

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES EDWARD KELLIE,

Defendant-Appellant.

UNPUBLISHED

June 30, 2000

No. 209536

Wayne Circuit Court

LC No. 93-013625

Before: Hood, P.J., and Gage and Whitbeck, 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 was sentenced to thirty to sixty years' imprisonment. Defendant now appeals as of right, and we affirm.

The victim testified that defendant, her mother's live-in boyfriend, engaged in sexual intercourse with her on approximately ten occasions in the spring of 1993, when she was eleven years old. The victim's account was corroborated, in part, by the fact that she was pregnant at the time she informed her mother that defendant had engaged in sexual intercourse with her¹ and by the testimony of the victim's mother, Ida Harris. Defendant denied any sexual contact with the victim, instead theorizing at trial that Harris programmed the victim to make the allegations against defendant and that the victim became pregnant by another person.

Defendant first contends that the prosecutor's closing argument remarks regarding flight constituted error requiring reversal because no evidence was presented at trial indicating that he attempted to flee the jurisdiction. Defendant also argues that the trial court erred in instructing the jury regarding flight because the evidence did not support the instruction.

This Court generally reviews questions of prosecutorial misconduct case by case, considering contested remarks in context and evaluating them in light of the defense arguments and their relationship

¹ The victim subsequently suffered a miscarriage.

to the evidence presented at trial to determine whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995); *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Defendant did not object, however, to the alleged prosecutorial misconduct. Thus, review of this issue is precluded unless there was plain error that was also outcome determinative. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997).

The record reveals that defendant moved out of Harris' home in August 1993 and subsequently began working in Lansing in September 1993, approximately a month after Harris accused him of molesting the victim. Defendant admitted that he was employed at First Housing Corporation based in Lansing, "which is where I was [when] they picked me up." In light of this evidence, we find that the prosecutor reasonably inferred that defendant had left the jurisdiction in response to Harris' allegations against him. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (A prosecutor is free to argue the evidence and all reasonable inferences therefrom.). Moreover, even if the prosecutor misinterpreted defendant's testimony, any error was harmless in light of (1) the victim's testimony that defendant engaged in repeated acts of sexual intercourse with her, (2) the corroborating testimony provided by Harris and police investigator Augusta Cunningham, and (3) the evidence that the victim was approximately three months pregnant when she told her mother that defendant had sexually abused her. Our failure to consider this claim further will not result in a miscarriage of justice because any error was not outcome determinative. *Carines, supra; Howard, supra*.

Defendant also claims that the trial court erred when it instructed the jury on flight because the evidence did not support such an instruction. Because defendant failed to object to the trial court's flight instruction, this issue likewise is not preserved for appellate review. *People v Kelly*, 231 Mich App 627, 646; 588 NW2d 480 (1998).

Instructions are reviewed in their entirety to determine whether they sufficiently protect the defendant's rights. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). No criminal verdict is to be reversed or set aside "on the ground of misdirection of the jury . . . unless . . . after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MCL 769.26; MSA 28.1096. As we have already concluded, the evidence in this case sufficiently supported an inference that defendant left the jurisdiction to avoid prosecution. Moreover, the trial court instructed the jury that evidence of flight "does not prove guilt. A person may run or hide for innocent reasons in life, such as panic, mistake or fear So you decide whether the evidence is true and if true, whether it shows the Defendant had a guilty state of mind." Because these instructions were sufficient to protect defendant's rights, *Moldenhauer, supra*, we find no miscarriage of justice. MCL 769.26; MSA 28.1096

Defendant next argues that Dr. Claude Young's testimony regarding the identity of the perpetrator in this case constituted inadmissible hearsay. Because defendant once again failed to preserve this issue for our review by objecting at trial to Dr. Young's testimony, we review this issue only for plain error affecting defendant's substantial rights. MRE 103(d); *Carines, supra*. It appears, however, that Dr. Young's testimony was properly admitted under MRE 803(4), the hearsay exception covering statements (regarding an assailant's identity) made for purposes of medical treatment or

diagnosis in connection with treatment.² *People v Meeboer (After Remand)*, 439 Mich 310, 322-326; 484 NW2d 621 (1992). Even assuming the admission of Dr. Young's testimony constituted error, in light of the fact that Dr. Young's testimony was cumulative to the victim's testimony at trial, as well as the corroborating testimony provided by Harris and Investigator Cunningham, and that Dr. Young's diagnosis confirmed that the victim was pregnant at the time she made the allegations regarding defendant, we find any error in the admission of Dr. Young's testimony harmless. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Next, limiting our review to the record, *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997), we reject defendant's claim that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel's unprofessional error or errors, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). A defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 446 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant claims that his trial attorney elicited evidence of other bad acts while cross examining prosecution witness Harris. The allegation that defendant had attempted to molest Harris' twelve year-old granddaughter was first disclosed during Harris' direct examination, not on defense counsel's cross examination as defendant claims. Moreover, defense counsel's cross examination of Harris clearly was a matter of trial strategy. Defense counsel attempted to call into question the veracity of the allegations involving Harris' granddaughter revealed during Harris' direct examination. Defense counsel successfully elicited from Harris that defendant had denied molesting her granddaughter, that Harris and her family had not filed a complaint with the police, that no charges were ever brought against defendant concerning the allegations, and that Harris continued to allow defendant to live with her after the allegations were made. Defense counsel additionally may have been trying to establish a motive for Harris to fabricate the allegations involving the instant victim. We will not second guess on appeal defense counsel's legitimate trial strategy, even though the strategy was ultimately unsuccessful. See *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Murphy*, 146 Mich App 724, 726; 381 NW2d 798 (1985), overruled in part on other grounds in *People v Wright*, 431 Mich 282; 430 NW2d 133 (1988).

² To the extent that defendant argues that the victim's statements were not reasonably necessary to her diagnosis and treatment, we observe that sexual abuse cases involve medical, physical, developmental and psychological components, all of which require diagnosis and treatment. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

With respect to defendant's claims that defense counsel's failures to object to the prosecutor's closing argument regarding flight, the trial court's jury instruction regarding flight, and Dr. Young's testimony regarding the identity of the man responsible for the victim's pregnancy, we already have determined that none of these alleged errors prejudiced defendant or denied defendant a fair trial. Defendant therefore has failed to demonstrate that defense counsel's conduct in these regards was prejudicial. *Pickens, supra*.

Lastly, defendant contends that the trial court abused its discretion by exceeding the sentencing guidelines' recommended minimum sentence range of three to eight years' imprisonment. A court may depart from the guidelines when, in its judgment, the recommended range is disproportionate to the seriousness of the crime. *People v Milbourn*, 435 Mich 630, 657; 461 NW2d 1 (1990). Departures from the judicial guidelines should alert appellate courts, however, to the possibility of a violation of the principle of proportionality, which demands that a sentence be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 636, 659-660. "The crucial test for proportionality is not whether the sentence departs from, or adheres to, the recommended range under the sentencing guidelines, but whether it reflects the seriousness of the matter." *People v Castillo*, 230 Mich App 442, 447-448; 584 NW2d 606 (1998).

After reviewing the record, we find that "the trial court properly considered the nature of the crime in a way not fully addressed in the guidelines" when sentencing defendant for the CSC I conviction. *Castillo, supra* at 449. Although defendant suggests that the trial court inadequately explained his departure from the guidelines,³ the sentencing hearing transcript demonstrates the trial court's lengthy elaboration of the considerations not adequately reflected within the guidelines calculation. For example, the trial court properly considered defendant's complete lack of remorse or "lack of insight" into his behavior, *People v Drayton*, 168 Mich App 174, 178-179; 423 NW2d 606 (1988); *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985), the devastating and lifelong impact of defendant's actions on the eleven year-old victim, *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998), and the facts that defendant represents a danger to other children and that a sentence within the guidelines range was insufficient to protect the community. *People v Crawford*, 144 Mich App 86, 87-88; 372 NW2d 688 (1985). The trial court further indicated, noting the nature and severity of the crime, that punishment was an important consideration and objective in this case.⁴ *People v Girardin*, 165 Mich App 264, 267-268; 418 NW2d 453 (1987); *Ross, supra*.

In light of the heinous nature of the crime, the impact of the crime on the victim, the fact that defendant expressed no remorse, and the threat that defendant posed to the community considering the

³ The trial court wrote on the sentencing information report departure evaluation, "Sentence not adequate for CSC of a 10 year old child causing pregnancy."

⁴ To the extent that defendant argues that the trial court punished him for exercising his right to a jury trial, we find no record support for defendant's contention, and we note the trial court's specific observations that "I'm certainly not going to . . . punish [defendant] . . . for maintaining [his] innocence or for [exercising his] right to trial."

likelihood that he would reoffend, we conclude that the trial court did not abuse its discretion in finding that the sentencing guidelines were insufficient under the circumstances presented by this case. *Castillo*, *supra* at 448-449. Defendant's sentence does not violate the principle of proportionality.

Affirmed.

/s/ Harold Hood

/s/ Hilda R. Gage

/s/ William C. Whitbeck