

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 26, 2013

v

SCOTT DOUGLAS GAGNON,

Defendant-Appellant.

No. 310728
Presque Isle Circuit Court
LC No. 11-092731-FC

Before: STEPHENS, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right his conviction of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (person under 13 years of age). On appeal, defendant argues that the trial court erred in scoring offense variable (OV) 4 at 10 points. We affirm.

Defendant's convictions stem from two incidents that occurred when KG, his biological daughter, was between 7 and 10 years old. Both incidents took place in KG's bedroom at defendant's apartment. On one occasion, defendant digitally penetrated KG's vagina while masturbating through his pants. The incident was witnessed by defendant's girlfriend, who corroborated KG's account at trial. On another occasion, defendant orally penetrated KG's vagina. Defendant threatened KG, telling her that she would "get in trouble" if she told anyone about the abuse. When KG reached high school, she finally disclosed the abuse to her foster parents, two counselors, the police, and a peer support group. KG testified that the abuse was "bugging" her and that she had "bad nightmares" as a result.

Defendant's unpreserved argument that the trial court incorrectly scored OV 4 at 10 points is reviewed for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). To prevail under the plain error standard, "defendant must show that '1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Additionally, the error must have resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

OV 4, codified as MCL 777.34, provides that 10 points are scored if “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). “[T]he fact that treatment has not been sought is not conclusive.” MCL 777.34(2).

We have stated that “the victim’s expression of fearfulness is enough to satisfy the [OV 4] statute.” *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009). In *Davenport*, the defendant argued that the trial court improperly scored OV 4 at 10 points. *Id.* We disagreed, holding:

The record reflects that, at sentencing, the prosecutor submitted a receipt for counseling services and he informed the court that, two days before sentencing, the victim “began another series of counselings” with Catholic Human Services. In light of this evidence, as well as [the defendant]’s systematic, repeated abuse of this child over a period of years, the trial court correctly determined that [the defendant] caused the victim “[s]erious psychological injury requiring professional treatment . . .” Accordingly, he is not entitled to resentencing. [*Id.*]

In *People v Drohan*, 264 Mich App 77; 689 NW2d 750 (2004), aff’d 475 Mich 140 (2006), the defendant challenged the scoring of OV 4 at 10 points after his convictions for third-degree and fourth-degree criminal sexual conduct. *Id.* at 79, 89-90. We upheld the score, citing the victim impact statement, which provided “evidence of the victim’s disrupted life, her nightmares, and her plans to seek treatment.” *Id.* at 90.

In this case, there was ample evidence to support the trial court’s scoring of OV 4 at 10 points. KG testified that the incidents of abuse “bugged” her and caused “bad nightmares.” It was undisputed that KG received professional treatment from two counselors. Defendant repeatedly sexually abused KG and threatened her if she attempted to tell anyone. In light of this evidence, and because “[a] scoring decision is not clearly erroneous if the record contains *any* evidence in support of the decision[.]” *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003) (citations and quotation marks omitted), we find that the trial court did not err in scoring OV 4 at 10 points. Thus, defendant cannot show that “error . . . occurred,” *Kimble*, 470 Mich at 312, and is not entitled to relief under the plain error standard.

Defendant next argues that his trial counsel was ineffective for failing to object to the scoring of OV 4 at sentencing. Because the trial court properly scored OV 4 at 10 points, an objection by trial counsel would have been futile, and counsel is not ineffective for failing to raise meritless or futile objections. *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012). Furthermore, because OV 4 was properly scored, the trial court’s sentence fell within the guidelines.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Amy Ronayne Krause