

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMARZE LAMONT MOORE,

Defendant-Appellant.

UNPUBLISHED

February 27, 2007

No. 265378

Wayne Circuit Court

LC No. 05-004056-01

Before: Kelly, P.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b).¹ Defendant was sentenced, as a second habitual offender, MCL 769.10, to 13 years, 4 months to 20 years in prison. Because there was no error in the scoring of defendant's sentencing guidelines, and defendant was sentenced within those guidelines, we affirm.

Defendant's conviction arises out of an incident with his 13-year-old stepdaughter. On an evening when his wife was working, defendant called his stepdaughter into his bedroom and told her to remove her clothing so he could check to see if she was sexually active. When the stepdaughter removed her clothing, defendant digitally penetrated her and performed oral sex on her. Defendant's stepdaughter informed her mother as to what occurred and defendant was arrested shortly thereafter.

Defendant first argues that because the court explained that it imposed the maximum sentence as a punishment for lying to the jury, he was penalized at sentencing for exercising his constitutional right to testify on his own behalf at trial. We disagree.

Defendant is challenging a sentence that is within the guidelines range but did not raise this issue at sentencing, in a motion for resentencing or in a motion to remand, so this issue is not

¹ Defendant was brought to trial on three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b), but was acquitted of all but one count of first-degree criminal sexual conduct.

properly preserved for appeal. *People v Kimble*, 470 Mich 305, 309-312; 684 NW2d 669 (2004); MCL 769.34(10). When a trial court's sentencing decision is unpreserved, review is limited to whether there was plain error which affected substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). In addition, unpreserved claims of constitutional error are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule: 1) an error must have occurred, 2) the error must be clear or obvious, 3) and the error must have affected substantial rights, meaning it affected the outcome of the trial. *Id.*, p 763, citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

The statutory sentencing guidelines apply to enumerated felonies committed on or after January 1, 1999. *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003); MCL 769.34(2). The trial court uses the guidelines to score the applicable offense and prior record variables to establish the proper range for the minimum sentence. *Kimble, supra*, p 309. These scores are then used with the sentencing grids to determine the minimum sentence range. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). The maximum sentence is set by statute, and the trial court cannot impose a minimum sentence that exceeds two-thirds of the maximum sentence. *Babcock, supra*, p 255, n 7.

This Court reviews the sentence to determine whether it is within the guidelines range and, if there is a departure from the guidelines, whether the trial court articulated a substantial and compelling reason for such departure. *Id.*, p 256. If the sentence falls within the appropriate guidelines range, this Court "must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence." *Id.*, p 261; MCL 769.34(10). A trial court has broad discretion to devise a sentence that takes into account the nature of the offense and the offender. *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000).

Defendant does not dispute that the trial court sentenced defendant within the guidelines range, but asserts that it imposed a sentence at the guidelines maximum for an improper reason. At sentencing, the trial judge articulated the factors he considered in assigning defendant's sentence, including the presentence report, the documents presented, letters defendant submitted to demonstrate his character, the seriousness of the offense, and his assessment that defendant lied to the jury. Thus, defendant's testimony was only one factor of several that the trial judge considered in deciding defendant's sentence, and it is not error to consider a defendant's character during sentencing. See *People v Adams*, 430 Mich 679, 701; 425 NW2d 437 (1988).²

Moreover, defendant's testimony contradicting that of the victim and her mother did not explain the additional evidence that supported the victim's version of the incident. For example, defendant asserted that he talked to the victim about her sexual activity, but there was no physical contact. This does not explain why the victim's mother found her shirt on defendant's

² *Adams* affirmed the authority of a judge to consider, in imposing a sentence, a defendant's false testimony in assessing his prospects for rehabilitation. *Adams, supra*, pp 701-702.

bed the next morning. In addition, the victim's mother testified that the acts the victim described to her were acts that defendant usually performed in their sex life. There was also evidence that defendant told his brother he was sorry, he did check the victim for sexual activity, and that he made a bad judgment. Finally, defendant's story did not explain why there was a fresh abrasion on the victim's genitalia. The trial court could, then, be of the opinion that defendant had lied during his testimony.

Again, and most importantly, if the sentence falls within the appropriate guidelines range, this Court must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence. *Babcock, supra*; MCL 769.34(10). Neither of the above two considerations being at issue, and the trial court's opinion not having affected defendant's guidelines range, the court did not commit plain error in assigning defendant the highest sentence within the guidelines range based on the presentence report, the evidence presented, the nature of the offense, and defendant's testimony.

Next, defendant argues that he is entitled to resentencing because the guidelines range was enhanced by the scoring of Offense Variable (OV) 4 on the basis of facts not actually found by a jury, in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree.

In reviewing the number of points scored at the trial level, this Court determines whether there was an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *Id.* Scoring decisions for which there is any evidence in support will be upheld. *Id.*

Offense variable 4 addresses psychological injury to a victim. MCL 777.34(1). A defendant is scored ten points under OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Defendant argues he should not have received any points for OV 4 because there was no evidence at trial regarding psychological injury to the victim, and under *Blakely*, defendant is entitled to be sentenced on the facts actually found by the jury. However, *Blakely* has been held to apply only to determinate sentencing based on judicial fact-finding, and therefore, not to the Michigan sentencing guidelines. "[T]he Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment." *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), quoting *People v Claypool*, 470 Mich 715, 730 n 14, 684 NW2d 278 (2004).

Here, the trial court found that ten points should be scored because the presentence report documented that the victim is in counseling on a weekly basis for this incident. A court is required to review the presentence report before assigning a sentence for a felony because it gives the court as much information as possible to tailor the sentence to both the offense and the offender. *People v Miles*, 454 Mich 90, 97; 559 NW2d 299 (1997); MCL 771.14. Moreover, a sentencing court may consider all evidence before it, including the contents of a presentence investigation report or testimony taken at a preliminary examination or trial. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). The presentence report

supporting the finding that the victim suffered psychological injury requiring professional treatment, the trial court did not err in assigning ten points under OV 4.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Alton T. Davis

/s/ Deborah A. Servitto