

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH ALBERT GRAHAM,

Defendant-Appellant.

UNPUBLISHED

October 11, 2011

No. 297830

Ottawa Circuit Court

LC No. 09-033860-FC

Before: GLEICHER, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant repeatedly sexually abused his daughter over an eight-year period. Based on these acts, the jury convicted defendant of four counts of first-degree criminal sexual conduct (CSC-I). We find no merit in defendant's challenges to his convictions and affirm in that regard. However, the trial court erroneously imposed a mandatory minimum sentence from an inapplicable statute, and the resultant sentences are outside the appropriate minimum sentencing guidelines range. We therefore vacate defendant's sentences and remand to allow the court to either impose compliant sentences or to state substantial and compelling reasons to support the particular upwardly departing sentence.

Defendant and his wife have several children, including the victim. The victim testified regarding numerous incidents of digital-vaginal penetration perpetrated upon her by defendant beginning when she was six or seven years old. Defendant warned the victim not to tell anyone or the family would be torn apart. In a May 2009 meeting with her school counselor and mother, the victim finally revealed that defendant had been sexually abusing her. Following defendant's arrest, the victim's mother and her siblings expressed their disbelief of her story and harassed and threatened the victim. At one point, the victim recanted her allegations and claimed that her brother had abused her. At trial, however, the victim reiterated her accusation that defendant was the person who sexually assaulted her. The jury subsequently convicted defendant of three counts of CSC-I pursuant to MCL 750.520b(1)(b) (victim is at least 13 but less than 16 years of age and related by blood or affinity) and one count of CSC-I in violation of MCL 750.520b(1)(a) (victim under 13 years of age). The court then sentenced defendant to four concurrent terms of 25 to 50 years' imprisonment.

I. INEFFECTIVE ASSISTANCE OF COUNSEL/INSANITY DEFENSE

We reject defendant's assertion that his trial counsel was ineffective for failing to have him independently evaluated to determine whether an insanity defense was viable. Defendant requested this Court to remand for an evidentiary hearing regarding counsel's performance, but we denied that motion. *People v Graham*, unpublished order of the Court of Appeals, entered October 28, 2010 (Docket No. 297830). As no evidentiary hearing occurred, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish that counsel was ineffective, a defendant must show that counsel's performance was so deficient that it actually denied him of the right to counsel. We presume, however, that counsel employed sound trial strategy. The defendant must then show "that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

There is absolutely no suggestion in the record that defendant was incompetent to be held accountable for his criminal acts. Appellate counsel argues that defendant's prior abuse of alcohol could negate his intent, but the record does not support that defendant ever abused alcohol. There also is no record indication that defendant was so severely mentally ill that he could not comprehend the wrongfulness of his acts or conform his behavior to legal standards. *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001), citing MCL 768.21a(1). Defendant had been taking Zoloft since 1997 to treat clinical depression, but this, standing alone, would be insufficient to cause defendant's trial counsel concern. Counsel is not ineffective for failing to raise a meritless defense. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

II. PROSECUTORIAL MISCONDUCT

Defendant challenges the propriety of certain remarks made by the prosecutor during jury selection and closing argument. We generally review allegations of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). As defendant failed to raise a timely objection, our review is limited to plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* (internal quotations omitted). We must review the prosecutor's comments "in context to determine whether they denied defendant a fair trial." *People v Bahoda*, 448 Mich 262, 266-267; 531 NW2d 659 (1995).

During jury selection, the prosecutor asked various questions to determine whether the potential jurors could set aside their biases and fairly judge a case involving familial sexual abuse. For example, the prosecutor queried whether any of the potential jurors knew anyone who had been sexually abused and, if so, how the matter was resolved. During this portion of the questioning, the prosecutor stated:

Everybody just do me a little favor, and just close your eyes for a second. And think back, as uncomfortable as it may be, to the first sexual experience you

ever had, and think about the details of that sexual experience. Think about what happened, who was there in the room, where you were touched, what happened.

And then open your eyes and imagine that I asked you to come to the stand and raise your right hand and swear to tell me the truth and tell me every fact of that first sexual experience you ever had, where the hands went, who touched you where, what they said to you. Do you think that would be easy? Do you think it would be easy to remember? Would it be easy to remember? Does everybody think it would be easy to remember every single thing that happened in the first sexual experience you had? You don't think so? Why not?

* * *

. . . Would it be particularly uncomfortable if the person was in the room that first sexual experience was with?

In closing argument, the prosecutor acknowledged that the victim revealed the abuse in a moment of anger and that she had recanted her accusation at one point. To rehabilitate the victim's testimony, the prosecutor reiterated the testimony of a "forensic interview specialist" that both actions were normal as a child is under "an extreme amount of pressure" when revealing sexual abuse. The prosecution then stated:

Can you imagine going home and having your mom tell your siblings she doesn't believe you either? So then all of your siblings obviously are going to believe what your mom believes. And they're calling you a slut and a whore and a liar. And you sit in your room, and you have a terrible time, and all because you told this.

The prosecutor continued to note the negative treatment the victim suffered at the hands of her family and raised various arguments geared toward bolstering the victim's veracity and explaining her prior inconsistent statements to her family members and law enforcement.

We hold that, during *voir dire*, the prosecutor improperly appealed to the potential jurors to sympathize with the victim. "A prosecutor may not appeal to the jury to sympathize with the victim." *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008).

The purpose of *voir dire* is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury. In *voir dire*, meaning 'to speak the truth,' potential jurors are questioned in an effort to uncover any bias they may have that could prevent them from fairly deciding the case. [*People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994) (internal citations omitted).]

While the prosecutor did ask certain questions geared toward "uncover[ing] any bias" the jurors might have, the prosecutor crossed the line in requesting the potential jurors to close their eyes and place themselves in the victim's shoes. The prosecutor's "question" is akin to the prohibited "golden rule" argument in civil cases. Under such an argument, the plaintiff's counsel directs the jury to put themselves in the plaintiff's position and ask themselves what value they would be

willing to accept in exchange for the loss suffered. Such arguments are prohibited where they reveal “a studied purpose to inflame or prejudice a jury.” See *Anderson v Harry’s Army Surplus, Inc*, 117 Mich App 601, 615-616; 324 NW2d 96 (1982), superseded in part on other grounds as stated in *Salter v Patton*, 261 Mich App 559, 566 n 2; 682 NW2d 537 (2004). The prosecutor’s comment during *voir dire* certainly tended “to inflame or prejudice” the jury. Despite this improper commentary, reversal is not warranted. The prosecutor’s improper statement was a brief portion of the jury selection process and “did not likely deflect the jury’s attention from the evidence presented.” *Unger*, 278 Mich App at 237.

We find no impropriety, however, in the prosecutor’s statements during closing argument. Although a prosecutor may not use her office to vouch for the credibility of prosecution witnesses, *Bahoda*, 448 Mich at 276, “a prosecutor may comment on his own witnesses’ credibility during closing argument, especially when there is conflicting evidence and the question of the defendant’s guilt depends on which witnesses the jury believes.” *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The defense in this case was based on defendant’s denial of guilt. Defense counsel’s strategy was to present evidence that the victim had lied in the past and was now lying about the sexual abuse. The prosecutor countered the defense theory by arguing the evidence that supported the victim’s veracity. This was not an improper argument.

III. NEWLY DISCOVERED EVIDENCE

Defendant maintains that the trial court abused its discretion by denying his motion for a new trial based on newly discovered evidence. It is unclear from the record whether defendant presented “newly discovered evidence” that the victim’s sister had witnessed their brother engage in sexual acts with the victim or whether the sister had simply stated that these sexual encounters occurred.

We review a trial court’s decision on a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). “An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes.” *Unger*, 278 Mich App at 217. A “court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.” MCR 6.431(B). A new trial based on newly discovered evidence is warranted if:

- (1) the evidence itself, not merely its materiality, was newly discovered;
- (2) the newly discovered evidence was not cumulative;
- (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and
- (4) the new evidence makes a different result probable on retrial. [*Cress*, 468 Mich at 692 (quotations omitted).]

We affirm the trial court’s rejection of defendant’s motion for a new trial as the proffered newly discovered evidence would not likely “make[] a different result probable on retrial.” Evidence concerning sexual relations between the victim and her brother would not necessarily exculpate defendant. Even if the victim was truthful regarding her brother, defendant could still have sexually abused the victim. Moreover, the jury was informed that the victim had previously

recanted her allegations against defendant and accused her brother of sexual assault. The jury apparently did not believe that evidence negated defendant's guilt. In any event, "[n]ewly discovered evidence is not ground for a new trial where it would be merely used for impeachment purposes." *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). Under these circumstances, the court was within its discretion to deny defendant's motion.

IV. OTHER ACTS EVIDENCE

Defendant challenges the trial court's admission of evidence regarding an uncharged act of sexual contact between defendant and the victim. The prosecution elicited testimony from the victim that defendant had entered her bedroom and touched her breasts one morning while she was dressing for school. Defendant further asserts that his trial counsel was ineffective in failing to object to this testimony. We generally review a court's decision to admit evidence for an abuse of discretion and underlying issues of law de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). As defendant failed to raise a timely objection at trial, our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 764-765.

Here, the trial court did not abuse its discretion or commit plain error in admitting the challenged evidence. MCL 768.27a provides:

[I]n a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant

"When a defendant is charged with a sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b)," even to establish the defendant's propensity to commit the charged acts. *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007).

The challenged testimony is "evidence that the defendant committed another listed offense against a minor," i.e. CSC-II in violation of MCL 750.520c(1)(b)(i). The prosecution had already presented evidence regarding several incidents of abuse over an extended period, including various other uncharged acts. The challenged evidence was merely cumulative. Accordingly, the trial court acted within its discretion in admitting the evidence and defense counsel was not ineffective in failing to object. *Mack*, 265 Mich App at 130.

V. SENTENCING

Defendant challenges the scoring of ten points for OV 4. The "interpretation and application of the statutory sentencing guidelines" involve questions of law that we review de novo. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). "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 Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Yet, as defendant failed to object at sentencing, our review is limited to plain error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

OV 4 (degree of psychological injury to the victim) is scored ten points where the defendant causes “serious psychological injury requiring professional treatment,” regardless of whether the victim actually seeks out treatment. MCL 777.34(1)(a), (2). “[T]he victim’s expression of fearfulness is enough to satisfy the statute.” *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009). The evidence supports defendant’s score in this case. Prior to revealing the abuse, the victim had been acting out and was failing her classes at school. The victim testified regarding the negative treatment she received from her family after revealing the abuse and her transition into foster care. At sentencing, the victim’s foster father testified that she was “withdrawn, distant, afraid or unable to trust others.” Based on this record, the challenged score was warranted. Accordingly, we reject defendant’s challenge to counsel’s performance in this regard. *Mack*, 265 Mich App at 130.

Defendant also challenges his 25-year minimum sentences. Defendant was convicted of three counts of CSC-I in violation of MCL 750.520b(1)(b) (victim between 13 and 16 years old) and one count in violation of MCL 750.520b(1)(a) (victim under 13 years old). The appropriate sentences for such statutory violations are defined in MCL 750.520b(2), the penalty provision of the CSC-I statute. Until 2006, MCL 750.520b(2) simply stated, “[CSC-I] is a felony punishable by imprisonment in the state prison for life or for any term of years.” Since an August 28, 2006 statutory amendment, however, subsection (2) provides, in relevant part:

[CSC-I] is a felony punishable as follows:

(a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.

(b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

The trial court clearly erred in sentencing defendant to 25 to 50-year terms of imprisonment for his convictions under MCL 750.520b(1)(b) (victim between 13 and 16 years old), as the victim was not “less than 13 years of age” at the time. Subsection (2)(b)’s 25-year mandatory minimum sentence was inapplicable and the court was required to proceed under the applicable minimum sentencing guidelines range. MCL 750.520b(2)(a).

In relation to defendant’s conviction and sentence under MCL 750.520b(1)(a) (victim under 13 years old), the prosecutor proceeded on the theory that defendant committed a sexual act against the victim when she was six or seven years old, which would have occurred in 2001 or 2002. At the time defendant committed that offense, MCL 750.520b(2) did not provide a mandatory minimum sentence. By the time defendant was convicted and sentenced, however, subsection (2) had been amended to impose a 25-year mandatory minimum sentence. The inquiry now before us is whether the pre or post-amendment version of the statute applies.

At all relevant times, MCL 769.34(2) provided that a defendant’s minimum sentence “shall be within the appropriate sentence range under the version of those sentencing guidelines in effect *on the date the crime was committed.*” (Emphasis added.) MCL 769.34(2)(a) provides an exception to the mandatory application of the minimum sentencing guidelines range, “[i]f a

statute mandates a minimum sentence.” Pursuant to MCL 769.34(2)(a), *if* MCL 750.520b(2)(b) applies in this case, defendant’s 25-year minimum sentence would not represent a departure from the guidelines. See *People v Wilcox*, 486 Mich 60, 65-66; 781 NW2d 784 (2010). However, we conclude that the 2006 amendment that added the mandatory minimum sentence to MCL 750.520b(2) is inapplicable where defendant committed the crime in 2001 or 2002.

As a general rule, we must apply amended statutes prospectively. *People v Doxey*, 263 Mich App 115, 121; 687 NW2d 360 (2004). Yet, the Legislature may choose to give a statute retroactive effect. “In determining whether a statute should be applied retroactively or prospectively only, ‘the primary and overriding rule is that the legislative intent governs.’” *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001), quoting *Franks v White Pine Copper Div*, 422 Mich 636, 670; 375 NW2d 715 (1985). There is an exception to the general rule for statutes that are “remedial or procedural in nature”: “[S]tatutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intention is manifested.” *Franks*, 422 Mich at 672.

When analyzing the retroactivity of an amended criminal statute, we must avoid violating the *Ex Post Facto* clause of the Michigan Constitution. Const 1963, art 1, § 10. A statute violates the *Ex Post Facto* clause if it “applies to events that occurred before its enactment” and “disadvantages the offender.” *People v Slocum*, 213 Mich App 239, 243; 539 NW2d 572 (1995). “A statute disadvantages an offender if (1) it makes punishable that which was not, (2) it makes an act a more serious offense, (3) it increases a punishment, or (4) it allows the prosecutor to convict on less evidence.” *Id.*

The underlying act of CSC-I with an individual under the age of 13 has always been a serious criminal offense. The 2006 amendment to MCL 750.520b(2) created a mandatory minimum sentence, which, depending on the offender’s guidelines scoring, could be greater than the otherwise applicable minimum sentencing guidelines range. As a defendant could face an increased punishment under the amended MCL 750.520b(2)(b), retroactive application could violate the *Ex Post Facto* clause of our constitution. See *Slocum*, 213 Mich App at 243.

Further, we hold that the Legislature did not intend to retroactively apply the 2006 amendment. We find instructive caselaw analyzing amendments to MCL 333.7401 of the Controlled Substances Act. The Legislature has amended MCL 333.7401 several times over the years by recategorizing offense levels based on the quantity of controlled substances involved, and by including, altering and removing mandatory minimum and maximum sentences. In *Thomas*, 260 Mich App at 458, the defendant committed his offense, and was convicted and sentenced, all while MCL 333.7401(2)(a)(iii) provided a mandatory minimum sentence of “not less than 10.” Following his sentencing, the Legislature eliminated the mandatory minimum term. The defendant then sought resentencing. *Thomas*, 260 Mich App at 457. The *Thomas* Court declined to apply the 2003 amendment because nothing in the statutory language evinced the Legislature’s intent to make the amendment retroactive. See *Doxey*, 263 Mich App 115 (holding that an amendment to MCL 333.7401[3], which changed a consecutive sentencing provision from mandatory to permissive, only applied to defendants who committed their offense after the amendment); see also *People v Dailey*, 469 Mich 1019; 678 NW2d 439 (2004), vacating in part *People v Dailey*, unpublished opinion per curiam of the Court of Appeals, issued August

26, 2003 (Docket No. 239683) (MCL 769.34[2]’s command that a defendant be sentenced under the guidelines version in effect on the date “the crime was committed” evinces the Legislature’s “intent to have defendant sentenced under” the penalty provisions of MCL 333.7401 in effect at the time of the offense).

Defendant committed the charged act of CSC-I on a victim under the age of 13 in 2001 or 2002, well before the 2006 amendment that created a 25-year mandatory minimum sentence. Accordingly, the statutory mandatory minimum was inapplicable pursuant to MCL 769.34(2) and the court was required to sentence defendant within the appropriate minimum guidelines range. Defendant had a total PRV score of 20 and OV score of 70, placing him in PRV Level C and OV Level IV. CSC-I is a Class A felony against a person. MCL 777.16y. A Class A offender in the C-IV cell has a minimum sentencing guidelines range of 108 to 180 months, or nine to 15 years. The trial court imposed a minimum sentence of 25 years, which represents an upward departure from the appropriate guidelines range. As the court did not believe this sentence was a departure, it failed to state any substantial and compelling reasons on the record to support the particular sentence. Absent such reasons on the record, we must vacate defendant’s sentences and remand for resentencing. See MCL 769.34(3); *People v Babcock*, 469 Mich 247, 258-259; 666 NW2d 231 (2003).

We affirm defendant’s convictions but vacate his sentences and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens