

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WAYNE HARRIS,

Defendant-Appellant.

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UNPUBLISHED

October 26, 2001

No. 222177

Wayne Circuit Court

LC No. 99-002746

Before: Holbrook, Jr., P.J., and Cavanagh and R. S. Gribbs\*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(b), for which he was sentenced to ten to fifteen years' imprisonment. We affirm.

Defendant first argues that he was denied a fair trial because the victim was intimidated by police, with the threat of juvenile detention, into testifying against him after recanting her accusations at his first preliminary examination. Defendant did not raise this issue below; therefore, this issue is forfeited unless defendant demonstrates plain error that was outcome determinative. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999); *People v Layher*, 238 Mich App 573, 586-587; 607 NW2d 91 (1999).

A prosecutor may not intimidate witnesses in or out of court. *People v Clark*, 172 Mich App 407, 409; 432 NW2d 726 (1988). A prosecutor may, however, inform a witness that false testimony could result in a perjury charge. *Layher*, *supra* at 587. Defendant's claim arises from the victim's testimony at the first preliminary examination at which time she testified that she did not want to go to trial "because I lied." The victim further testified that the court officer "told me that because I lied I can go to Juvenile." Thereafter, the trial court adjourned the proceedings and the victim was appointed counsel.

The preliminary examination was reconvened six days later at which time the victim testified about the events that gave rise to the charges against defendant. At the subsequent trial the victim admitted during defendant's cross-examination that she previously went into court and said that "it didn't happen" because "I didn't want to come – I didn't want to have to have a trial,"

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

and I didn't want to be under all this pressure.” On redirect examination, when the victim was asked what the “lady” [court officer] said in response to her denial of the events, she testified that she “forgot what she told me.” She also repeatedly testified that she wanted to testify about what defendant did to her and that her testimony at trial was the truth. On this record, we conclude that the victim was not intimidated into testifying against defendant by improper threats. See *Id.* at 587-588. Therefore, defendant has failed to demonstrate a plain error that affected the outcome of the trial.

Defendant also argues that his due process and confrontation rights were violated as a consequence of the prosecutor's failure to disclose the alleged intimidation. Defendant did not raise these issues below; therefore, they are forfeited unless defendant demonstrates plain error that was outcome determinative. *Carines, supra*.

A criminal defendant has a due process right of access to exculpatory and impeachment evidence possessed by the prosecution. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Brownridge (On Remand)*, 237 Mich App 210, 214; 602 NW2d 584 (1999). A defendant also has the right to confront his accusers. See *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001). In this case, the victim was not intimidated into testifying against defendant by improper threats. Further, the first preliminary examination was recorded and could have been obtained by defendant, who was present during the victim's testimony. Defendant also had the opportunity to cross-exam the victim at trial and elicited from her that she had lied in court in the past. Consequently, defendant has failed to demonstrate plain error warranting reversal.

Defendant next argues that he was denied the effective assistance of counsel because his counsel failed to pursue or obtain the intimidation and impeachment evidence. Because a *Ginther*<sup>1</sup> hearing was not conducted, this Court's review is limited to errors apparent on the record. *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must affirmatively show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). In this case, as discussed above, the victim was not intimidated by improper threats to testify against defendant. Further, defendant's counsel effectively elicited testimony from the victim that she had previously lied in court when she denied that defendant perpetrated the charged acts. Consequently, defendant has failed to demonstrate that his counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. See *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Next, defendant argues that resentencing is required because the trial court improperly scored offense variable eleven by including sexual penetrations for which defendant was

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

acquitted. Offense variable eleven (OV 11) requires the scoring of all sexual penetrations of the victim arising out of the sentencing offense. MCL 777.41. In this case, the victim testified in graphic detail about sexual penetrations that occurred. When imposing sentence, the trial court may conclude by a preponderance of the evidence that the defendant committed the crime charged, and consider that crime in sentencing, even though the defendant was convicted of a lesser offense. *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989). We conclude that the trial court's scoring of OV 11 was supported by the evidence.

Finally, defendant argues that his sentence was disproportionate because it was a departure from the guidelines that was not supported by a substantial and compelling reason, contrary to MCL 769.34(3). This Court's review of a sentence outside the guidelines range is limited to whether the trial court had a substantial and compelling reason to depart from the guidelines. MCL 769.34(11); *People v Babcock*, 244 Mich App 64, 74; 624 NW2d 479 (2000).

The existence or nonexistence of a particular factor is a factual determination, which this Court will review for clear error. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). The determination that a particular factor is objective and verifiable is reviewed as a matter of law. *Id.* at 78. The trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the guidelines is reviewed for an abuse of discretion. *Id.*

In this case, the trial court specifically found that the guidelines did not adequately address the heinous nature of defendant's actions. The trial court's considerations included that the victim was defendant's stepdaughter, that the molestation occurred in the presence of other young children, that the victim was only twelve years old, that the victim would be subjected to defendant on an ongoing basis because he is the father of some of her siblings, and that defendant had a criminal history of six domestic violence convictions involving the victim's mother. That defendant engaged in a continuing pattern of criminal activity against his own family is obvious. Considering defendant's history and the circumstances of this offense, the sentence imposed by the trial court was proportionate and the departure from the guidelines was supported by substantial and compelling reasons.

Affirmed.

/s/ Donald E. Holbrook, Jr.  
/s/ Mark J. Cavanagh  
/s/ Roman S. Gribbs