

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN ALLEN KRAUSE,

Defendant-Appellant.

UNPUBLISHED

August 10, 2004

No. 246896

Grand Traverse Circuit Court

LC No. 02-008996-FC

Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

I. Overview

A jury convicted defendant Shawn Allen Krause of third-degree criminal sexual conduct¹ and providing alcohol to a minor.² The trial court sentenced him as a fourth habitual offender³ to 7 to 20 years' imprisonment for the CSC conviction and sixty days' imprisonment for the conviction of providing alcohol to a minor, to be served concurrently. He appeals as of right. We affirm.

II. Basic Facts And Procedural History

This case arises from events that took place at a party in July 2002. The party was at the home of the complainant's friend, whose mother, Mary VanWagoner, had rented a room to Krause. The complainant was thirteen years old at the time. The complainant testified at trial that Krause, then twenty-nine years old, and a friend provided alcoholic beverages to her and some of her peers, and that the complainant then, while intoxicated, accepted Krause's invitation to have sexual intercourse. Several others who were at the party testified that the complainant and Krause admitted that they had sex, and that Krause asked those at the party not to tell VanWagoner about it. Krause did not testify. The jury found Krause guilty of third-degree criminal sexual assault and providing alcohol to a minor.⁴

¹ MCL 750.520d(1)(a).

² MCL 436.1701(1).

³ MCL 769.12.

⁴ There was also evidence that Krause engaged in sexual activity with the homeowner's fourteen-year-old daughter at the party. Krause was charged with assault with intent to commit second-degree criminal sexual conduct in that matter, but the jury found him not guilty.

III. Reference to a History of Imprisonment

A. Standard Of Review

We review constitutional issues de novo,⁵ but because no objection was made to the challenged testimony, we will reverse only for plain error that affected substantial rights.⁶

B. Testimony

Krause asserts that the admission of testimony that Krause had been in prison previously denied him a fair trial. We disagree.

Before trial, the trial court told the attorneys that it would “require that the references regarding ‘back to prison’ . . . not be solicited from witnesses on the stand,” but added, “Testimony about ‘I wouldn’t want to go to prison’ . . . that’s fine.” The prosecutor assured the court that he had instructed all of his witnesses “not to mention that the Defendant has any criminal conviction, that he’s been to prison.”

However, at trial, when the prosecutor asked one of the youths who had been at the party why he initially agreed not to tell anyone that Krause had sex with the complainant, the witness replied, “because [defendant] said that he didn’t want to go back to—or go to prison.” Discussing the incident later in chambers, the trial court stated that this testimony, “although he did try to correct it, was without question a violation of the Court’s preliminary ruling.” However, the trial court further noted that a juror had coughed just when the improper testimony was coming in, causing the trial court to doubt that the jury heard it clearly. The trial court offered to provide a curative instruction, but defense counsel declined on the ground that he wished not to emphasize the irregularity that way. Krause points to no other occasion when the jury heard of his record of prior imprisonment.

The potential prejudice from bringing a defendant’s earlier imprisonment to his jury’s attention is obvious.⁷ However, not every instance of mention before a jury of some inappropriate subject matter warrants a new trial.⁸ A criminal defendant is entitled to a fair trial, not a perfect one.⁹ Specifically, “an unresponsive, volunteered answer to a proper question” does not normally require a new trial.¹⁰ Further, the trial court specifically found that the prosecutor was blameless in this situation, and Krause does not assert otherwise in his brief on appeal. Finally, we are not convinced that this brief and isolated remark affected Krause’s substantial rights.

⁵ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

⁶ *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999).

⁷ See *People v Allen*, 429 Mich 558, 568-569; 420 NW2d 499 (1988).

⁸ *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

⁹ *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992).

¹⁰ *Haywood*, *supra* at 228.

Under these circumstances, the allusion to Krause’s prior imprisonment does not require reversal.

IV. Effective Assistance of Counsel

A. Standard Of Review

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact, which we review for clear error, and constitutional law, which we review de novo.¹¹ In this case, our review is limited to the facts on the record because the trial court did not hold an evidentiary hearing.¹²

B. Failure To Object

Krause argues that defense counsel was ineffective for failing to request a mistrial in response to the improper testimony. To establish ineffective assistance of counsel, the defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel’s error, it is reasonably probable that the outcome would have been different.¹³ Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.¹⁴ To show an objectively unreasonable performance, the defendant must prove that counsel made “errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”¹⁵ In so doing, the defendant must overcome a strong presumption that the challenged conduct might be considered sound trial strategy.¹⁶ The defendant must also show that the proceedings were “fundamentally unfair or unreliable.”¹⁷

We conclude that Krause has not established that his counsel was ineffective under these standards for failing to request a mistrial. “A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial.”¹⁸ As discussed above, the mishap in question was minor, and of little potential prejudice to Krause. Accordingly, defense counsel could not reasonably have supposed that the trial court would have

¹¹ *LeBlanc, supra* at 578.

¹² *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

¹³ *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 314, 318; 521 NW2d 797 (1994).

¹⁴ *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

¹⁵ *LeBlanc, supra* at 578, quoting *Strickland, supra* at 687.

¹⁶ *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

¹⁷ *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

¹⁸ *Haywood, supra* (citations omitted).

looked favorably upon a motion for a mistrial. Counsel is not obliged to argue futile motions.¹⁹ We conclude that Krause's claim of ineffective assistance of counsel is without merit.

V. Witness Tampering

A. Standard Of Review

We review the trial court's decision to allow the testimony of a witness who violated a sequestration order for an abuse of discretion.²⁰

B. Influencing A Sequestered Witness

Krause argues that he was denied a fair trial because a spectator apparently endeavored to apprise one or two prosecution witnesses of preceding testimony, thus potentially influencing their own. We disagree.

At the start of proceedings, the trial court ordered that the witnesses be sequestered. However, during a break in the proceedings, after the complainant had testified, defense counsel informed the trial court that a defense witness had reported that she overheard a spectator, apparently the father of the alleged victim of the assault with intent to commit CSC, talking to the owner of the house where the party took place about the testimony that had been presented. Defense counsel's understanding was that "there were statements made about this is how [the alleged assault with intent victim] needs to make sure this is how her testimony is based upon what [the complainant] had to say." The prosecutor responded that he had made inquiry, and learned that the spectator was "apparently coaching another witness what to say or coaching a mom what to tell her daughter to say," but added that the spectator himself denied it. The trial court encouraged the attorneys to try to ascertain whether the alleged assault victim, who was to testify next, had indeed been tainted, then admonished the spectators to refrain from talking to any witnesses about what was taking place at trial. The alleged assault victim then testified without objection.

"[T]rial courts have discretion to order sequestration of witnesses and discretion in instances of violation of such an order to exclude or to allow the testimony of the offending witness."²¹ When a court fails to exercise discretion if properly asked to do so the court abuses that discretion.²² However, no such request was made in this instance. Although defense counsel brought the suspicions of tampering to the trial court's attention, he requested no specific remedy. Because the alleged assault victim proceeded to testify without objection, appellate objections are forfeited. A defendant pressing an unreserved claim of error must show a plain error that affected substantial rights, and we will reverse only when the defendant is actually

¹⁹ See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

²⁰ See *People v Nixten*, 160 Mich App 203, 209; 408 NW2d 77 (1987).

²¹ *Nixten*, *supra* at 209.

²² See *People v Stafford*, 434 Mich 125, 134; 450 NW2d 559 (1990).

innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.²³

Krause implies that the alleged assault victim's father conspired with that witness to have her corroborate the complainant's testimony. However, as the trial court observed, the alleged assault victim may have been sympathetic to Krause, and in any event tended to minimize his misconduct. In fact, that witness' major role at trial was to provide the evidence behind the assault charge stemming from Krause's alleged improper touching of her, of which the jury found Krause not guilty. That witness' corroboration of the complainant's testimony concerning Krause's conduct with the latter was cumulative to the complainant's own direct and unambiguous account of Krause's criminal actions against her. Assuming *arguendo* that this witness' testimony should have been barred, its admission was of little consequence in connection with the charges of which Krause was convicted. Competent testimony that is duplicative of improperly admitted testimony can militate against the conclusion that a party was harmed by the error.²⁴

For these reasons, even assuming that a spectator did indeed approach the mother of a witness in hopes of persuading her to influence that witness, we cannot conclude that any such improper influence actually reached that witness in fact or, if it did, that it actually influenced her testimony. To the extent that the trial court erred in failing, *sua sponte*, to deliver factual findings and legal conclusions on this matter, the error did not affect defendant's substantial rights. Accordingly, we conclude that reversal is not warranted on this ground.

VI. Prosecutorial Misconduct

A. Standard Of Review

We review *de novo* allegations of prosecutorial misconduct while reviewing the trial court's factual findings for clear error.²⁵ If no objection was made to the challenged remarks, we will reverse only for plain error, placing the burden on the defendant to show that error occurred, that the error was clear or obvious, and that the plain error affected his substantial rights.²⁶ Moreover, if a curative instruction could have alleviated the prejudicial effect of the challenged remarks, error requiring reversal did not occur.²⁷

²³ *Carines, supra* at 763.

²⁴ See, e.g., *People v McRunels*, 237 Mich App 168, 185; 603 NW2d 95 (1999).

²⁵ *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

²⁶ *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *Carines, supra* at 752-753, 764; 597 NW2d 130 (1999).

²⁷ *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

B. Vouching

Krause argues that the prosecutor engaged in improper vouching when he attempted to explain inconsistencies in his witnesses' testimony by reminding the jury that one could hardly expect several teenage witnesses to provide identical accounts of what happened at a drinking party months after the fact. The prosecutor suggested that it would have been a matter of concern if they had all presented matching stories, because "that's not what happens in the real world, that's not the truth." The prosecutor added, "The truth is that people hear and see things differently . . ." These remarks drew no objection.

"Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness."²⁸ The critical inquiry is whether the prosecutor urged the jurors to suspend their own judgment out of deference to the prosecutor or police.²⁹

We reject the assertion that the prosecutor's argument in this case was improper. Our reading of the challenged comments indicates that the prosecutor was merely urging the jury to call upon everyday experience and common sense, not suggesting that he had some special knowledge concerning the truthfulness of his witnesses. Accordingly, we conclude that these remarks were not improper.

Krause next makes issue of the prosecutor's having argued that where other witnesses remembered the date upon which they spoke to the police, but one did not, this was "not an important fact," continuing, "No one in this case had a reason to lie about when they talked to the police." However, where the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence.³⁰ The prosecutor's argument was a fair characterization of the evidence, presented with no hint of vouching. The same analysis applies to Krause's attempt to make issue of the prosecutor's having argued that the defense witnesses had some bias or interest in the outcome. In the course of making this argument, the prosecutor nowhere hinted that he had personal insights into any witness' character for truthfulness. Accordingly, Krause fails to show that any improper vouching took place.

C. Appeal to Sympathy

It is well established that a prosecutor may not urge a jury to convict out of sympathy for the victim.³¹ As an example of both improper vouching and improper appeal to sympathy, Krause points to the prosecutor's statement, "If [the complainant] is making this up, what does she have to gain?" followed by his pointing out that the victim had to confess to her father that

²⁸ *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

²⁹ *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995).

³⁰ *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987).

³¹ See *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

she had sex with a twenty-nine-year-old man, then inform an assembly of strangers that “‘after I had consensual sex with a twenty-nine-year-old man I was bleeding from my vaginal area.’ That’s what she got out of this.” But these remarks, which drew no objections, ran afoul of neither stricture.

Again, the prosecutor is free to argue credibility from the evidence.³² And although the prosecutor necessarily touched on subject matter that was apt to arouse some juror sympathy, this was closely bound up with the credibility question. However, argument likely to stir sympathies is not prejudicial where, as here, the bulk of the prosecutor’s arguments were properly tied to the evidence and applicable law.³³ This is especially so where, as here, the trial court instructed the jury not to let sympathy influence its verdict. Accordingly, we conclude that there was no error requiring reversal.

D. Burden Shifting

“[T]he presumption of innocence is ‘at the core of our criminal process’”³⁴ Similarly fundamental is that the presumption of innocence can be overcome only by proof beyond a reasonable doubt of every element of every offense.³⁵ The prosecutor bears the burden of proof in a criminal case; therefore, the prosecutor may not argue to the jury that the defendant failed in some duty to prove his or her innocence.³⁶ By logical extension, a prosecutor also may not suggest that his burden of proof is less than beyond a reasonable doubt.

Krause argues that the prosecutor violated these principles with the following argument in rebuttal:

I’m still waiting to hear why, after [defense counsel’s] closing. I’m still waiting for that answer, why would seven or eight people come in here and concoct this bizarre story, take the time and energy to do that? There is no explanation and there hasn’t been any explanation that’s come from that witness chair

With these remarks, which drew no objection, the prosecutor was responding to defense counsel’s admonishments to the jury to resolve credibility contests in favor of the defense witnesses. “[W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate

³² *Smith, supra.*

³³ See *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988).

³⁴ *People v Saffold*, 465 Mich 268, 276; 631 NW2d 320 (2001), quoting *In re Guilty Plea Cases*, 395 Mich 96, 125; 235 NW2d 132 (1975).

³⁵ See *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970); *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

³⁶ See *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987).

theory cannot be said to shift the burden of proving innocence to the defendant.”³⁷ Defense counsel, by obvious implication, suggested that the prosecutor’s witnesses were lying in the important particulars, thereby opening the door to rebuttal emphasizing that defense counsel offered no motive or other explanation for such concerted untruthfulness. This was reasonable argument from the evidence; it did not shift the burden from the prosecution to the defense.³⁸

Krause also makes issue of the following excerpt of the prosecutor’s closing:

[Defense counsel] told you, “Well, we don’t have a different standard of credibility, because people are younger.” Well, in a way we do, because the judge is going to tell you you take into account a witness’ age and maturity in deciding, you know, what you believe about their testimony. Because younger people don’t carry around Franklin planners and they don’t write down details of their day and they don’t keep track of what day of the week it is during the summer when they’re off on summer vacation. Younger people’s memories are going to be different in some ways.

Krause argues that the prosecutor thus “advocated a lesser burden of proof because of the fact that his witnesses were teenagers.” We disagree. Again, there was no objection at trial. In his closing argument, defense counsel stated as follows:

We don’t apply different tests for credibility because of age. We apply tests of credibility about what someone says and how they said it, their demeanor on the stand. How did they say to you what they said to you? How certain were they of what they said on the stand and yet were just as certain that they said something totally different [on an earlier occasion]?

Obviously, the prosecutor’s argument was in response to defense counsel’s. The prosecutor did not even hint that his burden of proof was the least bit relaxed because he was relying on teenage witnesses. Instead, he simply encouraged the jury to bear in mind that his witnesses were teenagers while evaluating their credibility. In other words, the prosecutor suggested not that incredible testimony was sufficient to convict if it came from teenagers, but that teenagers might be credible even if they have not carefully kept track of dates, etc. The trial court did indeed invite the jury to allow “the witness’ age or maturity” to factor into how they judged that witness’ testimony. Because the prosecutorial argument of which defendant here makes issue was responsive to defense counsel’s argument, and an accurate statement of the law, it was not misconduct.

³⁷ *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

³⁸ Krause also argues that these remarks improperly denigrated the defense. See *Bahoda, supra* at 283. However, because the prosecutor focused on the evidence, not on the personalities involved, Krause’s characterization of this portion of the argument is inapt. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

E. Facts Not in Evidence

“Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case.”³⁹ Krause predicates his argument that the prosecutor engaged in such misconduct on the following excerpt:

Whether there was a tear in the vaginal area six weeks later, is that good evidence of anything, when you’re looking at a period of six weeks? We heard there was some pain, but we didn’t hear that there was any type of injury. We don’t know anything about [the complainant’s] past sexual history, there’s nothing that—that whether or not a medical exam had been done would not be good evidence of anything in this case, because it was six weeks later.

Defense counsel objected to this argument on the ground that there had been no medical testimony. The trial court sustained the objection, and immediately instructed the jury that “there’s no evidence either way to show that a medical examination would have been helpful.” There was no request for a mistrial, or other remedy beyond what the trial court provided. To the extent that Krause now seeks a new trial because of this brief foray into improper argument, the issue is unpreserved. We are satisfied that the trial court’s special instruction steered the jury from allowing medical considerations never brought into evidence to infect their deliberations. “It is well established that jurors are presumed to follow their instructions.”⁴⁰

We further note that, in closing argument, defense counsel stated as follows:

Presumably [the complainant] was injured as a result of this incident, presumably she had a bleeding of the vaginal area, some type of tearing, some type of injury would have occurred. Even . . . when this was brought out, do you have any medical evidence, six weeks later, that there would be any tear, any injury that would have been caused to her vaginal area because of this alleged criminal sexual conduct?

Defense counsel thus first mentioned the lack of medical evidence, thereby inviting the prosecutor’s response in kind. For that reason, and because the defense objection was sustained and followed by a curative instruction, no appellate relief is warranted.

³⁹ *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

⁴⁰ *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998).

VII. Challenge To Scoring Of Offense Variables 10 and 12

A. Standard Of Review

We review a sentencing court's factual findings for clear error.⁴¹ However, the proper application of the statutory sentencing guidelines presents a question of law, calling for review de novo.⁴²

B. OV 10

The trial court assessed Krause ten points for OV 10, which concerns victim vulnerability. This is the point total prescribed for cases in which the offender exploited a victim's youth or other certain other special vulnerabilities.⁴³ At sentencing, defense counsel complained that the victim's youthful age was an element of the conviction itself, and so should not be considered an aggravating factor for purposes of imposing sentence. The prosecutor responded that Krause was sixteen years older than the victim, and suggested that Krause exploited that age difference, and added that Krause also took advantage of the victim's state of intoxication on the occasion in question. The trial court described the age difference as "extraordinary," but focused mainly on the victim's alcohol consumption and the fact that Krause provided the alcohol to her in deciding to score ten points.

Krause points out that MCL 777.40(1)(c) prescribes five points where the offender exploited the victim's intoxication, and argues that he thus should have received no more than five points for OV 10. Had Krause merely come upon an intoxicated victim, this argument would have merit. But, as the trial court recognized, Krause provided the alcohol to his youthful victim. Krause's role in facilitating his youthful victim's intoxication, then, considered along with his sixteen-year age advantage, well justifies the assessment of ten points for OV 10.

C. OV 12

The trial court assessed five points for OV 12, which concerns contemporaneous felonies. MCL 777.42(1)(d) prescribes five points where, in addition to the sentencing offense, the offender engaged in "[o]ne contemporaneous felonious criminal act involving a crime against a person" The act that formed the basis for the scoring decision in this case was the inappropriate touching of the daughter of the owner of the house. The latter testified that she was fourteen years old at the time, and that defendant invited her into his bedroom, told her that he "had a little thing" for her, then put his hand on her "lower stomach," reaching "[j]ust at the tip" of her bathing suit bottoms, but withdrew when she protested.

As Krause points out, the jury found him not guilty of assault with intent to commit second-degree criminal sexual conduct. However, factfinding for purposes of sentencing is not

⁴¹ See MCR 2.613(C); *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995).

⁴² *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

⁴³ MCL 777.40(1)(b).

wholly derivative of factfinding attendant to trial proceedings, but takes place later, and is governed by substantially different rules. For purposes of sentencing, the court's consideration is confined neither to facts determined beyond a reasonable doubt, nor to evidence that would be admissible for determination of guilt or innocence. More particularly, factual findings for sentencing purposes require a mere preponderance of the evidence.⁴⁴ Information relied upon may come from several sources, including some that would not be admissible at trial, e.g., a presentence investigator's report.⁴⁵

The trial court acknowledged defendant's acquittal in connection with this other young victim, but opined that a preponderance of the evidence indicated that the incident took place. The court explained, "the touching, as it was described, in the region where it was described, certainly is evidence of a touching with the intent to derive sexual gratification from it. She is fourteen, it was her pubic region."

Krause concedes that the evidence suggested that he engaged in unpermitted touching, but argues that it was mere misdemeanor battery. However, given the nature of the touching that took place, the intimate setting, and the verbal expression of attraction, the evidence militates in favor of the conclusion that Krause did this touching with the intention of achieving sexual gratification. This elevates a minor battery to a felony.⁴⁶ Because there was evidence to support the trial court's scoring of OV 12, we affirm that decision.⁴⁷

D. Constitutional Challenge To Scoring Determinations

Finally, Krause argues that allowing the trial court to determine his offense variable scores using facts proved by a preponderance of the evidence was unconstitutional in light of *Blakely v Washington*,⁴⁸ which held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Krause asserts that the "prescribed statutory maximum," under Michigan's sentencing scheme, is "[t]he intersection of a defendant's base offense level and criminal history category."

While we acknowledge that this area of the law is currently unsettled, our reading of *Blakely* indicates that Krause's interpretation has been foreclosed. First, under Michigan's sentencing scheme, the intersection of a defendant's base offense level and criminal history category establishes a defendant's *minimum* sentence. We are not persuaded that by Krause's assertion that the minimum sentence should be considered the "statutory maximum" in this context, particularly in light of the fact that the Supreme Court has held that the factual findings

⁴⁴ See *People v Ewing (After Remand)*, 435 Mich 443, 472-473; 458 NW2d 880 (1990).

⁴⁵ *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985). See also MRE 1001(b)(3).

⁴⁶ MCL 750.520g(2); MCL 750.520b(1)(b); MCL 750.520a(n).

⁴⁷ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002).

⁴⁸ *Blakely v Washington*, 542 US ___, ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

underlying mandatory minimum sentences need not be established to a jury beyond a reasonable doubt.⁴⁹

Second, *Blakely* addressed the constitutionality of a *determinate* sentencing scheme, and the *Blakely* majority expressly denied that its holding was applicable to *indeterminate* sentencing schemes like Michigan's. As the *Blakely* majority explained, the Sixth Amendment "is not a limitation on judicial power, but a reservation of jury power," and therefore it "limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. *Indeterminate sentencing does not do so.*"⁵⁰ While acknowledging that "indeterminate schemes involve judicial factfinding," the Court reasoned that those facts "do not pertain to whether the defendant has a legal right to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned."⁵¹ The Court illustrated its point with the following example:

In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence – and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.^[52]

In this case, our system says that the sentencing court may punish a fourth habitual offender for third-degree CSC by up to life imprisonment.⁵³ Accordingly, we reject Krause's argument that he had a legal right to have the facts that determined his minimum sentence determined by a jury beyond a reasonable doubt.⁵⁴

Affirmed.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Bill Schuette

⁴⁹ See *Harris v United States*, 536 US 545, 561-568; 122 S Ct 2406; 153 L Ed 2d 524 (2002).

⁵⁰ *Blakely, supra* at ____, 124 S Ct at 2540 (emphasis added).

⁵¹ *Id.*

⁵² *Id.*

⁵³ See MCL 769.12(1)(a); MCL 777.16y.

⁵⁴ We note that our Supreme Court has recently indicated that the *Blakely* decision did not affect Michigan's indeterminate sentencing guidelines, although it did so in dicta. See *People v Claypool*, __ Mich __; __ NW2d __ (2004).