

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ALAN CLAY,

Defendant-Appellant.

UNPUBLISHED

August 26, 2003

No. 239372

Kalkaska Circuit Court

LC No. 00-002031-FH

Before: Hoekstra P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of four counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a). He was sentenced to 71 to 180 months' imprisonment for each conviction, to be served concurrently. Defendant appeals as of right. We affirm his convictions, but remand for resentencing.

Defendant first argues that the trial court violated his due process right to an impartial jury by allowing jurors to present questions for witnesses during trial. Defendant failed to object to the trial court's conduct at trial. Accordingly, this Court's review of this unpreserved claim is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

In *People v Heard*, 388 Mich 182, 187; 200 NW2d 73 (1972), the Michigan Supreme Court first addressed the "practice of permitting questions to witnesses propounded by jurors," and held that the practice "should rest in the sound discretion of the trial court." The Court stated:

It would appear that in certain circumstances, a juror might have a question which could help unravel otherwise confusing testimony. In such a situation, it would aid the fact-finding process if a juror were permitted to ask such a question. We hold that the questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court. The trial judge may permit such questioning if he wishes [*Id.*, at 187-188.]

Further, this Court has stated that "[a]lthough the *Heard* opinion specifically referred to juror questions which 'help unravel otherwise confusing testimony' we do not believe that the Court meant to limit juror questions to only those situations, but, rather, was merely posing an example

of where juror questions might aid in the fact-finding process.” *People v Stout*, 116 Mich App 726, 733; 323 NW2d 532 (1982).

On three occasions during trial, jurors were permitted to ask witnesses a question. However, before the witness was asked the question, the trial court screened it and the attorneys then reviewed the question. One of these questions asked the victim whether her parents had spoken to her about not having sexual intercourse. Another asked Pluszcynski if defendant had mentioned additional details of his sexual relations with the victim. The final question asked defendant why two witnesses did not like him and why the victim’s family wanted him to leave. While the second question helped to unravel otherwise confusing testimony, the remaining questions, and to an extent the second question, essentially related to that witness’ respective credibility or bias. It is the province of the jury to assess the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Accordingly, the trial court was within its discretion to allow the jurors to aid the fact-finding process in this manner. Further, the trial court’s screening of the questions reflects that the questions were competent and defense counsel’s acceptance of the questions indicates that the jurors were not prejudiced against defendant. Therefore, defendant has not show a plain error that affected his substantial rights.

Defendant requests that this Court overrule the “practice of permitting questions to witnesses propounded by jurors.” However, it is the Supreme Court’s obligation to overrule or modify case law. *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Therefore, we decline to address defendant’s request.

Defendant next argues that he was the denied effective assistance of counsel because defense counsel failed to object to other bad acts evidence and because defense counsel failed to object to the trial court assigning ten points under offense variable 9. Because defendant failed to move for an evidentiary hearing or motion for new trial before the trial court, this Court will only consider counsel mistakes to the extent that they are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that (1) “counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment,” and (2) “the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *People v Carbin*, 463 Mich 590, 599-600, 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668, 687, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). Defendant first argues that defense counsel was ineffective in failing to object to evidence of other bad acts. MRE 404(b) governs admission of evidence of bad acts. It provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Prior bad acts evidence is admissible if: (1) the evidence is offered for a proper purpose; (2) the evidence is relevant; and (3) the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is offered. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205; 520 NW2d 338 (1994); *People v Hawkins*, 245 Mich App 439, 447-448; 628 NW2d 105 (2001).

Defendant was charged with four counts of third-degree criminal sexual conduct arising out of several instances of sexual intercourse with a fourteen-year-old girl occurring while he baby-sat his live-in girlfriend's children. It was invariably during the time that defendant baby-sat for his girlfriend's children that he had sexual intercourse with the victim. At trial, the prosecution presented the testimony of a daughter of defendant's girlfriend, who defendant also had sexual intercourse when she was fourteen and while he baby-sat her siblings. This evidence was offered to show how defendant used his position as a caregiver to have sexual intercourse with underage girls, and thus showed defendant's plan, scheme or system.

On appeal, defendant argues that defense counsel was ineffective in failing to object to the admission of testimony from his girlfriend's daughter that related to an instance of sexual intercourse where she and defendant had taken a motorcycle ride away from the house, and then had sexual intercourse. We disagree. This instance arose from defendant's position as caregiver and was therefore relevant to defendant's plan, scheme or system of using that position to create the opportunity for sexual intercourse with underage girls. The evidence was properly admitted. Counsel does not render ineffective assistance by failing to raise futile objections. *Hawkins*, *supra* at 457.

Defendant last argues that defense counsel was ineffective in failing to object to the trial court's assigning him ten points for offense variable 9 (number of victims). "Sentencing is a critical stage at which a defendant has a constitutional right to counsel that includes the right to effective assistance of counsel." *People v Russell*, 254 Mich App 11, 19; 656 NW2d 817 (2002).

The trial court scored defendant ten points for offense variable 9 (number of victims), indicating that there were two to nine victims. MCL 777.39(1)(c). The trial court is instructed to "[c]ount each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a). The offense for which defendant was convicted involved only one victim, but, as previously mentioned, there was testimony that defendant engaged in similar conduct with his girlfriend's daughter.¹ Defendant argues, and the prosecution concedes, that it was on the basis of this testimony alone that the trial court assessed ten points for offense variable 9. On appeal, defendant argues that offense variable 9 refers only to the victims related to the charged offense, and that he was improperly scored for two victims. We agree.

Notably, defendant failed to present this issue having failed to raise it before, during, or after sentencing. MCL 769.34(10) provides:

¹ Unfortunately, this witness died in an automobile accident before trial and the charges against defendant were dismissed.

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

However, this Court has held that a defendant nonetheless secures appellate review of a sentencing issue when the issue is raised under the rubric of an ineffective assistance of counsel claim. *People v Kimble*, 252 Mich App 269, 279 n 7; 651 NW2d 798 (2002); *Harmon*, *supra* at 530.

In *People v Chesebro*, 206 Mich App 468, 469-473; 522 NW d 677 (1994), this Court held, under the judicial sentencing guidelines' offense variable 6 (number of victims), that "offense variables are to be scored only with respect to the specific criminal transaction that gives rise to the conviction for which the defendant is being sentenced unless the instructions for a variable specifically and explicitly direct the trial court to do otherwise." The judicial sentencing guidelines' offense variable 6 is identical to the instruction for offense variable 9 of the statutory sentencing guidelines. Michigan Sentencing Guidelines (2d ed) at 44; MCL 777.39(2)(a). The prosecution properly concedes that offense variable 9 refers only to victims related to the crimes charged. Since it was error to score defendant ten points under offense variable 9, an argument can be made that defense counsel was deficient in failing to object to the erroneous scoring.

Here, neither party disputes that error occurred. We conclude that defendant's counsel's error falls below the objective standard of reasonableness. The sentencing information report indicates that there were two or more victims of defendant's crimes, but it is undisputed that there was only one victim in this case. A review of the points scored for offense variables should have revealed this scoring error. Moreover, defense counsel was keenly aware that the charges based on defendant's sexual relations with the daughter of defendant's girlfriend had been dismissed, and thereby knew that she should not be considered a victim of the instant crimes.

Further, defense counsel's error caused defendant prejudice. Defendant's sentencing guidelines range was thirty-six to seventy-one months' imprisonment. The trial court sentenced defendant to 71 to 180 months' imprisonment. Subtracting the erroneously scored offense variable points, defendant's sentencing guidelines range is twenty-nine to fifty-seven months' imprisonment. MCL 777.64. Thus, "but for counsel's error, the result of the proceeding would have been different," as defendant sentencing guidelines range would have been twenty-nine to fifty-seven months instead of thirty-six to seventy-one months. *Carbin*, *supra* at 600. This difference establishes prejudice from defense counsel's error. Therefore, to tailor the remedy to the injury suffered, resentencing is required. *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995).

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ David H. Sawyer

/s/ Brian K. Zahra