1994 WL 233606
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Court of Appeals of Minnesota.

Enrique BRIVIESCA, petitioner, Appellant,

v.

STATE of Minnesota, Respondent.

No. C3-94-21.
|
May 31, 1994.
|
Review Denied July 8, 1994.

Appeal from District Court, Meeker County; John J. Weyrens, Judge.

Attorneys and Law Firms

John M. Stuart, State Public Defender, Susan K. Maki, Asst. State Public Defender, Minneapolis, for appellant.

Hubert H. Humphrey, III, Atty. Gen., Robert A. Stanich, Asst. Atty. Gen., St. Paul, Michael J. Thompson, Meeker County Atty. Gen., Litchfield, for respondent.

Considered and decided by LANSING, P.J., and FORSBERG and DAVIES, JJ.

UNPUBLISHED OPINION

DAVIES, Judge.

***1** Appellant challenges the denial of postconviction relief from his first degree criminal sexual conduct conviction. He alleges prosecutorial failure to make a necessary disclosure, error in jury instruction, and improper sentence. We affirm.

FACTS

Appellant Enrique Briviesca, Jr., who lived with his girlfriend and her young children from July to December 1991, was convicted of first degree criminal sexual conduct for sexually abusing the girlfriend's eight-year-old daughter. Appellant controlled the house while he lived there, required the victim to call him "dad," and attacked her on several occasions while her mother was away. On each occasion, appellant covered the victim's face with a blanket or towel and penetrated her vagina with his penis and his finger.

After appellant's arrest, a jailer asked him to speak with an investigator about the case, and appellant refused. Because there was no record of this conversation, the prosecutor did not disclose it to appellant's counsel, who did not learn of the conversation until trial.

Appellant was charged with four counts of first degree and three counts of second degree criminal sexual conduct. The court instructed the jury separately on each count, and submitted separate verdict forms for each count. The jury was not, however, given the final sentence of CRIMJIG 3.20, advising how uncertainty in multi-charge cases should be handled. The jury found appellant guilty on all counts.

For convenience in sentencing, the trial court vacated all convictions except for one count of first degree criminal sexual conduct. The sentencing court departed from the presumptive sentence of 86 months, and sentenced appellant to 116 months based on the multiple acts, and the victim's age and particular vulnerability. Appellant, who did not appeal his conviction, sought postconviction relief under Minn.Stat. § 590.01-.06 (1992), which relief was denied.

DECISION

I.

Appellant alleges that his conversation with the jailer was an "oral statement," and that the prosecutor's failure to disclose the conversation was prejudicial. Appellant relies on *State v. Kaiser,* 486 N.W.2d 384, 387 (Minn.1992), and contends that the postconviction court should have ordered a new trial as a sanction for the nondisclosure. We disagree.

A prosecutor must disclose "the substance of any oral statements which relate to the case." Minn.R.Crim.P. 9.01, subd. 1(2). In *Kaiser,* the prosecutor deliberately withheld information that should have been disclosed. *Kaiser,* 486 N.W.2d at 387. Here, however, the prosecutor did not disclose

the information based on a good-faith interpretation of rule 9.01.

Furthermore, the prosecution did not exploit the nondisclosure and made almost no use of the undisclosed conversation. After appellant presented evidence that no one had questioned him while in custody, the prosecutor asked appellant whether he remembered his conversation with the jailer. After appellant responded "No, I don't recall," the prosecutor did not cross-examine, call any witnesses, or offer other evidence to rebut appellant's testimony. Nor did the prosecutor refer to the issue in closing argument.

***2** Thus, appellant's conversation with the jailer was, at most, a marginal issue at trial. The postconviction court did not abuse its discretion by finding that there was not a reasonable probability that the outcome would have been different if the conversation had been disclosed.

II.

Appellant argues that the trial court erred by failing to instruct the jury under CRIMJIG 3.20, which states that if the jury finds the defendant committed a crime, but is unsure which crime, the jury should find the defendant guilty of only the lesser crime. 10 *Minnesota Practice,* CRIMJIG 3.20 (1990).

Here, however, appellant did not request any such instruction at trial and did not object to the lack of that instruction. Where a defendant fails to object at trial he cannot challenge the jury instructions on appeal. *State v. Dahlstrom,* 276 Minn. 301, 310-11, 150 N.W.2d 53, 60-61 (1967). Furthermore, the court instructed the jury separately on each count. Accordingly, we find no error.

III.

This court reviews a sentencing departure for abuse of discretion. *State v. Garcia,* 302 N.W.2d 643, 647 (Minn.1981). This court will affirm a departure if sufficient evidence to justify departure appears in the record, even if the stated reason is invalid. *Williams v. State,* 361 N.W.2d 840, 844 (Minn.1985).

But a court may not depart upward from the sentencing guidelines for conduct that is an element of the offense. *State v. Brusven,* 327 N.W.2d 591, 593 (Minn.1982). Here, the trial court sentenced appellant for a violation of Minn.Stat. § 609.342, subd. 1(h)(v) (1990). The elements of this crime are: (1) sexual penetration; (2) by a person with a significant relationship to the victim; (3) while the victim is under 16 years of age; and (4) the sexual abuse involves multiple acts committed over an extended period of time. Minn.Stat. § 609.342, subd. 1(h)(v) (1990). A significant relationship includes an adult who resides in the same house as the victim. Minn.Stat. § 609.341, subd. 15 (1990).

At sentencing, the trial court based its upward departure on, among other things, the victim's particular vulnerability. In affirming the trial court's sentence, the postconviction court found that the victim was particularly vulnerable based on: (1) her age, (2) because appellant covered her face with a blanket or towel during the offenses, and (3) because appellant had a significant relationship with her and lived in the same house.

We believe the postconviction court did not abuse its discretion because the record supports the finding that the victim was particularly vulnerable, and particular vulnerability is not an element of this offense. A victim can be particularly vulnerable because of age, even if age is an element of the offense. *State v. Partlow,* 321 N.W.2d 886, 887 n. 1 (Minn.1982) (victim two years old). Moreover, the record indicates that appellant physically restrained the victim during the assaults, and dominated both the victim and her household. Thus, a basis for the departure-the victim's particular vulnerability-appears in the record. *See State v. Kobow,* 466 N.W.2d 747, 753 (Minn.App.1991) (holding that victim's particular vulnerability, alone, is sufficient to support upward departure), *pet. for rev. denied* (Minn. Apr. 18, 1991).

***3** Nor do we believe that the extent of the departure is disproportionate. The court deviated upward by only 35 percent. The sentencing court did not abuse its discretion in sentencing appellant to 116 months in prison.

IV.

Appellant raises several issues in his supplemental pro se brief. Because appellant did not raise these issues in his petition for postconviction relief, they are not before this court at this time.

Affirmed.

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