

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN LAMAR GREEN,

Defendant-Appellant.

UNPUBLISHED

December 17, 2002

No. 234040

Wayne Circuit Court

LC No. 00-009107

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). He was sentenced to nine to twenty years' imprisonment for each count of first-degree criminal sexual conduct to run concurrently. Defendant appeals as of right. We affirm.

Defendant's convictions arose from allegations of sexual abuse made by complainant, who was a six-year-old boy. Defendant, who was aged seventeen at the time of trial was the son of a friend of complainant's mother. Complainant alleged that several incidents of sexual assault occurred while complainant and his mother stayed at defendant's mother's home.

On appeal defendant argues his rights to confrontation, a fair trial, and to present a defense were violated when the trial court denied his request to question the child victim regarding prior sexual assaults by third parties for the purpose establishing his familiarity with sexual matters or to refute medical evidence of penetration. We disagree. A party seeking admission of excluded evidence must make an offer of proof to provide the trial court with an adequate basis on which to make its ruling, and to provide this Court with the information needed to evaluate the claim of error. MRE 103(a)(2); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). Here, though defendant requested to question complainant regarding prior sexual assaults, he did not proffer this evidence to explain complainant's familiarity with sexual matters or to refute medical evidence of penetrations. Nor did defendant express his concern over how complainant could have provided the sexual detail without having suffered defendant's conduct. We find that the trial court had no basis to rule on this issue, and it is not properly preserved for our review. *Id.* at 545. In order to avoid forfeiture of this unpreserved constitutional issue on appeal, defendant must show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Also, the decision to admit evidence under the rape-

shield statute is reviewed for an abuse of discretion. *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984).

In *People v Morse*, 231 Mich App 424, 436-437; 586 NW2d 555 (1998), this Court identified safeguard procedures that must be followed when determining whether evidence of prior sexual abuse involving the victim and another person is admissible. The defendant is obligated to make an offer of proof and demonstrate relevance. *Id.* In this context, “the prior sexual conduct must account for how the child could provide the testimony’s sexual detail without having suffered defendant’s alleged conduct.” *Id.* at 434, citing *People v Hill*, 289 Ill App 3d 859, 862-865, 683 NE2d 188, 225 Ill Dec 244 (1997).

Defendant attempted to question the victim regarding whether prior sexual incidents by third parties occurred. The trial court here excluded the evidence, relying on the rape-shield statute, MCL 750.520j. It appears from the record that the purpose of defendant’s attempt to question complainant regarding these events was not purported to explain how the child could have provided the sexual detail without having suffered defendant’s alleged conduct. We conclude that the trial court properly determined that defendant failed to demonstrate the relevance of the incidents as required by *Morse, supra*, 231 Mich App 436-437. Thus, the trial court did not abuse its discretion and the issue is forfeited. *Carines, supra*, 460 Mich 763; *Hackett, supra*, 421 Mich 349.

Even if defendant had established that questioning complainant about prior sexual incidents with third parties was relevant to his “age inappropriate” sexual knowledge, the trial court still properly held such questioning impermissible. Specifically, *Morse* requires the defendant to establish that another person was convicted of criminal sexual conduct involving the victim, and the facts underlying the previous conviction are significantly similar, to be relevant to the proceedings. *Morse, supra*, 231 Mich App 437. Our review of the record reveals that neither of these requirements were met in this case. There was no evidence that another person was convicted of criminal sexual conduct involving the victim. The facts underlying the previous alleged act were not shown to be remotely similar. There was no direct testimony demonstrating that the alleged prior sexual incidents actually occurred or that the content of those incidents were sufficiently similar to defendant’s conduct. Therefore, the trial court properly denied defendant’s request to question the victim regarding prior sexual incidences with third persons. *Id.*

Defendant next argues the denial of questioning was improper when the evidence was offered to refute medical evidence of penetration. There was medical testimony that complainant was scarred at the opening of the anus caused by penetration to the rectum by an object larger than the opening of the rectum. The prosecution’s purpose for introducing such evidence was, in part, to establish that penetration occurred. In support, defendant relies on *People v Haley*, 153 Mich App 400, 405-406; 395 NW2d 60 (1986), where this Court held the defendant should have been allowed to introduce evidence of the victim’s previous sexual conduct with her father when the prosecution introduced medical evidence to establish penetration of the victim. Here, defendant did introduce evidence of complainant’s previous sexual conduct with others. Complainant’s mother testified that she suspected there was a prior sexual incident between complainant and a friend. In fact, there was testimony that complainant admitted to something of a sexual nature that happened with the friend. As such, the record indicates defendant was not foreclosed from offering evidence regarding other possible sources of scarring and penetration.

The trial court permitted such testimony, and, unlike *Haley*, the allegations of other occurrences of sexual abuse were speculative in nature. *Id.* at 406. Since the trial court permitted testimony to rebut medical testimony and to present other sources of penetration, defendant's argument fails to demonstrate prejudice. *Carines, supra*, 460 Mich 763.

Defendant's final argument is that defense counsel's failure to provide notice under the rape-shield statute was ineffective assistance of counsel because evidence of the victim's sexual incidents with third persons could have provided evidence critical to the defense and may have resulted in defendant's acquittal. Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Since an evidentiary hearing or motion for new trial before the trial court did not precede this claim of ineffective assistance of counsel, we will consider it only to the extent that alleged errors are apparent from the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

Our review of the record indicates that there is no reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different. Defendant's argument assumes the trial court's decision to preclude evidence related to the victim's prior sexual history would be upheld by this Court because of his non-compliance with the notice provisions of the rape-shield statute. However, the trial court's decision was supported on grounds of irrelevance and the substantive portion of the rape-shield statute. Therefore, it is unnecessary to address whether non-compliance with the rape-shield notice provisions would have affected the result of the proceedings. Also, there was no objection to the failure to comply with notice provisions of the rape-shield statute at trial. In fact, the prosecution offered to stipulate to defense counsel's proposed questioning regarding the victim's prior sexual history, but the trial court precluded the questioning, reasoning that the parties could not stipulate to a violation of the law. There is little possibility that the result of the proceedings could have been different where the issue of notice under the rape-shield provision was not objected to, or raised.

Administratively, we note that defendant was initially charged with four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). After the preliminary examination the felony information was amended to include an additional count of second-degree criminal sexual conduct, MCL 750.520c. Following a bench trial on the charges, the trial court found defendant "guilty as charged, or guilty of criminal sexual conduct in the first[-]degree as charged in counts one, two, and three, as well as count four, criminal sexual conduct in the second degree." At the sentencing hearing, the trial court stated "[a]fter a trial by this Court sitting without a jury, he was adjudicated guilty of criminal sexual conduct in the first degree in Count 1, and I believe there was an adjudication of criminal sexual conduct in the first degree in all four counts." The trial court then sentenced defendant to nine to twenty years' imprisonment "as to each named count." The judgment of sentence reflects nine to twenty years' imprisonment for each of four counts of first-degree criminal sexual conduct to be served concurrently. It is clear from our review of the lower court record that the trial court mistakenly did not sentence defendant on one of the charges. However, it is unclear when reading the transcripts if the missing count is the

fourth count of first-degree criminal sexual conduct or the fifth count of second-degree criminal sexual conduct. In any event, since a court speaks through its written orders, not through its oral statements, we must assume after reading the judgment of sentence that the trial court did not sentence defendant on the fifth charge, second-degree criminal sexual conduct. *People v Turner*, 181 Mich App 680, 683; 449 NW2d 680 (1989). Neither defendant nor the prosecutor raise any issues relating to the error. We note that the error does not merit any substantive relief to defendant, however, we must remand this issue to the trial court for the ministerial task of entering an order correcting the administrative error on the judgment of sentence. See generally *People v Herndon*, 246 Mich App 371, 392-393, 423; 633 NW2d 376 (2001); *People v Avant*, 235 Mich App 499, 521; 597 NW2d 864 (1999).

We affirm defendant's convictions, and remand for entry of an order correcting the administrative errors associated with defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Pat M. Donofrio