STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH J. LANCASTER,

Defendant-Appellant.

UNPUBLISHED
June 6, 1997

No. 181635
Barry Circuit Court
LC No. 93-000097-FC

Before: Bandstra, P.J., and Hoekstra and S.F. Cox*, JJ.

PER CURIAM.

Defendant was convicted by a jury of seven counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court sentenced defendant to concurrent terms of twenty-five to fifty years' imprisonment for the CSC-I convictions and to three to nine years' imprisonment for the CSC-II conviction. Defendant appeals as of right, and we affirm, but remand for correction of the Presentence Investigation Report (PSIR).

Defendant first argues that the trial court erred by permitting the prosecutor, just prior to the commencement of trial, to amend the information to allege two additional counts of CSC-I by digital penetration in addition to the original counts that charged penile and vaginal penetration. Because defendant withdrew his objection to the amendment of the information, defendant cannot now argue that he is entitled to a reversal of his convictions on this basis. *People v Barclay*, 208 Mich App 670, 672-673; 528 NW2d 842 (1995). Notwithstanding waiver, however, defendant has failed to demonstrate grounds for reversal. We will not reverse a trial court's decision to amend an information unless the defendant was prejudiced in his defense or if a failure of justice resulted. MCL 767.76; MSA 28.1016; *People v Mahone*, 97 Mich App 192, 195; 293 NW2d 618 (1980). Here, no prejudice or failure of justice will result because the amendments did not allege a new crime, but rather, they simply charged a different type of penetration, and defendant makes no claim that he was deprived of an opportunity to

* Circuit judge, sitting on the Court of Appeals by assignment.

defend against the charges. *People v Stricklin*, 162 Mich App 623, 633-634; 413 NW2d 457 (1987).

Defendant next asserts that the prosecutor's misconduct during his cross-examination of defendant constitutes error requiring reversal. Although it is improper to ask a criminal defendant to comment on the credibility of prosecution witnesses, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), defendant did not object to the improper questions. We believe that a timely objection could have cured any prejudice, and thus decline to review the issue. *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995). Moreover, our review of defendant's responses to the prosecutor's questions leads us to conclude that defendant suffered no harm. *Buckey*, *supra*.

Next, defendant argues that his twenty-five to fifty-year sentence, which is within the guidelines, is disproportionate. We disagree. Defendant's lack of criminal history, his employment and his representation that the offense was not particularly heinous are not unusual circumstances that would overcome the presumption of proportionality that attaches to a sentence within the guidelines. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Defendant next claims that he is entitled to have certain information, challenged by defendant as untrue at sentencing, stricken from the PSIR. We agree. This Court has consistently held that when a sentencing court states that it will disregard information in a PSIR challenged by a defendant as inaccurate, the defendant is entitled to have the information stricken from the report. MCL 771.14(5); MSA 28.114(5); see, e.g., *People v Martinez (After Remand)*, 210 Mich App 199, 202; 532 NW2d 863 (1995); *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993). However, because the trial court did not consider the challenged information when imposing sentence, defendant is not entitled to resentencing. *Id*. Therefore, we direct only that the trial court on remand strike from the PSIR the information challenged by defendant that the trial court agreed not to consider, and forward a corrected copy to the Michigan Department of Corrections.

Defendant's in pro per supplemental brief raises two additional claims. First, defendant argues that his statement to Trooper Smith should have been suppressed, as Smith did not readvise defendant of his *Miranda*[1] rights prior to interviewing him. He is mistaken. "The *Miranda* warnings are not a liturgy which must be read each time a defendant is questioned." *People v Godboldo*, 158 Mich App 603, 605; 405 NW2d 114 (1986). Rather, the *Miranda* rule is a procedural safeguard designed to protect an accused's right against self-incrimination. *Id*. Thus, the only question is whether, viewing the totality of the circumstances, defendant's statement to Smith was voluntary. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). After reviewing the record and considering all relevant factors, we conclude that defendant's statement to Smith was voluntary.

Lastly, defendant claims that the trial court erred by refusing the deliberating jury's request to replay the testimony of complainant, defendant, defendant's wife, and the three state troopers. We find defendant's claim without merit because the trial court's response did not foreclose the possibility of the jury rehearing the requested testimony. *Austin*, *supra* at 569

We affirm defendant's convictions and sentence, but remand to the trial court so that the PSIR can be corrected and a copy forwarded to the Michigan Department of Corrections. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Sean F. Cox

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2nd 694 (1966).