STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 28, 2000
v	No. 213003 Montcalm Circuit Court
ROBERT KEITH STRAY, JR, Defendant-Appellant.	LC No. 98-000037-FC

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and sentenced to eight to twenty-five years' imprisonment.[1] Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred when it instructed the jury. Because defendant failed to object to the instruction, the issue is unpreserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). This Court reviews a claim of unpreserved instructional error for plain error to determine if the claim has been forfeited. *People v Carines*, 460 Mich 750, 761-763, 767; 597 NW2d 130 (1999). In *Carines, supra* at 763-764, our Supreme Court summarized the plain error analysis as follows:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. . . . Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [Citations omitted.]

After the trial court instructed the jurors and dismissed them to deliberate, the court met with counsel in chambers and defense counsel, although stating that he had no objections to the court's instructions, commented that he was unsure if the court had instructed the jury concerning the "time, place, and venue" of the offense. The court then brought the jurors back to the courtroom and gave them the following instruction:

> In connection with this finding, ladies and gentlemen, it would be, that this alleged act with which the defendant is charged happened on or about the 21st or 22nd of November in Ferris Township of Montcalm County.

Defendant did not object to this instruction. However, on appeal defendant contends that it constituted a finding of fact by the trial court regarding the date and time of the alleged incident. Defendant argues that the date of the alleged incident was a key issue in the case, given that defendant presented several alibi witnesses, and that the court's instruction effectively extinguished any factual controversy. Defendant asserts that he is entitled to a new trial, and relies on *People v Place*, 226 Mich 212; 197 NW 513 (1924); *People v Allensworth*, 401 Mich 67; 257 NW2d 81 (1977); and *People v Brocato*, 17 Mich App 277; 169 NW2d 483 (1969). We find these cases inapplicable.

In *Place*, *supra*, the alleged victim testified that the defendant took certain indecent liberties with her in the afternoon of February 3, 1923, in the defendant's office. *Place*, *supra* at 214. The defendant presented various witnesses who testified that they had been with the defendant, in his office, during the afternoon on the date of the alleged incident. *Id*. When instructing the jurors, the trial court refused a defense request for an instruction specifically limiting the time and date of the offense to the afternoon of February 3, 1923, and instead instructed them that they needed only to determine if the defendant committed the alleged acts "on or about" February 3, 1923. Our Supreme Court held that the trial court erred in not specifically confining the temporal element of the charge to the afternoon of February 3, 1923, given the specificity of the allegations. *Id*. at 217.

Place is distinguishable from this case. First, in the present case, the victim's allegations regarding the date of the incident were not limited to a particular date and time. Rather, based on both his testimony and various statements he made to others, the victim was not absolutely certain whether the molestation occurred on Friday, November 21, 1997, or Saturday, November 22, 1997. The prosecution's complaint and the felony information also alleged that the acts giving rise to the present case took place on either November 21 or 22, 1997. Second, the present case, unlike *Place*, involves a claim of error that is not preserved. Third, the *Place* court's reversal of the defendant's conviction did not rest solely on its finding that the jury instruction was improper. Rather, the Supreme Court's holding was inextricably intertwined with its finding that the trial court also committed errors in admitting certain evidence against the defendant. *Place*, *supra* at 216-217. Moreover, we note that in this case defendant used the victim's uncertainty regarding the date, time, and place of the incident to argue that the victim's testimony was not credible or worthy of belief; to that extent, it assisted the defense to have the judge instruct the jury regarding two possible dates because that uncertainty dovetailed with the defense theory that the victim was fabricating this incident. Finally, the basic defense in this case was not a dispute over time or place, it was that the incident never happened.

The *Brocato* decision is similarly unavailing. In *Brocato*, the felony information charged the defendant with taking indecent liberties with a female who was under the age of sixteen. *Id.* at 281-282. The information also contained a statement that the victim positively knew that the alleged misconduct occurred on Tuesday, September 28, 1965. *Id*. at 286. This Court held that the trial court erred in failing to instruct the jurors to confine their deliberations to a determination whether the alleged offense took place on September 28, 1965 because there was nothing in the record to indicate that the incident occurred at some other time, and because defendant and his witnesses were able to account for defendant's activities during the specific time period alleged by the victim. *Id*. at 288.

In the present case, however, the court's instruction limited the jurors to considering whether the alleged acts happened on either November 21 or 22, 1997. These were the same dates contained in the complaint and information, and to which the victim testified at trial, and so the trial court did not give the jurors free rein to consider dates that were unsupported by the record.

In *Allensworth, supra* at 69, the trial court instructed the jury that it need not deliberate, and could find as a matter of fact that a murder took place on a particular date. In the present case, however, the court did not command the jurors to find that defendant committed the prohibited act at a specific time. This Court reviews jury instructions as a whole, and balances the general tenor of the instructions against the potentially misleading effect of a single sentence contained within them. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995); *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993); *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). A review of the lower court record indicates that defense counsel requested the court to instruct the jury on "time, place, and venue." The court instructed the jury that in order to convict defendant of the charged offense, the jurors would have to find that the alleged events occurred on either November 21 or 22, 1997. The instruction contained the key terms "would be" and "alleged," and did not include any imperatives. The instruction was proper, and therefore did not constitute plain error.

Nor has defendant demonstrated that he was prejudiced by the trial court's instruction. As we observed above, the gist of the defense was that this incident never happened, not that it might have happened at a time other than Friday or Saturday night. The victim's uncertainty regarding the time was only material insofar as it provided defendant with a basis for arguing that the victim fabricated the incident. Thus, the trial court's instruction did not prejudice defendant. Accordingly, we conclude that defendant has failed to demonstrate plain error and prejudice; this claim was therefore forfeit by defendant's failure to object to the court's instruction.

Defendant next argues that the trial court erred when it calculated his sentence. According to defendant the court should not have scored fifteen points under offense variable five because the record did not support a finding that the victim was moved to another place of greater danger or was held captive. However, because the former sentencing guidelines do not have the force of law, a claim of a miscalculated variable is not in itself a claim of legal error. *People v Mitchell*, 454 Mich 145, 175, 178; 560 NW2d 600 (1997). Thus, a putative error in the scoring guidelines is simply not a basis upon which an appellate court can grant relief. *People v Raby*, 456 Mich 487, 499; 572 NW2d 644 (1998).

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens

[1] Defendant's codefendant, the victim's father, John Frederick Schutte, was tried and convicted of first-degree criminal sexual conduct in a separate trial. His case has also been appealed to this Court.