

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY H. KOBE,

Defendant-Appellant.

UNPUBLISHED

March 18, 1997

No. 179113

Oakland Circuit Court

LC Nos. 93-126119;

93-126120; 93-126121

Before: McDonald, P.J., and Murphy and M.F. Sapala*, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of criminal sexual conduct, first-degree, MCL 750.520(1)(b); MSA 28.788(2)(1)(b). He was sentenced to thirty to sixty years' imprisonment on each count. Because defendant pleaded guilty to habitual offender, fourth offense, MCL 769.12; MSA 28.788(2)(1)(b), those sentences were vacated and defendant was sentenced as an habitual offender to thirty to sixty years' imprisonment. Defendant now appeals as of right. We affirm his convictions but remand to the trial court to correct defendant's sentence.

Defendant first argues that he was denied a fair trial because the prosecutor impeached his testimony with a pending escape charge that had not yet resulted in a conviction. When questioning defendant at trial, the prosecutor brought out that defendant had been arrested for the current charges in the State of Nevada and had been charged with escape from a correctional program in Alabama. Defendant did not object to this testimony at trial. Generally, to preserve an evidentiary issue for review, a defendant must object at trial and specify the same ground for objection that he asserts on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). Moreover, an error in the admission of evidence is not ground for granting a new trial or setting aside a verdict unless refusal to take this action appears to the court inconsistent with substantial justice. MCR 2.613(A); *Grant, supra* at 545.

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

We find that the admission into evidence of defendant's escape from an Alabama prison was more prejudicial than probative and was not relevant to an issue of fact at trial other than defendant's character, contrary to MRE 404(b); *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993). However, we do not find that the admission was inconsistent with substantial justice and requires a new trial. MCR 2.613(A); *People v Winchell*, 171 Mich App 662, 665; 430 NW2d 812 (1988). While in police custody, defendant admitted that fellatio had occurred with his young daughter between five and ten times. He was charged and convicted of three occurrences. We cannot say that it is reasonably possible that a juror might have voted to acquit defendant without the evidence of his escape from an Alabama institution.

Defendant also complains that the prosecutor improperly questioned him about his convictions in Alabama, to which he admitted that he had pleaded guilty to twenty-two burglaries. Again, defendant did not object to this question at trial. In deciding whether to admit a prior theft conviction to impeach a witness who is the defendant, the trial court first must determine that the crime was punishable by more than one year in prison. The trial court must then exercise its discretion in balancing the "degree of probativeness and prejudice inherent in the admission of the prior conviction." *People v Allen*, 429 Mich 558, 606; 420 NW2d 499 (1988). MRE 609, which governs the admission of prior convictions to impeach a witness, leaves the admission of most theft crimes to impeach the testimony of a defendant-witness to the discretion of the trial court. *Id.* at 596. An erroneous admission of a prior conviction is subject to a harmless error analysis upon review. *Id.* at 612.

Defendant's argument that these convictions should not have been admitted because they were more than ten years old does not comport with MRE 609(c), which provides that a prior conviction is inadmissible if "more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." Because defendant escaped before serving out his sentence for the Alabama convictions, the ten-year period had not even begun to run. See *People v Coddington*, 188 Mich App 584, 506; 470 NW2d 478 (1991). Although the admission of these prior convictions without a determination of their probative value and prejudicial effect is error, defendant's failure to object at trial precludes review of the issue by this Court absent a miscarriage of justice. *People v Robinson*, 172 Mich App 650, 656; 432 NW2d 390 (1988). Because defendant admitted to the charged conduct and because sufficient evidence was presented at trial to convict him of the charged offenses, no miscarriage of justice will occur by our refusing to review this issue.

Defendant next argues that he was deprived of effective assistance of counsel because his attorney did not object to the admission of this evidence. In order to succeed on an ineffective-assistance-of-counsel claim, a defendant must first show that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 687-688. In other words, defendant must show that he was prejudiced by his counsel's failure to

challenge the trial court proceedings. *People v Zinn*, 217 Mich App 340, 350; 551 NW2d 704 (1996).

By failing to object to any of the questionable evidence, defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. However, defendant has not demonstrated that he was prejudiced by his counsel's failure to challenge the trial court proceedings. His confession removes this case from a close credibility contest between defendant and his young daughter. The trial court held a *Walker* hearing and determined that defendant's statement was voluntary. Defendant does not contest the results of that hearing. Therefore, he has not shown that, but for his counsel's errors, a reasonable juror might have voted to acquit him.

Next, defendant argues that he was denied a fair trial by prosecutorial misconduct. In particular, he complains of the prosecutor's questioning of witnesses whether they believed the complainant or defendant, the improper use of the complainant's prior consistent statements to bolster her credibility, the repeated questioning of defendant regarding the believability of prosecution witnesses, and the prosecutor's closing arguments in which defendant alleges the government's burden of proof was distorted. Defendant did not object at trial to any of the complained-of testimony or prosecutorial remarks. Absent a timely and specific objection, appellate review of allegedly improper remarks or questioning by the prosecutor is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *Stanaway, supra* at 687. No miscarriage of justice will occur if we decline to review this issue. Had there been a timely objection when the prosecutor asked questions intended to bolster the complainant's credibility, the trial court could have cautioned the prosecutor and instructed the jury to ignore the testimony. Moreover, the complainant's testimony was not the sole evidence that a crime had been committed. Defendant confessed to the police that he had committed criminal sexual conduct with his young daughter. Furthermore, although it is improper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses, this error does not require reversal of defendant's conviction. See *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1988). Finally, we do not agree with defendant that the prosecutor shifted the burden of proof to defendant in his closing arguments. A review of the prosecutor's comments reveals that he simply argued from the evidence that defendant was not worthy of belief, which is acceptable prosecutorial argument. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant next argues that the trial court erred in denying his motion for resentencing because he was improperly scored fifty points for Offense Variable (OV) 12. We disagree. In *People v Raby*, 218 Mich App 78, 82 fn 2; 554 NW2d 25 (1996), we noted: "In first-degree and third-degree criminal sexual conduct, the penetration that forms the basis of the conviction offense may not be scored. Sentencing Guidelines, p 45." However, a "defendant's ongoing penetrations of a victim over an extended period can constitute acts that occurred in a continuous time sequence and displayed a single intent or goal." *Id.* at 83. Here, the complainant testified to three separate penetrations, all of which resulted in separate convictions for defendant. However, defendant admitted while in custody that his daughter had performed fellatio on him between five and ten times. Therefore, the trial court did

not abuse its discretion in scoring fifty points under OV 12. Moreover, the sentencing guidelines are inapplicable to defendant who pleaded guilty to being an habitual offender. See *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995). The review of habitual offender sentences is limited to considering whether the sentence violates the principle of proportionality without reference to the guidelines. *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996). Here, defendant could have been sentenced to a term of life or any lesser term. His sentence was not excessive nor disproportionate.

Defendant next argues that the trial court erred in ordering that his Michigan habitual offender sentence be served consecutively to his remaining sentences in Alabama. Consecutive sentencing is not to be used except when specifically authorized by statute. *People v Nantelle*, 215 Mich App 77, 79; 544 NW2d 667 (1996). MCL 768.7a; MSA 28.1030(1) provides that when a person commits a crime while escaped from prison, the sentence for that crime shall be served consecutively to the unexpired time from any prior conviction. See *People v Miller*, 152 Mich App 508, 513; 394 NW2d 459 (1986). However, the plain language of this statute shows that it only applies to escapes from penal or reformatory institutions located within the State of Michigan. Because defendant escaped from an out-of-state prison, this statute does not apply, and we have not been presented with any other statutory authority that would justify a consecutive sentence in this matter. Therefore, the trial court erred in ordering a consecutive sentence.

Defendant's argument that he is entitled to be resentenced before a different judge because the sentence imposed is disproportionate is not preserved for our review and is moreover without merit.

Finally, defendant argues that he is entitled to be resentenced because the trial court considered invalid convictions at his sentencing. Although defendant previously argued before the trial court that for some of his Alabama convictions he was not represented by counsel, he argues for the first time on appeal that some of these convictions did not exist.

A defendant who collaterally challenges an antecedent conviction on the basis that he was not represented by counsel bears the initial burden of establishing that the conviction was obtained without counsel. *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994). He can satisfy this initial burden by presenting "prima facie proof" that a previous conviction was obtained without counsel such as "a docket entry" or "a transcript" or by presenting evidence that the defendant requested such records and the sentencing court "either (a) failed to reply to the request, or (b) refused to furnish copies of the records." *Id.* Defendant has failed to meet this threshold standard.

Moreover, after his convictions of criminal sexual conduct, defendant pleaded guilty to being an habitual offender and acknowledged three prior convictions, two in Alabama and one in Michigan, to the trial court. In sentencing habitual offenders, the existence of prior convictions can be established by the trial court through a statement of the defendant. *Zinn, supra* at 345. Even if some of the "twenty-two prior convictions" did not exist, or were obtained without representation, defendant has not shown that he suffered prejudice in his sentencing.

Defendant's convictions are affirmed, but the case is remanded to the trial court to enter an appropriate judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ William B. Murphy

I concur in the affirmance of the conviction only because the properly admitted confession of the defendant persuades me that a reasonable juror would not have voted to acquit. It is abundantly clear from the record that defense counsel's performance fell substantially below an objective standard of professional norms. Without the confession and its resultant bolstering of the daughter's credibility, defense counsel's ineffectiveness alone would require a new trial.

/s/ Michael F. Sapala