STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 3, 2005
v	No. 252489 Montmorency Circuit Court
RICHARD MICHAEL SHAW, Defendant-Appellant.	LC Nos. 02-000194-FC 02-000195-FC 02-000196-FC 02-000197-FC 02-000198-FC 02-000199-FC 02-000200-FC 02-000201-FC

Before: Markey, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right following a jury trial that resulted in his conviction for six separate charges of first-degree criminal sexual conduct (CSC I), MCL 750.520b, one charge of CSC II, MCL 750.520c, and one charge of CSC III, MCL 750.520d. The trial court sentenced defendant to concurrent terms of 18 to 35 years in prison for each CSC I conviction and 9 to 15 years in prison for the CSC II and CSC III convictions. We affirm.

Defendant is the victim's stepfather. At trial, the victim testified that defendant forcibly performed various sexual acts on her beginning from the time she was eleven years old continuing until after she had grown and moved into her own apartment. While somewhat vague about exact dates, the victim provided vivid descriptions of eight particular incidents. She testified that she remembered the earliest recited incident clearly because defendant pulled his penis out of her vagina during intercourse and ejaculated on her abdomen. On another occasion, defendant forced her to have intercourse in his truck while on a snowy back road near his hunting cabin. The record reflects that the victim was a petite girl and defendant was tall and weighed roughly three hundred pounds. According to the victim, defendant routinely used his size advantage to overcome her staunchest resistance. The victim recalled in detail how a seatbelt buckle dug into her back and how defendant pinned her wrists together and forced her legs apart to subdue her and have intercourse with her in the truck's cramped cab.

Another occasion stuck out in her mind because she was home from school with an upset stomach. Nevertheless, defendant forced her to perform fellatio on him and she gagged when he ejaculated into her mouth. A relatively recent incident involved the victim awakening in her apartment to find defendant beside her bed. Defendant had let himself in using a spare key the victim had given his wife. He pinned the victim, ripped off her underwear, and forcibly penetrated her vagina with his penis. The most recent event occurred when he forced her to have intercourse (in his words, "for old-times' sake") during a visit when she expected him to be absent. She was twenty-two years old. Her testimony reflected that the eight incidents she related at trial were merely the incidents, out of hundreds, that she remembered most clearly.

In addition to the victim's testimony, a police officer testified that defendant admitted having sexual intercourse with the victim on at least two occasions over a six-month period. Defendant also told the police officer about an occasion a few years earlier when the victim emerged from the shower, approached him on his bed, and spontaneously began rubbing his exposed penis. Defendant told the officer that he had taken a dose of prescription drugs and did not respond to the victim. He mentioned that he soon lost his erection, so she began performing fellatio. He told the officer that the medication caused him to either black out or blank out and he did not remember anything else.

Defendant initially pleaded no contest to two of the charges, but later withdrew the plea. At trial, defendant denied any wrongdoing and denied admitting any sexual contact to police, but nevertheless testified about an incident very similar to the one the officer described. Defendant testified that he had taken his medication and was lying on his bed "half out of it" when the victim entered the room naked and attempted to have sex with him. In the defendant's account at trial, the event occurred only a few months before his arrest and he preempted any contact by telling her to "get her clothes on and go home." Defendant claimed that the victim contrived the allegations of abuse and rape because of his interference in her relationship with a boyfriend who was more than ten years her senior.

In response, the prosecution presented the victim's diary in which she described, from an early age, her fear of defendant, her vain efforts to ward off his advances, a concern for her younger sisters, reservations about telling the authorities, and her desire to live on her own, free from defendant's molestation.

Defendant first challenges the trial court's decision to provide the jury with a list of the elements of CSC I, II, and III rather than read them to the jury on the record. Defendant specifically waived this issue below when the trial court told counsel, "Here's a list of the elements. I wouldn't be giving it, since I don't want to – if no one – if you're both going to approve this, I'll do it. If somebody objects, I will read it to them; but I am going to give them a list anyway, so is there any objection to me not reading them?" To this inquiry, defense counsel responded, "No objection." While this was a lack of objection in form, in substance it was the expression of approval sought by the trial judge. Therefore, when viewed in context, defense counsel affirmatively accepted the trial court's decision to refrain from reading the elements, and we will not review this issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Moreover, defendant fails to demonstrate any error in the list of elements, or any reason why an oral presentation would be anything other than redundant. Therefore, the presentation did not prejudice defendant in any identifiable way, and defendant consequently fails to establish his

appellate claim of ineffective assistance of counsel. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

Defendant next contends that the trial court abused its discretion when it sentenced defendant to 18 to 35 years for each CSC I conviction and 9 to 15 years on each of the lesser CSC convictions. Defendant correctly admits that the judicial sentencing guidelines governed all the convictions except one of the charges of CSC I and the charge for CSC III. Regarding defendant's sentences for these counts, the sentencing court upwardly departed from the statutory guidelines by three years in the case of the CSC I sentence and by three years and one month on the CSC III sentence. The court reasoned that Prior Record Variable (PRV) 7, which addresses the number of defendant's convictions, only accounted for two of his concurrent convictions. The court explained that in its opinion, PRV 7 did not adequately weigh the extent of criminal activity in a case such as this where defendant received eight separate criminal sexual conduct convictions – six more than the guidelines account for. The trial court noted that defendant's guidelines scores after trial were identical with those he received at sentencing for the withdrawn plea despite the addition of six intervenient convictions.

This was not a case of several convictions stemming from one incident, but a situation where the prosecution only sought convictions for a fraction of the offenses that actually occurred and only sought one conviction for each separate sexual episode. Therefore, we agree with the sentencing court that the variable's score objectively and verifiably underrepresented the extent of defendant's criminal conduct and culpability in this case and that the inordinately low score provided the sentencing court with a substantial and compelling reason to add the extra three years or so to defendant's minimum sentence on each conviction. *People v Babcock*, 469 Mich 247, 273; 666 NW2d 231 (2003). Given the violent and intrusive nature of the sexual assaults underlying these convictions and defendant's extensive history of such assaults, the sentences were proportionate to defendant and the crimes he committed. *Id*. Therefore, we affirm the court's upward departure from the statutory sentencing guidelines for the CSC III conviction and the relevant CSC I conviction.

As for defendant's CSC II conviction, defendant argues that the sentencing court deviated from the old judicial sentencing guidelines by two years. Defendant acknowledges that the judicial guidelines lack the force of law, but suggests that the sentence imposed for the CSC II conviction violates the principle of proportionality. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). Defendant admits that the balance of the CSC I convictions actually fall within the old judicial guidelines range, but challenges those sentences on proportionality grounds as well. *Id*. We disagree with defendant's arguments. The CSC II conviction stemmed from an incident where defendant attempted to force the victim to perform fellatio on him. Defendant's plans were interrupted by a noise before any penetration began but after he had forced the victim to massage his penis. The remaining CSC I cases relate to instances involving forced sexual penetration that occurred while the victim still lived in defendant's household. The evidence demonstrated that defendant engaged in forced sexual activities with his stepdaughter beginning at age eleven and continuing into her adult life. His conduct was an abominable abuse of his authority that did not cease even after the victim had established her independence and moved out of his home. The evidence showed that these crimes were utterly repulsive and terrifying to the victim, yet defendant established them as a routine part of her life. Therefore,

defendant did not receive disproportionately high sentences for his conduct, because the sentences adequately reflect the seriousness of the offenses and culpability of this offender. *Id*.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Peter D. O'Connell