

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC BRIAN FOURCHA,

Defendant-Appellant.

UNPUBLISHED

March 9, 2010

No. 288214

Kent Circuit Court

LC No. 08-002030-FH

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

PER CURIAM.

Defendant was convicted of two counts of third-degree criminal sexual conduct (person 13 through 15), MCL 750.520d(1)(a), and two counts of accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a. Defendant was sentenced as a habitual offender second offense, MCL 769.10, to 12 to 22-1/2 years' imprisonment for each conviction of third-degree criminal sexual conduct, and 3 to 6 years' imprisonment for each conviction of accosting a minor for immoral purposes. Defendant appeals, and we affirm the convictions but remand for resentencing.

Defendant contends that there was insufficient evidence to support his two convictions of accosting, enticing, or soliciting a child for immoral purposes. We review a challenge to the sufficiency of the evidence *de novo*. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution has presented sufficient evidence to sustain a conviction we construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

MCL 750.145a provides in relevant part:

A person who accosts, entices, or solicits a child less than 16 years of age . . . with the intent to induce or force that child . . . to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age . . . to engage in any of those acts is guilty of a felony

The prosecutor argued that defendant provided alcohol to the two victims with intent to force them to have sexual intercourse with him. After reviewing the record, we conclude that there was sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of two separate offenses under this statute.

With respect to 14-year-old victim NP, evidence would allow a rational trier of fact to conclude beyond a reasonable doubt that defendant accosted, enticed, solicited or encouraged NP to engage in an immoral act, an act of sexual intercourse, gross indecency, or other delinquent act with intent to force, induce, or cause NP to submit to one of those acts. MCL 750.145a. Evidence showed that defendant provided alcohol to NP on December 7, 2007, waited until she was inebriated and passed out, and then, unbeknownst to her, unbuttoned and unzipped her pants and proceeded to touch her vagina while she was sleeping. On the following evening, NP awakened to find defendant kissing her and removing her pants and he then engaged in sexual intercourse with her.

Similarly, with respect to 14-year-old victim KP, evidence would allow a rational trier of fact to conclude beyond a reasonable doubt that defendant accosted, enticed, solicited, or encouraged KP to engage in an immoral act, an act of sexual intercourse, gross indecency, or other delinquent act with intent to force, induce, or cause KP to submit to one of those acts. MCL 750.145a. Here, evidence showed that, on or about December 7, 2007, defendant frequented KP's residence when no other adults were present and stayed there until late in the evening. Defendant acted as KP's boyfriend when he was at the residence and he isolated himself with KP in her bedroom where no one could observe his actions. Defendant provided alcohol to KP. At some point defendant had sexual intercourse with KP while he and the victim were alone in her bedroom.

In sum, viewed in a light most favorable to the prosecution, we find that there was sufficient evidence to allow a rational trier of fact to convict defendant of two counts under MCL 750.145a beyond a reasonable doubt.

Next, defendant argues that he was denied his right to present a defense when the trial court refused to allow him to introduce a letter written by NP to KP shortly after the sexual assaults took place wherein NP recanted the allegations she made to police regarding defendant's sexual misconduct. Defendant failed to preserve this issue for review because he did not raise any constitutional claim in the trial court. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) (an objection based on one ground does not preserve an appellate challenge based on a different ground). Whether exclusion of evidence violated a defendant's right to present a defense involves a constitutional question that we review de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Generally, we review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, we review de novo questions of law such as whether evidence is excluded by a rule of evidence. *Id.* An unpreserved constitutional error is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant has a fundamental right to present evidence in his own defense. *People v Unger*, 278 Mich App 210, 249; 749 NW2d 272 (2008). "Although the right to present a defense is a fundamental element of due process, it is not an absolute right. The accused must

still comply with ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

In this case, the letter at issue was not admissible for substantive purposes despite its relevance to the issues involved in the case, i.e. credibility of the victim, because the letter amounted to inadmissible hearsay evidence. MRE 801(c). In addition, while the letter may have been admissible for impeachment purposes as extrinsic evidence of a prior inconsistent statement under MRE 613(b), any error in exclusion of the letter was harmless. NP testified to significant aspects of the letter and she admitted that she wrote the letter. She further explained that, in the letter, she offered to recant her previous allegations against defendant in an effort to retain KP’s and another girl’s friendship. NP even read a portion of the letter during her testimony where she wrote that she would, “tell the detective the truth.” In addition, the trial court stated defendant could read any portion of the letter for impeachment purposes, and defendant fails to articulate how NP’s credibility would have been further undermined if the written document had been actually admitted as an exhibit. The exclusion of the letter did not deny defendant a substantial defense under the circumstances and it did not amount to plain error affecting defendant’s substantial rights. *Carines*, 460 Mich at 763-764.

Next, defendant argues that the trial court erred in scoring legislative sentencing guidelines prior record variable (PRV) 7, offense variable (OV) 9, and OV 11. “This Court reviews a sentencing court’s scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, this issue also involves statutory interpretation, which we review de novo. *Id.* “Scoring decisions for which there is any evidence in support will be upheld.” *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

The trial court scored PRV 7 at 20 points. MCL 777.57 governs the scoring of PRV 7, and provides that the trial court assess 20 points if the offender “has 2 or more subsequent or concurrent convictions.” MCL 777.57(1)(a). The statute provides in part, “[s]core the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed.” MCL 777.57(2)(a). Defendant argues that PRV 7 should be rescored at 10 points if this Court were to vacate his two convictions of accosting or soliciting a minor for immoral purposes. In light of our resolution with respect to defendant’s sufficiency challenge *supra*, we find the trial court properly scored PRV 7 at 20.

The trial court scored OV 9 at ten points. MCL 777.39 governs the scoring of OV 9 and provides in part that the trial court assess ten points if two to nine victims “were placed in danger of physical injury or death.” MCL 777.39(1)(c). The statute defines “victim” as “each person who was placed in danger of physical injury or loss of life or property” MCL 777.39(2)(a). Our Supreme Court recently examined OV 9 and held “[o]ffense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise.” *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009). In this case, the sentencing offense was one of the CSC III offenses; however, whether the CSC III offense involved victim KP or victim NP is unclear. Nevertheless, whether the sentencing offense related to the CSC III offense involving KP or the CSC III

offense involving NP is irrelevant because the evidence shows that each of these offenses only involved one victim. There was no evidence that more than one victim was present when these acts of sexual misconduct took place; therefore, there were not two “victims” involved in the CSC III offense related to KP or to the CSC III offense related to NP for purposes of scoring OV 9. In sum, there is no evidence on the record to support that two victims were placed in danger of physical injury or death when each offense was committed. MCL 777.39(1)(c). The trial court should not have assessed any points for OV 9.

The trial court scored OV 11 at 50 points. MCL 777.41 governs the scoring of OV 11 and provides that the trial court assess 50 points if two or more criminal sexual penetrations occurred, 25 points if only one criminal sexual penetration occurred, and zero points if no criminal sexual penetration occurred. MCL 777.41(1). The statute also provides:

(a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.

(b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in [OV 12 or OV 13].

(c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense. [MCL 777.41(2).]

In this case, regardless of which CSC III conviction served as the sentencing offense, the evidence indicates that both of the offenses only involved a single act of criminal sexual penetration. Because the statute provides that points are not to be assessed for the penetration that forms the basis of a CSC III offense, and because there was no evidence of multiple penetrations during either offense, there was no evidence to support the trial court’s scoring OV 11 at 50 points. Any evidence showing that penetrations occurred “beyond the sentencing offense,” was relevant only for scoring OV 12 and OV 13. MCL 777.41(2)(b).

In sum, the trial court erred in scoring OV 9 and OV 11. Defendant’s total OV score was 100 points. The erroneous scoring of OV 9 and OV 11 resulted in 60 additional points being assessed to defendant’s total OV score; absent these errors defendant’s total OV score should have been 40 points. A total OV score of 40 points would reduce defendant’s OV level from VI to IV and would result in a lower recommended sentencing range. See MCL 777.16y (CSC III is a Class B offense), and MCL 777.63 (a total OV score of 40 points for a Class B offense results in an OV level of IV, which, when coupled with defendant’s PRV score of 80, results in a reduced recommended sentencing range of 87 to 145 months. Therefore, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Affirmed, but remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Donald S. Owens