

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS ANTHONY GOODMAN,

Defendant-Appellant

UNPUBLISHED

August 28, 2007

No. 269620

Wayne Circuit Court

LC No. 05-010643-01

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct (“CSC”), MCL 750.520b(1)(a) (sexual penetration of a person under 13 years of age), and one count of second-degree CSC, MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age). Defendant received concurrent sentences of 225 to 600 months’ imprisonment for each first-degree CSC conviction and 84 to 180 months’ imprisonment for the second-degree CSC conviction. We affirm.

I. Facts

In May 2005, the victim, a 10-year-old boy, reported to his school’s social worker that defendant, a close friend of the victim’s mother, had been “bothering” him. The victim told the social worker that he had been living with defendant since January 2005 and reported that defendant frequently forced him to engage in oral and anal sex. School officials called the Detroit Police Department. Soon thereafter, an officer with the department took the victim to the Sixth Precinct in Detroit for further questioning, and the victim again described the instances of sexual abuse committed by defendant.

At trial, the victim described the most recent instance of sexual abuse that had occurred. According to the victim, defendant picked him up from his father’s house but did not take him to school. Instead, defendant and the victim went to the victim’s mother’s house. The victim’s mother was not home. Defendant and the victim were watching television and started wrestling. Then, defendant began touching the victim’s genital area. Although the victim told him to stop, defendant put his genitals near the victim’s mouth and “talk[ed] about sucking it.” The victim declined. Soon thereafter, defendant came up behind the victim and “started humping on [him].” Defendant pulled down the victim’s shorts. The victim felt something “inside [his] butt” that was painful. Defendant ejaculated.

The victim testified that defendant had performed similar actions approximately 14 or 15 times before, admitted that “sometimes” defendant inserted his penis inside the victim’s anus and described another instance in which anal sex occurred. The victim also testified that defendant had forced him to perform oral sex at least three times.

II. Ineffective Assistance of Counsel

Defendant argues that he received ineffective assistance of counsel because his trial counsel failed to challenge opinion testimony by two witnesses concerning the victim’s veracity and several instances of inadmissible hearsay. We disagree.

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In general, we review a trial court’s findings of fact for clear error and review questions of constitutional law de novo. *Id.* Because defendant “failed to move for a new trial or an evidentiary hearing with regard to his claim, review is limited to mistakes apparent on the record.” *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel, defendant “must show that his attorney’s representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To establish prejudice, “a defendant must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different’” *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). Defendant must also overcome the presumption that the challenged action constitutes sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Where, however, the defendant is denied counsel during a critical stage of the proceedings, the proceedings are presumed to have been unfair. *United States v Cronin*, 466 US 648, 662; 104 S Ct 2039; 80 L Ed 2d 657 (1984). In that case, the conviction is constitutional error and no showing of prejudice is required. *Id.* at 659 n 25.

As an initial matter, counsel’s performance in this case does not rise to the level of denial of counsel as contemplated by the *Cronin* Court. Counsel was neither “totally absent” during a critical stage of the proceeding, nor did she “entirely fail[] to subject the prosecution’s case to meaningful adversarial testing.” *Id.* at 659 & n 25. Counsel cross-examined each prosecutorial witness during the trial and presented two defense witnesses in addition to defendant. She presented a competent opening statement, closing argument, and theory of the case. Therefore, defendant was required to show both that counsel’s performance was unreasonable and that he was prejudiced by her deficient performance.

With respect to defendant's argument that his trial counsel was ineffective for failing to challenge the opinion testimony of two witnesses concerning the victim's veracity, we note that "[i]t is generally improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). However, defendant fails to identify the witnesses and statements to which he refers. We speculate that he is referring to a statement by the school social worker, who testified that when the victim told her about the alleged abuse, she "looked in his eyes" and saw "sincerity." In this instance, however, defense counsel objected. The trial court overruled the objection, reasoning that the social worker could "testify as to what she did and what she perceived. It's personal knowledge." Counsel's performance in that instance was not deficient because she raised an objection. It is not clear to what other instance of opinion testimony defendant refers.

We agree that the failure of defendant's trial counsel to challenge the admission of inadmissible hearsay was unreasonable and constituted deficient performance. Three of the prosecution's witnesses testified regarding the victim's statements concerning the alleged sexual abuse. The school social worker testified:

And so then I asked him to clarify what he was—what he meant by hurting him and he said, 'Well, he does sexual things to me, um, in the home at night.' There are other people that live in the home but he would wait until these people were in bed and then he would come into the room where he was and he said that, um, he did oral sex and that he does it—quote, 'He does it to me in my butt.'

The victim's mother testified:

He looked me in my face and he said, 'Ma, I never ever would try to destroy your friendship with your brother but your brother touched me and I need for you to believe me.' With tears running down his eyes he said, 'I'm your child and I need you to believe that your brother has been hurting me.'

In addition, a police officer testified, "[the victim] said that his uncle had been sexually abusing him."

These and other statements made during trial constituted hearsay not falling within any exception. In particular, the statements do not fall within the exception in MRE 803A.¹ This hearsay exception only applies when the declarant was under 10 years of age when the statement was made. MRE 803A(1). The victim in this case was 10 years old when he first reported the alleged abuse.

¹ MRE 803A allows, under certain circumstances, the admission of a child-declarant's statement regarding sexual abuse to the extent it corroborates the declarant's testimony during the same proceeding.

The statements may fall under the rationale of the “catch-all” hearsay exception, MRE 803(24), and the prosecution properly notes our Supreme Court’s observation in *People v Katt*, 468 Mich 272, 295-296; 662 NW2d 12 (2003), that a child’s earlier statement is more probative than one repeated at trial. However, MRE 803(24) also provides:

[A] statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant. [MRE 803(24).]

Under this circumstance, admission of hearsay testimony under MRE 803(24) is not allowed. There is no indication that the prosecution provided any notice to defense counsel.

Finally, the statements do not fall under the hearsay exception for excited utterances. MRE 803(2). There was no indication that when the victim reported the alleged abuse he was “under the ‘sway of excitement precipitated by an external startling event’” and did not “‘have the reflective capacity essential for fabrication’” *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, *Evidence* (2d ed), § 803.04(1), p 803-819. The social worker’s testimony did not suggest that the victim lacked the capacity for fabrication at the time he spoke with her. She did not, for example, testify that he was scared, crying or shaking. See *People v McLaughlin*, 258 Mich App 635, 660; 672 NW2d 860 (2003) (finding an excited utterance where the declarant was “frantic” and having trouble breathing and speaking when she made the statement); *People v Kowalak (On Remand)*, 215 Mich App 554, 557-560; 546 NW2d 681 (1996) (finding an excited utterance where the statement was made 30 to 45 minutes after the startling event and where the declarant was “petrified” and “scared to death” at the time she made the statement). Therefore, defense counsel should have challenged the hearsay statements made by the social worker, the victim’s mother, and a police officer. Also, she should not have stipulated that, had a second police officer testified, he would have testified that the victim told him he had been sexually abused by defendant. There was no conceivable trial strategy for allowing the jury to hear these damaging allegations against defendant repeated by multiple witnesses.

However, defendant has not established that counsel’s failure to raise these objections was prejudicial in that, absent the admission of this hearsay evidence, the result of the trial would likely have been different. Even if the trial court ruled the evidence inadmissible, the social worker, the victim’s mother, and a police officer would likely have testified that they took certain actions as a result of what they learned from the victim. This would tend to show that the victim told them about the alleged sexual abuse and that they believed him. Moreover, the victim testified at trial and there is reason to believe that the jury was persuaded by his testimony. The victim was 10 years old when he reported the abuse and 11 years old when he testified at trial. He was old enough to have had a clear understanding of what was happening to him and his testimony was competent and consistent. Accordingly, there is no indication that the absence of the hearsay statements in question would have tipped the scales in defendant’s favor.

III. Sentencing

A. Constitutionality

Defendant argues that the trial court violated his constitutional right to trial by jury, as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), when it considered facts not admitted by defendant or established by a jury beyond a reasonable doubt when determining his minimum sentence. We disagree. In *People v Drohan*, 475 Mich 140, 143; 715 NW2d 778 (2006), cert den *Drohan v Michigan*, ___ US __; 127 S Ct 592; 166 L Ed 2d 440 (2006), our Supreme Court concluded that the United States Supreme Court's holding in *Blakely* does not apply to Michigan's indeterminate sentencing scheme. Accordingly, defendant's constitutional right was not violated.²

B. OV 11

Defendant also argues that the trial court erred in scoring him 50 points for offense variable ("OV") 11, because none of the alleged sexual penetrations used to score OV 11 arose from the sentencing offense. We disagree. We review a trial court's scoring decision for an abuse of discretion. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*

The sentencing court may score 50 points under OV 11 where two or more criminal sexual penetrations occurred. MCL 777.41(1)(a). OV 11 directs the sentencing court to "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). However, "the 1 penetration that forms the basis of a first- or third- degree criminal sexual conduct offense" cannot be scored. MCL 777.41(2)(c). A criminal sexual penetration that forms the basis of an additional criminal sexual conduct conviction may be scored under OV 11. *Cox, supra* at 455-456; *People v Mutchie*, 251 Mich App 273, 280-281; 650 NW2d 733 (2002), aff'd 468 Mich 50 (2003). In this case, defendant was convicted of four counts of first-degree criminal sexual conduct. Therefore, the statute operates to exclude the use of one of these sexual penetrations as the sentencing offense, *Mutchie, supra* at 280-281, but the remaining three criminal sexual penetrations for which defendant was convicted may be used to score OV 11, as long as these penetrations "arise out of" the sentencing offense.

² In addition, a sentencing court may consider all record evidence before it when calculating the guidelines, including admissions by the defendant, trial evidence or testimony, and the contents of the presentence investigation report. *People v Dewald*, 267 Mich App 365, 380; 705 NW2d 167 (2005); *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994).

The trial court in this case noted the “arising out of” requirement, but did not articulate its reasoning with respect to that requirement. We uphold scoring decisions for which there is any evidence in support, *Endres, supra* at 417, and there is some support for the proposition that the subsequent penetrations “arose out of” the first. Defendant’s sexual penetrations of the victim could be considered part of a pattern of defendant’s abuse of his close relationship with the victim’s mother. There is causal connection between the first penetration and subsequent penetrations; the subsequent penetrations occurred because defendant influenced the victim to not tell his mother by convincing him that she would not believe his allegations. Therefore, the trial court did not abuse its discretion in scoring defendant 50 points for OV 11.

C. OV 13

Finally, defendant argues that the trial court erred in scoring him 50 points for OV 13 because it scored points for the same conduct under OV 11 and OV 13. We disagree.

The sentencing court may score 50 points under OV 13 where “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age.” MCL 777.43(1)(a). Conduct scored in OV 11 or OV 12 may not be scored under OV 13. MCL 777.43(2)(c). The trial court scored defendant 50 points for OV 13. This was not an abuse of discretion because there was evidence of at least three instances beyond those scored in OV 11 in which defendant penetrated the victim.

Again, judicially ascertained facts may be used to increase a defendant’s sentence within the range authorized by the jury’s verdict. *Drohan, supra* at 163. Even where a factfinder declines to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing. *People v Perez*, 255 Mich App 703, 713; 622 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). At trial, the victim testified that defendant performed anal sex on him 14 or 15 times. The trial court’s finding that the victim’s testimony was credible in that additional uncharged sexual penetrations occurred is sufficient to sustain its scoring of OV 13 at 50 points. See *id.* (“[T]he victim testified that there were multiple penetrations. The trial court obviously found the victim’s testimony to be credible. Therefore, there existed evidence to support the score and we shall affirm the scoring.”)

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Christopher M. Murray