

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
March 4, 2014

v

MICHAEL DEJEON MCREYNOLDS,  
  
Defendant-Appellant.

No. 307453  
Wayne Circuit Court  
LC No. 11-006595-FC

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Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant Michael Dejeon Reynolds of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration of victims younger than 13), at a trial in the Wayne Circuit Court.<sup>1</sup> On October 21, 2011, the trial court sentenced the 20-year-old defendant to a prison term of 25 to 37 and 1/2 years for each conviction, to be served concurrently, in accordance with MCL 750.520b(2)(b) (mandating a 25-year minimum term of imprisonment “[f]or a violation . . . committed by an individual 17 years of age or older against an individual less than 13 years of age”). Defendant now appeals as of right. We affirm.

The two victims were both 12 years of age at the time of defendant’s October 2011 trial. The victims recalled that in the spring or summer of 2011,<sup>2</sup> when they were still in the fifth grade, defendant and a friend called “D” engaged both victims in digital penetration and forced them to perform oral sex. Specifically, it was alleged that defendant digitally penetrated both victims. It was these acts that led to defendant’s convictions.

Defendant first argues that the trial court erred in preliminarily instructing the potential jurors that the trial would not proceed in the same manner as depicted in legal dramas on television and in the movies. Defendant concludes that the instruction preemptively bolstered

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<sup>1</sup> The prosecutor charged both defendant and a codefendant, Jason Russell Carter, with two counts of first-degree CSC for penetrating the same young victims. Codefendant Carter was tried separately and was also convicted of two counts of first-degree CSC. His appeal is also before this Court.

<sup>2</sup> The prosecutor alleged that the crimes occurred in or around May 2011.

the prosecution's case and minimized its burden of proof by announcing that the prosecutor need not present particular evidence, including forensic evidence. Defendant concedes that he did not object to the trial court's special preliminary instruction, so this issue is unpreserved for appellate review.

This Court generally considers de novo claims of instructional error. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). Where a claim of instructional error is preserved, this Court reviews "for an abuse of discretion a trial court's determination that a specific instruction" applies or does not apply to the facts of record. *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011); see also *People v Young*, 472 Mich 130, 135, 141; 693 NW2d 801 (2005) (noting that a "decision whether to give a[n] . . . instruction falls within the trial court's sound discretion"). "[W]here, as here, the defendant failed to preserve his claim," an appellate court confines its review "to the plain-error framework set forth in" *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994), and *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). *Young*, 472 Mich at 135, 143. Thus, this Court reviews unpreserved claims of error only to ascertain whether any plain error affected the defendant's substantial rights. *Id.*

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000) (quotation marks and citation omitted). This Court reviews jury instructions as a whole to determine whether error requiring reversal occurred. *Bartlett*, 231 Mich App at 143. Even when somewhat imperfect, jury instructions do not qualify as erroneous provided that they fairly present to the jury the issues to be tried and sufficiently protect the defendant's rights. *People v Knapp*, 244 Mich App 361, 376; 624 NW2d 227 (2001); *Bartlett*, 231 Mich App at 143-144.

During the trial court's voir dire of the prospective jurors, it read the jury some preliminary instructions, and defendant complains on appeal about the following instruction:

Now, how many of you watch television shows like CSI and Law & Order and Harry's Law and some of those?

I have to admit to some Law & Orders myself once in a while. You can probably imagine why I ask that question. We don't want you to be sitting there under the delusion that what you're about to see in the real world of the Frank Murphy Hall of Justice bears much relationship to how you see trial reenacted on television and in the movies.

Although I know those television trial shows are very popular these days, . . . they can give you a very false or misleading idea of how cases are investigated and how they're tried in a courtroom. Especially when it comes into the area of forensic science . . . , or the ability of either side to produce scientific evidence that proves or disproves the case. Most of that stuff is just fantasy that lives in the minds of television script writers.

Please do not confuse what you see on TV with reality. Please don't expect here, for example, the prosecutor is going to produce a lot of exotic

scientific evidence . . . , or that he is going to produce superbly articulate witnesses who look like GQ models and have been trained at the actor[']s studio because I can guarantee you that is not going to be the case here.

And by the same token you can't expect the defense here is going to stage a melodramatic scene at the end of the trial where the real culprit burst[s] through the door of the courtroom and reveals a complicated conspiracy between General Motors and the CIA. . . . [T]hat's just for television and the movies. It's not for the real world.

And . . . on television they always show the defense lawyer is . . . never just trying the case by himself as [defense counsel] is here. He's always got a team . . . of 15 or 20 lawyers that he consults at length after each day of trial and they eat Chinese food out of white cartons around a big conference table, brainstorm the case. Well [defense counsel] is going it alone here, that's the way it is in the real world, just like [the prosecutor] is.

I mean even though [the prosecutor] comes from an office with . . . well over a hundred assistant prosecutors upstairs, they're all doing their own thing. They're busy with their own cases. They're not all just focused on . . . [defendant's] trial today.

I say all that to simply remind you that trial evidence is frequently imperfect and can also be boring. And as far as I know, there's no videotapes of the crime charged here.

So what you must do in order to perform your duty in a responsible fashion is to simply take the evidence that's presented to you and then use your own common sense and decide whether that evidence proves to you beyond a reasonable doubt that the defendant is guilty or not. Wh[at] you are not to do is to take the evidence that's presented to you and then decide whether it's presented to you the same way you think it would have been presented in your last week's Law & Order episode and measure it against that standard and decide whether i[t] proves beyond a reasonable doubt that the defendant is guilty, okay.

An accurate reading of the trial court's preliminary instruction belies defendant's contention that the instruction minimized the prosecutor's burden of proof by announcing that he need not present forensic evidence. The court merely informed the potential jurors that the prosecutor likely would not introduce during trial multiple items of scientific evidence or trained actor-like witnesses. And the above-quoted instruction, viewed as a whole, accurately advised the potential jurors that they had a responsibility to review the evidence presented by the parties, apply their common sense, and determine whether that evidence established defendant's guilt beyond a reasonable doubt. See CJI2d 3.1(3) (in deciding the facts, the jury must "think about all the evidence"), CJI2d 3.2 (describing the proof beyond a reasonable doubt standard), CJI2d 3.2(3) (describing a reasonable doubt as comprising "a doubt based on reason and common sense"), CJI2d 3.5 (defining evidence), CJI2d 3.5(9) (instructing that the jurors "should use [their] own common sense and general knowledge in weighing and judging the evidence"), and

CJI2d 3.6(2) (in deciding witness credibility, the jurors “should rely on [their] own common sense and everyday experience”). Furthermore, before opening statements, the trial court gave additional preliminary instructions tracking the concepts in CJI2d 3.1, CJI2d 3.5, and CJI2d 3.6, among others; and after closing arguments, the trial court correctly instructed the jury in accordance with CJI2d 3.1, CJI2d 3.2, CJI2d 3.5, and CJI2d 3.6, among others.

For these reasons, defendant has not demonstrated any plain error. And because the trial court’s instructions when reviewed as a whole properly informed the jury regarding the prosecutor’s burden of proof and other relevant matters, defense counsel was not ineffective for failing to raise a meritless objection to the instructions. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant’s next argument is that his 25-year mandatory minimum term of imprisonment constitutes cruel or unusual punishment prohibited by Const 1963, art 1, § 16. Defendant did not challenge in the trial court the statutory 25-year mandatory minimum sentence term as violative of 1963 Const, art 1, § 16. Therefore, this issue is unpreserved for appellate review. This Court reviews unpreserved claims of error only to ascertain whether any plain error affected the defendant’s substantial rights. *Young*, 472 Mich at 135, 143.

Defendant’s argument is foreclosed by our decision in *People v Benton*, 294 Mich App 191, 203, 207; 817 NW2d 599 (2011), where this Court rejected the defendant’s contention that the “mandatory 25-year minimum sentences for her [CSC I] convictions,” authorized in MCL 750.520b(2)(b), were “cruel and/or unusual punishments that violate the federal and state constitutions.” This Court analyzed and rejected the defendant’s constitutional challenge, and those grounds are the same as those proffered by defendant in the present case. Defendant has therefore not demonstrated that the 25-year minimum sentence mandated by MCL 750.520b(2)(b) violated 1963 Const, art 1, § 16, *Benton*, 294 Mich App at 203-207, and nor has he distinguished the applicability of *Benton* to this case.

For his final argument, defendant asserts that the trial court violated his due process rights in imposing the 25-year mandatory minimum sentence because it was based on defendant’s age being in excess of 17, a fact that the jury did not find beyond a reasonable doubt. See *Alleyne v United States*, \_\_\_ US \_\_\_; 133 S Ct 2151; 186 L Ed 2d 314 (2013). The parties discussed at trial whether defendant’s age constituted an element of CSC I under MCL 750.520b(1)(a), or a sentencing enhancement issue under MCL 750.520b(2)(b). However, because defendant did not take the position that the trial court should as a matter of constitutional law instruct the jury that his age was an element of the offense, this issue is unpreserved for appellate review.<sup>3</sup>

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<sup>3</sup> Even if it was preserved, defendant’s argument would still be subject to a harmless error analysis. See *People v Kowalski*, 489 Mich 488, 505 n 30; 803 NW2d 200 (2011). As to *unpreserved* errors under *Alleyne*, the few federal courts that have addressed the issue have concluded that they are subject to plain error analysis, *United States v Mack*, 729 F3d 594, 607-609 (CA 6, 2013), while *preserved Alleyne* errors have been subjected to the similar harmless

This Court reviews unpreserved claims of error only to ascertain whether any plain error affected the defendant's substantial rights. *Young*, 472 Mich at 135, 143. We hold under this standard that the trial court's imposition of the 25-year mandatory minimum sentence for CSC I based on defendant's age, an element regarding which the court did not instruct the jury, constituted a plain error because it violated defendant's Fifth and Sixth Amendment rights under the United States Constitution. However, the error does not warrant vacating his sentence.

After the evidentiary phase of the trial concluded, the trial court and the parties addressed jury instruction issues, including the elements of the CSC I charges. The parties concurred that the jury had to find beyond a reasonable doubt that (1) defendant committed a sexual act involving entry of his finger into the victims' genital openings, CJI2d 20.1(2)(a), and (2) the victims had not reached 13 years of age, CJI2d 20.3. The prosecutor initially noted his belief that the CSC I charges also required proof beyond a reasonable doubt that defendant was older than 17 at the time of the penetrations, while the court believed that defendant's age only came into play for sentencing enhancement purposes. Ultimately, the court decided to omit defendant's age from the CSC I elements during jury instructions, in part because the model criminal jury instructions mentioned nothing about a defendant's age as an element of CSC I.

Defendant's argument is premised upon *Alleyne*, where the United States Supreme Court held as follows:

In *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), this Court held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. . . .

*Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with our decision in *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and with the original meaning of the Sixth Amendment. *Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt.* See *id.* at 483 n 10, 490. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. Accordingly, *Harris* is overruled. [133 S Ct at 2155 (Opinion by THOMAS, J., emphasis added)<sup>4</sup>.]

The Supreme Court elaborated that (1) "*Apprendi* concluded that any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the error test. *United States v Harakaly*, 734 F3d 88, 94-95 (CA 1, 2013). See, also, *United States v Lara-Ruiz*, 721 F3d 554, 557 (CA 8, 2013) (recognizing plain error or harmless error analysis applies to an *Alleyne* error, depending on whether it was preserved).

<sup>4</sup> In separate opinions, a majority of the justices concurred in Parts I, III-B, III-C, and IV of Justice THOMAS's lead opinion. See concurring opinion by SOTOMAYOR, J., 133 S Ct at 2164-2166, and partial concurrence by BREYER, J., 133 S Ct at 2166-2167.

crime,” and “the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt,” *Alleyne*, 133 S Ct at 2160 (quotation marks and citation omitted); (2) “[i]t is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed,” *id.*; and (3) because “facts increasing the legally prescribed floor [undisputedly] *aggravate* the punishment,” “the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.” *Id.* at 2161 (emphasis in original).

We can find no legitimate way to distinguish *Alleyne* from the circumstances of defendant’s sentencing. The trial court did not instruct the jury regarding a duty to find defendant’s age beyond a reasonable doubt, yet the court proceeded to impose the 25-year minimum sentence in MCL 750.520b(2)(b) on the basis of its finding that defendant was 17 years of age or older when he penetrated the victims. Because the statutory minimum sentences imposed by the court rested on a matter not found by defendant’s jury beyond a reasonable doubt, the court’s imposition of the 25-year mandatory minimum sentences constituted plain error because it violated defendant’s federal rights to a jury trial and due process. *Alleyne*, 133 S Ct at 2155-2156, citing US Const, Ams V and VI.

This Court recently decided *People v Herron*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 309320, issued December 12, 2013), slip op at 3-7, the first published case to address arguments invoking *Alleyne*. However, as this Court emphasized in *Herron*, the trial court in that case did not sentence the defendant to a statutory mandatory minimum term of imprisonment. *Id.*, slip op at 6. This Court rejected the defendant’s reliance on *Alleyne* in support of the argument that “judicial fact-finding using Michigan’s sentencing guidelines, see MCL 764.34(2) and MCL 777.1 *et seq.*, as a guide to determine a minimum term of an indeterminate sentence range violates the Sixth Amendment and Fourteenth Amendment to the United States Constitution.” *Id.*, slip op at 3. This Court concluded, in relevant part:

*In this case, judicial fact-finding within the context of Michigan’s sentencing guidelines was not used to establish a mandatory minimum floor of a sentencing range. Rather, judicial fact-finding and the sentencing guidelines were utilized to inform the trial judge’s sentencing discretion within the maximum determined by statute and the jury’s verdict. The statutes defendant was convicted of violating do not provide for a mandatory minimum sentence on the basis of any judicial fact-finding. While judicial fact-finding in scoring the sentencing guidelines produces a recommended range for a minimum sentence of an indeterminate sentence, the maximum of which is set by law, [People v Drohan, 475 Mich 140, 164; 715 NW2d 778 (2006)], it does not establish a mandatory minimum; therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the Sixth Amendment’s right to a jury trial. Alleyne, 570 US at \_\_\_; 133 S Ct at 2163, n 6.*

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*We conclude that defendant’s argument [invoking Alleyne] fails in light of the pains the Supreme Court took in Part III-C of its opinion to distinguish*

*judicial fact-finding to establish a mandatory minimum floor of a sentencing range from the traditional wide discretion accorded judges to establish a minimum sentence within a range authorized by law as determined by a jury verdict or a defendant's plea. We hold that judicial fact-finding to score Michigan's guidelines falls within the "wide discretion" accorded a sentencing judge "in the sources and types of evidence used to assist [the judge] in determining the kind and extent of punishment to be imposed within limits fixed by law." Alleyne, 570 US at \_\_\_ n 6; 133 S Ct at 2163 n 6, quoting Williams v New York, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). Michigan's sentencing guidelines are within the "broad sentencing discretion, informed by judicial factfinding, [which] does not violate the Sixth Amendment." Alleyne, 570 US at \_\_\_; 133 S Ct at 2163. [Herron, slip op at 6-7 (emphasis added).]*

Because *Herron* did not involve application of a statutory mandatory minimum sentence, its analysis of *Alleyne* is not dispositive of the issue presented in this case.

Defendant has not briefed whether *Alleyne* applies retroactively to this case, but we must address it before applying it to the present appeal. The prosecution states that *Alleyne* does apply because it was decided while this case was on direct appeal. "The issue whether a United States Supreme Court decision applies retroactively presents a question of law that [this Court] review[s] de novo." *People v Gomez*, 295 Mich App 411, 414; 820 NW2d 217 (2012).

"[T]he decision in question must satisfy a threshold criterion: namely, that the decision clearly establishes a new principle of law." *People v Parker*, 267 Mich App 319, 326-327; 704 NW2d 734 (2005) (quotation marks and footnote omitted). The United States Supreme Court has defined a new rule "as a rule that . . . was not *dictated* by precedent existing at the time the defendant's conviction became final." *Whorton v Bockting*, 549 US 406, 416; 127 S Ct 1173; 167 L Ed 2d 1 (2007) (quotation marks and citation omitted, emphasis in original). "The explicit overruling of an earlier holding no doubt creates a new rule." *Id.* (quotation marks and citation omitted). Because the decision in *Alleyne*, 133 S Ct at 2155, expressly overruled *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), the *Alleyne* ruling constitutes a new rule. And because the new rule set forth in *Alleyne* embodies "a new rule for the conduct of criminal prosecutions" grounded in the Fifth and Sixth Amendments to the United States Constitution, the new rule "applies retroactively to all cases, state or federal, pending on direct review or not yet final . . ." *People v Sexton*, 458 Mich 43, 54-55; 580 NW2d 404 (1998) (quotation marks and citation omitted).

Nevertheless, this plain error only compels vacating defendant's sentences if it violated defendant's substantial rights. Although this subjected him to a mandatory minimum prison term of 25 years, the basis for doing so—his age at the time the crimes were committed—is undisputed. Consequently, because defendant's age was not contested and easily ascertainable,<sup>5</sup>

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<sup>5</sup> Indeed, a court can take judicial notice of a party's age if it is contained in a source of unquestionable reliability, *People v Goecke*, 457 Mich 442, 448 n 2; 579 NW2d 868 (1998), such

not having the jury make a finding on that issue did not seriously affect the fairness, integrity, or public reputation of these judicial proceedings. *Carines*, 460 Mich at 763-766. Or, stated under the harmless error test, we have no doubt but that any reasonable jury would find that defendant was over the age of 18 when he committed these crimes, as defendant's age at the time is undisputed. Consequently, defendant is not entitled to relief on this issue.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray

/s/ Michael J. Riordan

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as a driver's license, birth certificate, or if it is contained in the lower court record. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009).