

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY RALPH MATTISON,

Defendant-Appellant.

UNPUBLISHED

May 21, 2009

No. 283212

Wayne Circuit Court

LC No. 07-006223-FC

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct under MCL 750.520b(1)(a) (victim under 13 years old), and three counts of first-degree criminal sexual conduct under MCL 750.520b(1)(b) (victim between 13 and 16, and the actor is related by blood).¹ The trial court sentenced defendant to concurrent prison terms of 15 to 30 years for each conviction. For the reasons set forth below, we affirm defendant's convictions, but vacate his sentences and remand for resentencing and correction of the presentence report.

I. Basic Facts

Defendant was convicted of sexually abusing his biological daughter. Defendant and the victim's mother divorced when the victim was three or four years old, and remarried when the victim was 11 years old. In the interim, the victim lived with her mother and visited defendant every other weekend. The victim, aged 18 at the time of trial, testified that defendant began engaging in sexual acts with her when she was about 11 or 12 years old. She explained that defendant eventually began having sexual intercourse with her "two to three times a week, if not more." The sexual acts occurred in different rooms throughout the house and inside defendant's van. The victim indicated that defendant warned that if she disclosed the acts he would kill the person she told or would hurt her. During the first incident that the victim could recall, defendant directed her into the basement, kissed her "on the mouth," and put her hand on his penis. The victim testified that as she developed, defendant began having sexual intercourse

¹ Defendant was charged with a total of 16 counts of first-degree CSC. The trial court dismissed ten counts after the prosecution rested at trial, and the jury acquitted defendant of one count.

with her. The victim further testified that defendant also had “oral” sex with her, and explained that defendant’s “tongue would kiss [her] vagina.” The victim also indicated that defendant “made [her] suck or kiss his penis.” The victim explained that the last sexual act occurred in February 2007, when defendant had sexual intercourse with her in his van while parked in a mall parking lot. Three days later, the victim disclosed the incidents to a schoolteacher. The victim subsequently reported to the police that after the last act of sexual intercourse, defendant ejaculated on a particular seat in his van. Deoxyribonucleic acid (DNA) testing of semen taken from the van seat revealed the presence of DNA that matched a DNA sample taken from defendant.

At trial, defendant denied any wrongdoing and argued that the victim was not credible, was manipulative, and wanted her parents to remain separated for her own personal gain. Defendant testified that the semen stains in his van were deposited when he twice had sexual intercourse with a coworker in May 2007.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to sustain his convictions. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact’s role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To prove first-degree CSC under MCL 750.520b(1)(a), the prosecution was required to show that defendant engaged in sexual penetration with another person under the age of 13. See *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). Under MCL 750.520b(1)(b), a “person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person,” “[t]hat other person is at least 13 but less than 16 years of age,” and “[t]he actor is related to the victim.” MCL 750.520b(1)(b)(ii). Sexual penetration is defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body” MCL 750.520a(r).

A. Convictions Involving Cunnilingus

Defendant challenges his convictions involving cunnilingus, arguing that there was no evidence of penetration of the victim’s genital opening. The victim testified that defendant had “oral” sex with her, and explained that defendant’s “tongue would kiss” “the top part of [her] vagina.” The “vagina,” by definition, connotes part of the female’s genital openings. See *Random House Webster’s College Dictionary* (1997), p 1417 (“[t]he passage leading from the uterus to the vulva” in a female). Any intrusion, *however slight*, of the vagina *or* the labia majora constitutes penetration of the female genital openings under MCL 750.520a(r). See *People v Bristol*, 115 Mich App 236, 237-238; 320 NW2d 229 (1981); see also *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992). The victim testified that she knew what a

vagina is, knows that it is a very specific part of her body, and knows the location of her vagina. Thus, the victim's testimony, viewed in a light most favorable to the prosecution, was sufficient to sustain defendant's convictions of first-degree CSC involving cunnilingus.

B. Conviction Involving Fellatio

Defendant argues that his conviction involving fellatio must be vacated because the victim testified that she was made to "suck *or* kiss" his penis and, with no further specification, there was only evidence of sexual contact. Fellatio requires entry of a penis into another person's mouth. *People v Reid*, 233 Mich App 457, 480; 592 NW2d 767 (1999). It does not consist merely of any oral contact with the male genitals. *Id.* In this case, immediately after the victim testified that defendant made her "suck or kiss" his penis, the following exchange occurred:

Q. All right. How many times has his penis been *in your mouth*, approximately?
More than three?

A. Yes.

Also, during defense counsel's cross-examination of the victim, the following exchange occurred:

Q. Well, there were times when he placed his penis *in your mouth*; is that right?

A. Yes.

With this testimony, the victim distinguished between sexual contact and fellatio. Therefore, defendant's conviction of first-degree CSC involving fellatio was supported by sufficient evidence.

C. Convictions for Acts when the Victim was under the Age of 13

Defendant challenges his convictions under MCL 750.520b(1)(a), arguing that there was no evidence that any acts of sexual penetration occurred while the victim was under the age of 13. Defendant relies on the victim's testimony that she could not recall her age when the first act of sexual intercourse occurred, but thought she was "[a]round thirteen or fourteen." Upon further questioning, however, the victim explained that defendant began having sexual intercourse with her *before* he and her mother began living together in April 2001. Given the victim's birth date of October 6, 1989, she was only 11 years old in April 2001. In other testimony, the victim testified that defendant started having "sex" with her at age 11, and explained that "sex" included sexual intercourse and oral sex. Deferring to the jury's assessment of the victim's testimony and viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to reasonably find that defendant engaged in acts of sexual penetration with the victim when she was under the age of 13. Consequently, sufficient evidence was presented to sustain defendant's convictions for first-degree CSC under MCL 750.520b(1)(a).

III. Prosecutorial Misconduct

Defendant argues that he was denied a fair trial because the prosecutor impermissibly shifted the burden of proof. Because defendant failed to object below to the prosecutor's conduct, this Court reviews his unpreserved claims for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). This Court will not reverse if the alleged prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant argues that the prosecutor impermissibly shifted the burden of proof during closing argument when she made the following remarks concerning the DNA evidence:

Now, there's just one thing, ladies and gentlemen - - I'm going to end up saying it five times before I stop talking to you. That is that this Defendant can't get around that DNA, he can't get around that sperm on that van, seat of that van, he can't do it. No matter what angle you look at it he can't get around it. He's not going to tell you that's not his. But I want you to think how in the world would a seventeen year old [the victim] know that her father's sperm is on the seat of that van exactly where she pointed it out to be in February of 2007, when it's not even known by the lab until at least May to July of 2007. She knows where it's at because she knows what he did. And he pulled out and he didn't ejaculate in her because he didn't want to leave his calling card in her. But he did it on the seat and she told. She said that from the very beginning. He admitted that to you. So, when he comes up with this story about his coworker, it's a lie. Because you didn't hear any evidence whatsoever that she's got any sort of telepathy or mind reading abilities. Did he tell her that he had sex with a coworker? Of course not. You can't get around it.

And when you get back in that jury room, if there's any difficulties you have whatsoever with this case, I want you to go right back to that, because it's going to boil down to that. And you can't get around it, period. There's no way around it. No matter what way you turn, you're going to end right back up with that DNA there.

* * *

Don't go back there and say I believe her, but it's not enough But again, and I'll say it one last time, he can't get around that DNA and you have more than her word. You have her telling where it can be found from the very beginning and there it is. So you have scientific evidence that backs up her word.

* * *

But remember, you know what, he can't get around the DNA. Can't do it. That backs up her word and his story on it is ridiculous.

A prosecutor may not imply that a defendant must prove something or present a reasonable explanation. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). Here, however, the prosecutor's argument, viewed in context, did not shift the burden of proof. The victim reported to the police that defendant's van was one of many places that defendant

engaged in sexual intercourse with her and that, after the last incident in February 2007, he ejaculated on a particular seat in the van. Subsequent testing of the van seat revealed semen that belonged to defendant. During his testimony, defendant explained the presence of his semen by claiming that he had sexual intercourse with a coworker and ejaculated on the seat. In closing argument, the prosecutor discussed the DNA evidence in the context of arguing that the victim was credible. The argument was not improper. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996) (a prosecutor may argue from the facts that a witness is credible). To the extent that the challenged remarks could be viewed as improper, the trial court instructed the jury that defendant did not have to offer any evidence or prove his innocence, and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Consequently, this unpreserved claim does not warrant reversal.

IV. Scoring of Offense Variables 11 and 13

Defendant argues that resentencing is required because the trial court erroneously scored 50 points each for offense variables (OV) 11 and 13 of the sentencing guidelines. Defendant did not object below to the scoring of OV 11 or 13. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines 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. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); MCL 769.34(10). However, plain error in the scoring of the guidelines can be raised and corrected on appeal where a scoring error resulted in a sentence that was not within the appropriate guidelines range. *Id.* at 310. This issue may also be reviewed in the context of defendant's claim that defense counsel was ineffective for failing to object to the scoring of OV 11 and 13. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); MCL 769.34(10).

When scoring the guidelines, “[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). A scoring decision “for which there is any evidence in support will be upheld.” *Id.* “The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo.” *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

A. OV 11

MCL 777.41(1)(a) provides that 50 points are to be scored if “[t]wo or more criminal sexual penetrations occurred.” In scoring OV 11, a trial court may not count a sexual penetration that formed the basis for the conviction when that offense is “the sentencing offense.” MCL 777.41(2)(c). All other “sexual penetrations of the victim by the offender arising out of the sentencing offense” should be scored. MCL 777.41(2)(a). The phrase “arising out of” suggests “a causal connection between two events of a sort that is more than incidental.” *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006). “Something that ‘aris[es] out of,’ or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen.” *Id.* In this case, the victim testified that defendant engaged in sexual activity with her on numerous occasions, but did not testify that defendant engaged in more than one penetration during a single episode. Therefore, there was no evidence that two or more sexual penetrations arose, sprung, or

resulted from a single sentencing offense. Accordingly, the 50-point score for OV 11 constituted plain error.

If OV 11 is correctly scored at zero points, defendant's total OV score decreases from 105 to 55 points. This scoring adjustment moves defendant from OV level VI (100+ points) to OV level III (40 to 59 points), and lowers defendant's guidelines range from 135 to 225 months to 81 to 135 months. MCL 777.62. Thus, the plain scoring error affects defendant's substantial rights because it affects the appropriate guidelines range. Defendant is entitled to resentencing. *Francisco, supra* at 88-92. On remand, the trial court shall sentence defendant on current and correct information meaning that any and all OV scoring errors must be corrected in order for the trial court to sentence defendant using the appropriate guidelines range.

B. OV 13

MCL 777.43 provides that 50 points should be scored if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or person less than 13 years of age." MCL 777.43(1)(a). In this case, defendant was convicted of two offenses against the victim under MCL 750.520b(1)(a), and acquitted of a third offense. Contrary to defendant's suggestion, a crime need not have resulted in a conviction in order to be considered for purposes of OV 13. MCL 777.43(2)(a). In light of the victim's testimony that defendant regularly engaged in sexual intercourse and oral sex with her when she was 11 or 12 years old, there was sufficient evidence for the trial court to assess 50 points for OV 13.

VII. Resentencing before a Different Judge

We reject defendant's argument that this case should be assigned to a different judge for resentencing. Because defendant failed to move for disqualification in the trial court pursuant to MCR 2.003, we review this unpreserved claim for plain error affecting substantial rights. *Carines, supra*. In deciding whether resentencing should occur before a different judge, this Court considers (1) whether the original judge would reasonably be expected on remand to have substantial difficulty in putting aside previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable for the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997). Absent actual personal bias or prejudice against either a party or a party's attorney, a judge will not be disqualified. MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996).

Defendant contends that the trial judge is biased against him, and his sentiments in fashioning his sentence warrant resentencing before another judge. But our review of the trial judge's remarks supporting his imposition of defendant's sentence reveals that there is no evidence of personal bias or prejudice required for disqualification of a trial judge. Further, there is nothing in the record to indicate that he would have substantial difficulty in setting aside previously expressed views or findings determined to be erroneous. Therefore, resentencing before a different judge is not warranted.

VIII. Accuracy of the Presentence Report

Defendant also argues that the trial court failed to correct inaccurate information in his presentence report. At sentencing, defendant challenged the information in the Marriage section of the report that implied that he was simultaneously married to two women. He also challenged the assessment of attorney fees, noting that he had retained counsel. The trial court ordered that the Marriage section be corrected, and acknowledged that the assessment of attorney fees was inaccurate. In addition, the prosecutor noted that defendant was convicted of five counts of first-degree CSC, but the Current Conviction(s) section indicates that defendant was convicted of six counts. These corrections are not reflected in the copy of the presentence report that was forwarded to this Court. Based on the record, the prosecutor concedes, and we agree, that the presentence report should be corrected to reflect the modifications that were identified at sentencing. On remand, the trial court shall make the factual modifications that were raised at sentencing.

IX. Standard 4 Brief

In his Standard 4 brief, filed pursuant to Supreme Court Administrative Order No 2004-4, defendant also argues that his convictions and sentences require reversal for several other reasons. We have reviewed defendant's claims and find no error requiring reversal. First, defendant alleges multiple instances of ineffective assistance of counsel that he claims denied him a fair trial. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorner*, *supra* at 75-76. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma*, *supra* at 302.

Defendant alleges that his counsel was ineffective for failing to investigate and call certain witnesses at trial that may have established an alibi, failing to present medical evidence regarding defendant's herpes diagnosis, failing to point out inconsistencies between pretrial examination testimony and trial testimony, failing to submit "important records and transcripts" to the jury, failing to object to the existence of biased jurors, failing to object to multiple instances of prosecutorial conduct, failing to object to multiple instances of trial court bias, making defendant meet him at a bar to pay him when defendant does not drink, and cumulative error. After reviewing the record, we find no merit to defendant's pro se issues of ineffective assistance of counsel individually or cumulatively. Defendant has not affirmatively demonstrated that his counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *Pickens*, *supra* at 303.

Likewise, we find no merit in defendant's pro se claims of prosecutorial misconduct. "The test for prosecutorial misconduct is whether, after examining the prosecutor's statements and actions in context, the defendant was denied a fair and impartial trial." *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Claims of prosecutorial misconduct are considered on a case-by-case basis, and the actions of the prosecutor must be considered as a whole and evaluated in light of the defense arguments and the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutors are afforded great latitude

regarding their arguments and conduct at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant asserts that prosecutorial misconduct denied him a fair trial because the prosecutor provided her personal opinion that defendant was lying at trial and that he was guilty, dwelled on defendant's bad character, misrepresented facts in evidence, yelled, appealed to juror's sympathies, appealed to class prejudices, misled the jury, improperly questioned defendant's character, erroneously admitted irrelevant DNA evidence, allowed false testimony, and threatened defendant's wife. After reviewing the record, we conclude that none of the instances cited by defendant amounted to prosecutorial misconduct and therefore defendant was not denied a fair and impartial trial. *Hill, supra* at 135.

Finally, defendant argues that the trial judge was biased against him before, during, and after trial. Defendant alleges that the trial judge made inappropriate comments, was prejudiced against him because of delays in the trial date, displayed "violent behavior", could not control the jury because he could not control his own temper, voiced comments and personal feelings, was not impartial, allowed biased jurors on the jury, used foul language while yelling in the hallway, and was obviously biased at sentencing. After reviewing the record, we conclude that defendant's allegations are not supported by the record and do not show actual personal bias or prejudice against defendant or his attorney, thus the trial judge need not be disqualified. MCR 2.003(B)(1); *Cain, supra* at 495.

Defendant's convictions are affirmed, but we vacate defendant's sentences and remand for resentencing and correction of the presentence report. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Pat M. Donofrio