

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW DOUGLAS PACE,

Defendant-Appellant.

UNPUBLISHED

March 21, 2013

No. 307734

Wayne Circuit Court

LC No. 11-004168-FC

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b). The trial court sentenced defendant to concurrent terms of 48 months to 180 months' imprisonment. We affirm defendant's conviction on the charged CSC II count (Count 4). However, because we conclude that the trial court erred by finding defendant guilty of an uncharged cognate offense of CSC II, we vacate defendant's conviction on "Count 5" and remand for resentencing.

Defendant's convictions arose out of his sexual abuse of his wife's granddaughter. The prosecutor charged defendant with three counts of CSC I, MCL 750.520b(1)(a) (Counts 1-3), and one count of CSC II, MCL 750.520c(1)(b) (Count 4). At trial, the granddaughter testified that on multiple occasions when she was approximately age 13, defendant touched her genitals and attempted vaginal and anal penetration with his penis and his fingers. After hearing the granddaughter's testimony, the trial court found that defendant had committed two acts of CSC II, but found that the evidence was not sufficient to prove beyond a reasonable doubt that sexual penetration occurred on the CSC I counts.

CSC II is a cognate offense of CSC I. *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997). As the *Lemons* Court explained:

CSC I requires the prosecutor to prove "sexual penetration." MCL 750.520b(1). CSC II requires the prosecutor to prove "sexual contact." MCL 750.520c(1). Sexual penetration can be for any purpose. MCL 750.520a(l). The statute defines sexual contact, however, as touching that "can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(k). Thus, because CSC II requires proof of an intent not required by CSC I—that defendant intended to seek sexual arousal or gratification—CSC II is

a cognate lesser offense of CSC I. In short, it is possible to commit CSC I without first having committed CSC II. [*Id.*; see also *People v Nyx*, 479 Mich 112, 136; 734 NW2d 548 (2007) (Taylor, J., with one justice concurring and two justices concurring in result).]

In this case, the trial court convicted defendant of two counts of CSC II, even though the prosecutor had charged defendant with only a single count of CSC II. Defendant did not object at trial to the conviction on the uncharged CSC II offense; accordingly, we review the conviction for plain error. *People v Otterbridge*, 477 Mich 875, 875; 721 NW2d 595 (2006).

MCL 768.32(1) controls whether a defendant may be convicted of an inferior offense. The statute “permits the trier of fact to find a defendant guilty of a lesser offense if the lesser offense is necessarily included in the greater offense.” *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010). However, cognate offenses are not inferior offenses within the meaning of MCL 768.32(1). *Id.* Accordingly, a trial court “may not find a defendant not guilty of a charged offense but guilty of a cognate offense.” *Id.*

In this case, the prosecutor alleged penile or digital penetration in the CSC I counts. In contrast, the prosecutor alleged sexual contact in the CSC II count. As we have noted, the trial court expressly stated it could not find that sexual penetration occurred beyond a reasonable doubt. Upon making that finding, the court’s only option was to acquit defendant of the CSC I charges and to convict on the single CSC II charge. The trial court plainly erred by finding defendant guilty of an additional uncharged CSC II offense, because the uncharged conviction arose from a cognate offense of the charged crimes.

Regarding the charged CSC II offense (Count 4), we conclude, after a de novo review of the record, that the evidence was sufficient to convict defendant. Defendant argues that the granddaughter’s testimony was not credible and that both of his CSC II convictions should be reversed. We disagree. A prosecutor must prove each element of the charged crime beyond a reasonable doubt. See *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). The elements of CSC II, as charged in this case, are: (1) defendant engaged in sexual contact with the complainant; (2) the complainant was at least age 13 but less than age 16; (3) defendant and complainant were members of the same household. MCL 750.520c(1)(b)(i); see generally *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). “Sexual contact” means “the intentional touching of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification” MCL 750.520a(q).

The prosecutor proved the elements of the charged CSC II count. The complainant testified in detail about a specific sexual abuse incident that occurred in the living room of the home where she and defendant lived. She described defendant touching her “private parts” with his finger, she provided information about when the incident occurred, and she testified that defendant told her not to tell her grandmother about the incident. Moreover, we find nothing in the record that warrants overturning the trial court’s determination that the complainant’s testimony was credible. Rather, we defer to the trial court’s credibility determinations in a bench trial. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). The record thus supports the trial court’s findings regarding the charged CSC II count.

We turn next to defendant's argument that his trial counsel was ineffective. Both the United States and the Michigan Constitutions guarantee a defendant the right to assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. The right to counsel includes the right to effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Our Supreme Court has held that the Michigan Constitution guarantees a defendant the same right to counsel as the United States Constitution, and Michigan has adopted the standard for evaluating the effectiveness of counsel set out by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994).

Our Supreme Court recently summarized the appellate burden on a defendant who has challenged the effectiveness of trial counsel: "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 135 (2012).

Defendant challenges several aspects of his trial counsel's representation. Most of these challenges, however, he supports only with assertions in an unsigned, unverified, undated affidavit. The affidavit is not valid and this Court need not consider it. MCR 2.114(B); see *Wood v Bediako*, 272 Mich App 558, 562-563; 727 NW2d 654 (2006).

Even if defendant had presented factual support for his arguments concerning his counsel's effectiveness, we would find the arguments meritless. Defense counsel's decisions regarding which witnesses to call, whether to waive a jury trial, and whether to present the defendant's testimony are matters of trial strategy, and this Court will not assess that strategy in hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Moreover, the record demonstrates that defense counsel adequately challenged the complainant's credibility, and defendant has presented nothing on appeal to indicate that his testimony, or that of additional witnesses, would have altered the trial court's credibility determination or the prosecutor's proof of the elements on the charged CSC II offense. The record also demonstrates that defendant validly waived a jury trial and validly waived his right to testify.

Similarly, defendant's argument fails on his claim that counsel was ineffective for deciding against obtaining the complainant's school records, including records from an anger management specialist. Defendant maintains the school records would demonstrate the complainant's failure to confide in the school personnel, which, according to defendant, would prove that the complainant fabricated the abuse allegations.

Defendant's argument is unsubstantiated. To establish that counsel was ineffective for failure to present evidence, the defendant must demonstrate that the missing evidence would have been a substantial defense. See *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). In this case, defense counsel presented other sufficient evidence regarding the complainant's delay in reporting the abuse and the complainant's decision not to report the abuse to the anger management specialist. Consequently, even if trial counsel had obtained the school records, the evidence in the records would have been redundant regarding the complainant's delay in reporting the abuse. In sum, defendant has not met his burden of demonstrating that his counsel's performance was below an objective standard of reasonableness.

Defendant's last challenge is to the scoring of the sentencing offense variables and the resulting sentence. We first note that our decision to vacate the "Count 5" uncharged CSC II conviction requires a remand for resentencing, which will in turn require a new sentencing information report. We briefly address the concerns raised by defendant to provide guidance to the trial court on resentencing. Defendant argues that the trial court erred in assessing 10 points against defendant for offense variable (OV) 4, psychological injury to a victim. MCL 777.34(2). A 10-point score is required if a victim sustained serious psychological injury that may require professional treatment. *Id.* The sentencing court may consider all evidence in the records, including testimony from a preliminary examination and trial testimony. *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008). A 10-point score for OV 4 is appropriate if the record demonstrates that the complainant was fearful or angry as a result of the sexual abuse. *People v Waclawski*, 286 Mich App 634, 681; 780 NW2d 321 (2009); see also *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). If on remand the trial court assesses points on OV 4, the court should identify the evidence supporting the score.

Defendant next challenges his 50-point score on OV 11 (criminal sexual penetration). MCL 777.41(1). A 50-point score is required if two or more sexual penetrations occurred. *Id.* A trial court may assess OV points against a defendant if the court finds by a preponderance of the evidence that the OV conduct occurred. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). In this case, however, the trial court gave no indication of any finding, by a preponderance or otherwise, that sexual penetrations occurred to warrant a 50-point OV 11 score. Rather, the trial court found the evidence was insufficient to prove sexual penetration beyond a reasonable doubt ("I cannot, however, find beyond a reasonable doubt that there was sexual penetration"). The court made no other finding at sentencing concerning sexual penetration. Accordingly, as the prosecution concedes on appeal, the 50-point score on OV 11 was erroneous, absent an explanation for the score on remand.

Defendant also challenges the 25-point score on OV 13 (pattern of felonious activity). MCL 777.43(1). A 25-point score is required if the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. *Id.* In determining the number of crimes for purposes of OV 13, the trial court must count all crimes the defendant committed within a five-year period preceding the sentencing offense, even if the defendant was not convicted of the crimes. MCL 777.43(2)(a); *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). However, the trial court may not assess points under OV 13 for conduct that the court scored under OV 11. MCL 777.43(2)(c); *People v Bonilla-Machado*, 489 Mich 412, 424; 803 NW2d 217 (2011). If on remand the trial court assesses points on OV 13, the court must identify the crimes that support the score.

Defendant also claims that his counsel failed to allocute on his behalf. Given that defendant must be resentenced, we need not decide this issue. We note, however, that the trial court gave both defense counsel and defendant an opportunity to allocute and that they both presented allocution statements.

Defendant's conviction on the CSC II Count 4 is affirmed; his conviction and sentence on the uncharged CSC II "Count 5" are vacated, and the matter is remanded for resentencing on the remaining CSC II count. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Peter D. O'Connell

/s/ Jane M. Beckering