality is not whether the sentence departs from or adheres

to the recommended range, but whether it reflects the seriousness of the matter.” *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995); see also *Lemons*, *supra* at 260.

The statutory sentence for first-degree criminal sexual conduct is life or any term of years in prison. MCL 750.520b(2). Here, the recommended minimum sentence was ten to twenty-five years’ imprisonment. Although the trial court specifically stated, during the sentencing hearing, that it departed from the guidelines because the recommended sentence did not adequately reflect the seriousness of the offense, in its brief statement the court did not satisfactorily articulate its reasoning for that significant upward departure. See *People Rocky*, 237 Mich App 74, 79; 601 NW2d 887 (1999). In addition, the court failed to take the opportunity to correct that oversight at a post-judgment hearing on the issue of alleged scoring error in the guidelines.³

We acknowledge that defendant’s life sentence does not exceed the statutory maximum for sexual assault on a nine-year-old victim. We also note that a sentencing court may impose the maximum sentence decreed by the Legislature in cases falling within the most serious class of offenses. *People v Merriweather*, 447 Mich 799, 806; 527 NW2d 460 (1994). However, though we strongly believe that sexual assault of a young, defenseless victim is a serious matter, warranting serious punishment, given the court’s limited and questionable explanation for departure from the guidelines, and the court’s failure to correct the alleged scoring error in the guidelines, we cannot be certain that defendant’s life sentence was proportionate to the circumstances surrounding this particular case.

Accordingly, defendant's conviction is affirmed, but the matter is remanded for the sentencing judge to reconsider the correct guidelines and to state in more detail the court’s reasoning for the sentence imposed so that this Court may be in a position to more adequately address the issue of proportionality. If the trial court should determine that corrected guidelines would affect its sentence, then resentencing shall occur. The trial court shall comply with the directive in this opinion within 42 days of issuance and provide this Court with a transcript or written opinion of its decision. We retain jurisdiction.

/s/ Jeffrey G. Collins
/s/ William B. Murphy
/s/ Kathleen Jansen

³ This Court earlier remanded this case to allow defendant to move for an evidentiary hearing, pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), on the issue of defense counsel’s failure to object to the guidelines scoring. At the hearing the prosecutor seemingly accepted the defendant’s position that corrected guidelines would result in a recommended minimum range of 5 to 10 years’ imprisonment.