STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEXANDER STANFORD,

Defendant-Appellant.

UNPUBLISHED
February 3, 1998

No. 201194
Recorder's Court
LC No. 95-009210

Before: Markman, P.J., and McDonald and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for attempt to commit criminal sexual conduct first-degree, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and assault with intent to commit criminal sexual conduct second-degree, MCL 750.520g(2); MSA 28.788(7)(2). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to fifteen to thirty years' imprisonment. We affirm.

Defendant first argues that he was denied a fair trial because of prosecutorial misconduct. We disagree. Review of this issue is foreclosed because any prejudicial effect of the prosecutor's remarks could have been cured by an appropriate instruction and a failure to review the issue would not result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993).

Defendant argues that the prosecution insinuated that defendant was in hiding prior to his arrest, which was not supported with any evidence, and, without a cautionary instruction issued by the trial court *sua sponte*, the jury was free to use the statement as substantive evidence of defendant's guilt. Defendant specifically objects to the following statement made by the prosecutor:

> And the allegation came about the police had him in custody briefly. This is St. Clair Shores Police. But one of them determined that it happened in the city of Detroit. There was contact with the Detroit Police Officers. But he was released from their custody. And he was not seen or heard from for some months. But then once as some time past [sic] he was found. And this case began.

If this statement can be interpreted as an insinuation that defendant hid from the police, as defendant suggests, the prosecution did not produce any evidence to support it. However, there is no evidence of prosecutorial bad faith on the record which would require reversal. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). In light of the fact that this statement, to which defendant did not object, was made in opening statements and not alluded to again by the prosecution, the statement was not so prejudicial that it could not have been cured by an appropriate instruction.

In addition, because defendant's trial strategy was to admit that sexual touching did occur between him and the complainant, arguing only that it did not constitute first-degree criminal sexual conduct, it is highly unlikely that the jury relied on this statement to convict defendant. Therefore, failure to review this issue would not result in a miscarriage of justice.

Defendant also argues that he was denied effective assistance of counsel. We disagree. Defendant has not fully preserved this issue for review by moving for a new trial or an evidentiary hearing before the trial court. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Thus, our review is limited to the existing record. *Id.*

Defendant argues that he was denied effective assistance of counsel when defense counsel "effectively" pled him guilty in his opening statement. Reviewing this issue on the basis of the existing record, defendant has not demonstrated that counsel's performance was objectively unreasonable or that the challenged action was not sound trial strategy. *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997); *Marji, supra*, at 533. Defense counsel is not allowed to argue the functional equivalent of a guilty plea to the highest charge with which defendant has been charged. *People v Wise*, 134 Mich App 82, 97; 351 NW2d 255 (1984). "An attorney may admit guilt of a lesser included offense in hopes that due to his candor the jury will convict of the lesser offense instead of the greater." *People v Schultz*, 85 Mich App 527, 532; 271 NW2d 305 (1978).

Defense counsel did not concede guilt here of the highest crime charged which was criminal sexual conduct first-degree-- indeed he explicitly rejected the idea that defendant had sexually penetrated the victim in any way-- but merely conceded that touching had taken place between defendant and complainant, a minor. This is legitimate trial strategy. *Wise, supra,* at 98. Defendant, while testifying, admitted that "sexual games were going on" between him and complainant. Defendant also testified that he and complainant were lying on the floor together and that he rubbed his penis against complainant's vaginal area and that his penis may have touched her buttocks. This choice of strategy by defendant's counsel was not the functional equivalent of a guilty plea and defendant was afforded his constitutional right to plead not guilty. *People v Harmelin*, 176 Mich App 524, 535; 440 NW2d 75 (1989).

Defendant also argues that in order for defense counsel to use this strategy of pleading defendant guilty to a lesser offense, there must be showing on the record that defendant wishes to admit his guilt. An on-the-record inquiry into defendant's consent to this trial strategy is preferable, but not required. *Wise, supra,* at 99. Reviewing the existing record, it appears that defendant consented to this trial strategy. Defendant's theory of the case and defendant's own testimony concede that there was

sexual touching between defendant and the thirteen year old complainant. To the extent that this requirement applies where defense counsel concedes guilt on a lesser offense hoping to win acquittal on the more serious charges, it has been satisfied in this case. *Wise, supra*, at 99. Defendant has failed to overcome the presumption that he received effective assistance of counsel.

Finally, defendant argues that his sentence should be overturned because it was disproportionate and based on improper considerations. We disagree. In light of the circumstances surrounding the offense and the offender, the trial judge did not abuse his discretion in sentencing defendant to a prison term of fifteen to thirty years. A trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society. *People v Hansford*, 454 Mich 320, 326; 562 NW2d 460 (1997). In sentencing defendant, the trial court properly took into account defendant's prior criminal record, defendant's apparent lack of remorse, the evidence adduced at trial, and the effect defendant's actions have had on complainant.

Defendant also argues that the trial court based defendant's sentence on an improper finding of penetration which the jury effectively rejected with its verdict. Read in its entirety, the record does not reflect the trial judge made an independent finding of guilt on another charge but only used complainant's testimony of penetration as an aggravating factor in determining defendant's sentence. *People v Fortson*, 202 Mich App 13, 21; 507 NW2d 763 (1993); *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995). Taking into account that defendant had previously been convicted and sentenced for sexual conduct with the same minor complainant, the effect of defendant's conduct on complainant, and defendant's lack of remorse, along with defendant's present convictions, defendant's sentence is proportionate.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Mark J. Cavanagh