STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOYD GORDON PECK,

Defendant-Appellant.

UNPUBLISHED
November 14, 1997

No. 188494
Genesee Circuit Court
LC No. 95-052071-FC

Before: Corrigan, C.J., and Michael J. Kelly and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and was sentenced to eighteen to twenty-five years' imprisonment. Defendant appeals as of right. We affirm defendant's conviction but remand for entry of a sixteen-year, seven-month minimum sentence in compliance with the indeterminate sentencing law.

Defendant first argues that the trial court abused its discretion in denying his motion for a mistrial because he was denied an impartial trial by virtue of the inevitable bias sustained when one of the jurors spoke with the detective in charge of the case. A trial court's grant or denial of a motion for mistrial will not be reversed on appeal absent an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id.*

Here, we find that defendant has failed to demonstrate that he was prejudiced by the ex parte communication between the juror and the detective, who did not testify at trial. The two spoke about the weather, fathers' equal rights, and the length of jury duty. They did not discuss defendant's case. The juror immediately reported the contact he had with the detective to the jury coordinator. Defendant claims that the communication produced a reasonable possibility of prejudice because the juror must have felt a "connection" with the prosecution after conversing with the officer in charge of the case. However, aside from this general assertion, defendant does not demonstrate that the jury failed to be impartial or that they convicted defendant based on this juror's relatively innocuous communication with the detective. Rather, the court instructed the juror not to discuss the issue with the other jurors or tell

them what had happened. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a mistrial because there was no indication that defendant was prejudiced by the conversation.

Defendant next argues that a police officer improperly vouched for the victim's credibility by stating that he believed the victim was telling the truth when she accused defendant of sexually assaulting her. Because defendant did not object to the admission of the officer's testimony at trial, this Court may only take notice of plain errors that affect the substantial rights of a party. *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994). An error affects the substantial rights of a defendant if it affected the outcome of the proceedings. *Id*. at 552-553.

Because matters of credibility are to be determined by the trier of fact, it is improper for a witness to comment or provide an opinion on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). In this case, despite the prosecutor cautioning the officer not to state whether he thought the victim was telling the truth or lying, the officer testified that he thought she was telling the truth. Thus, the officer plainly vouched for the victim's credibility. However, we believe that the error did not affect defendant's substantial rights, because it did not likely affect the outcome of the proceedings. The victim testified that defendant molested her on a Saturday in November 1994, and that she told a family friend that he did. The friend testified that the victim told her that defendant molested her. Although defendant denied that he molested the victim or that he was present at her residence at any time in November 1994, aside from Thanksgiving day, the victim, her mother and the friend testified that defendant baby-sat the victim and her siblings in November 1994. The victim's mother stated that defendant baby-sat on at least two Saturdays during the month of November. Defendant's supervisor testified that defendant did not work on three of the Saturdays in November. Although defendant's girlfriend testified that defendant was with her on two of the Saturdays and did not baby-sit on the other two Saturdays in November, she only testified as to their activities on Saturday, November 26. Therefore, on the basis of the ample evidence described above, we conclude that the officer's testimony that he believed that the victim was telling the truth about defendant did not likely affect the outcome of the proceedings.

Defendant also argues that the officer improperly referred to alleged similar acts when he volunteered that the victim's sisters stated that the same thing that happened to the victim also happened to them. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. MRE 404(b)(1). However, evidence that is relevant[1] to an issue other than a defendant's criminal propensity may be admitted if the danger of undue prejudice does not substantially outweigh its probative value.[2] *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). Specifically, evidence of other acts is admissible to prove motive, opportunity, intent, preparation, scheme, plan, or system in doing an act. MRE 404(b)(1).

Here, the prosecutor asked the officer whether the victim's behavior was consistent with the behavior of a child who was telling the truth, and he volunteered, "Her conduct and her behavior, I believe she was--she wasn't exaggerating a bit with what she was telling me. When I ask the other two what happened they said the same thing that happened to them, and they overheard what was being

discussed." It was not clear from the officer's comment whether he was stating that the victim's sisters also accused defendant of molesting them; however, it appears likely that is what he intended. Aside from the officer's indistinct and unsolicited comment, the prosecutor did not provide any other indication that defendant also molested the victim's sisters. Even assuming arguendo that the officer's comment amounted to evidence of a prior bad act, there was no opportunity for the prosecutor to explain its propriety because defendant did not raise the issue at trial. Evidence of other acts could have been relevant to prove motive, opportunity, intent, preparation, scheme, plan, or system in doing the alleged act. Because there was only one dubious comment on the issue and there was ample other evidence from which the jury could reasonably believe that defendant molested the victim, any error in the admission of the officer's testimony in this regard was harmless. See *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994).

Next, defendant claims that he was denied the effective assistance of counsel by his attorney's failure to object to the officer's testimony. Because defendant did not move for a new trial or an evidentiary hearing, this Court's review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). In order to succeed on a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. Defendant must also overcome a strong presumption that counsel's assistance constituted sound trial strategy. Second, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Because the admission of the officer's comments did not affect defendant's substantial rights, and there is no reasonable probability that the result of the proceedings would have been different absent the unobjected to testimony, defendant has not demonstrated that he was denied effective assistance of counsel.

Defendant next argues that the trial court erroneously failed to sua sponte give a cautionary instruction to the jury or strike the hearsay testimony of a family friend in which she stated that the victim told her that defendant touched her in her private areas. In order to preserve an evidentiary issue for appellate review, the opposing party must object at trial and specify the same grounds for objection as it asserts at trial. MRE 103(a)(1); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Although defendant objected to the testimony of this witness on the basis that it was hearsay, he did not move to strike the testimony or request a cautionary instruction at trial. Defendant has provided no authority for his claim that the trial court was required to have sua sponte taken such action.

Defendant next argues that his minimum term of eighteen years' imprisonment is greater than two-thirds of the maximum twenty-five year term, and thus violates the indeterminate sentencing act. We agree. See MCL 769.8(1); MSA 28.1080(1); *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). Therefore, this Court must reduce defendant's minimum sentence to two-thirds of the twenty-five year maximum, which is sixteen years, seven months. *People v Thomas*, 447 Mich 390, 392-394; 523 NW2d 215 (1994).

Defendant also argues that his sentence was disproportionate. This Court reviews a defendant's claim that his sentence is disproportionate for an abuse of discretion. *People v Milbourn*,

435 Mich 630; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* The sentencing guidelines are intended to assist the court in assessing the appropriate sentence and to promote consistency in sentencing. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). A sentence that falls within the guidelines range is presumptively valid. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

In this case, the sentencing guidelines' recommended minimum sentence for the underlying offense of first-degree criminal sexual conduct was from eight to twenty years. Defendant's sixteen-year, seven-month minimum sentence falls within the guidelines range and is presumptively valid. Moreover, there are no unusual circumstances that would make the sentence disproportionate. Defendant was a fifty-one-year-old man who frequently baby-sat the twelve-year-old victim and her younger siblings. The victim testified that defendant took her into her mother's bedroom, removed her pants and underwear and inserted his tongue into her vagina. Although defendant indicates that he had no prior criminal record and had a favorable work history, these circumstances do not mitigate the fact that he was convicted of molesting a child to whom he was a caregiver. Accordingly, defendant's new minimum sentence is not disproportionate to the circumstances of the offense and the offender.

Because we find defendant's sentence to be proportionate, defendant's challenges to the scoring of the guidelines do not state a cognizable claim on appeal. *People v Mitchell*, 454 Mcih 145, 177-178; 560 NW2d 600 (1997).

We affirm defendant's conviction, but remand for entry of a sixteen-year minimum sentence.

/s/ Maura D. Corrigan
/s/ Joel P. Hoekstra

[1] Relevant evidence is defined by MRE 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[2] MRE 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."