

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERWIN LUTHER SUCCESS,

Defendant-Appellant.

UNPUBLISHED

January 15, 2004

No. 243081

Oakland Circuit Court

LC No. 2001-177835-FC

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of four counts of first-degree criminal sexual conduct (CSC), in violation of MCL 750.520b, and three counts of third-degree CSC, in violation of MCL 750.520d, for engaging in sexual intercourse with his stepdaughter. Defendant received sentences of 50 to 75 years in prison for the first-degree CSC convictions and 10 to 15 years in prison for the third-degree CSC convictions. We affirm.

The charges in this case arose from allegations that defendant engaged in inappropriate sexual conduct with the victim beginning in 1996, when the victim was fourteen years old, and ending in March 2001, when the victim was nineteen years old. Defendant's conduct began with inappropriate touching, and over the course of time, defendant's conduct rose to the level of sexual relations with the minor victim.

On appeal, defendant first argues that his constitutional rights were violated because of prosecutorial misconduct at trial. Defendant alleges that the prosecutor improperly shifted the burden of proof to defendant when she asked defendant's expert witness whether he ever recommended that DNA samples analyzed by a Michigan State Police crime laboratory analyst, which were taken from used condoms found in defendant's home and blood samples of defendant and the victim, be retested by an independent laboratory, and whether it would have been a good idea for the victim's mother to be tested. The record demonstrates that defense counsel's initial objections to these questions were based on the work-product doctrine and his assertion that he could not compel a witness to be tested. Defense counsel did not state his concerns about burden shifting until after the prosecutor's questions had been asked and answered. Review of prosecutorial misconduct claims by this Court is precluded where a defendant does not timely and specifically object, and this Court will only review such claims for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

The test for prosecutorial misconduct “is whether defendant was denied a fair trial,” and “[i]ssues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor’s remarks in context.” *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Moreover, “[w]hile the prosecution may not use a defendant’s failure to present evidence as substantive evidence of guilt, the prosecution is entitled to contest fairly evidence presented by a defendant.” *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999), citing *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995). In other words, while a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory of defense, argument on the inferences created does not shift the burden of proof. *Reid, supra*, quoting *Fields, supra*. “Further, a witness is subject to cross-examination concerning any issue in a case, including credibility.” *Id.*, citing MRE 611(b).

We conclude from our review of the record that the prosecutor’s cross-examination of defendant’s expert did not improperly shift the burden of proof. Defendant presented evidence, by way of expert testimony, that the DNA samples may have become contaminated during the crime laboratory’s testing and that there was a possibility that the DNA on the outside of one of the condoms could have come from the victim’s mother. The prosecutor’s questions concerning whether the expert ever recommended that the DNA samples be re-tested by an independent laboratory and whether it would have been a good idea to have the victim’s mother tested directly challenged the credibility of the testimony elicited from the expert by defense counsel on direct examination. *Reid, supra* at 477-478. Further, the prosecutor’s questions directly challenged the defense’s alternative theory that it was the victim’s mother’s DNA on the condom, not the victim’s. Accordingly, we conclude the prosecutor properly responded to the defense presentation of expert testimony and did not improperly shift the burden of proof.

Defendant next argues on appeal that he was denied due process when the prosecutor introduced evidence at trial of a personal protection order (PPO) taken out by the victim against defendant and then asked the testifying officer to explain the purpose of a PPO. The record demonstrates, however, that it was defense counsel who initially mentioned the PPO at trial during his cross-examination of the victim. During this cross-examination, defense counsel asked whether the victim had requested the PPO and questioned her about statements contained therein. Moreover, during redirect examination, the prosecutor further questioned the victim about those statements in the PPO and sought to have it admitted into evidence and defense counsel stated that he had no objections. A party waives appellate review of evidentiary errors when he contributes to them by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), citing *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Under the circumstances, defendant waived appellate review of this issue. Nevertheless, we note that defendant bases his argument on the assertion that the prosecutor’s conduct violated MRE 404(b), which prevents the admission of evidence of other crimes, wrongs, or acts, by defendant in order to show conformity therewith. In the present case, neither the PPO nor the officer’s testimony addressed a prior crime, wrong, or act by defendant. Therefore, no error occurred.

Defendant's final argument on appeal is that the trial court's imposition of a 50- to 75-year sentence for the first-degree CSC convictions rather than the 10- to 25- year minimum sentence recommended under the judicial guidelines¹ violates his constitutional rights. Specifically, defendant asserts that the term of his sentence is beyond his life expectancy and may deny him the possibility of parole, thereby violating his due process rights and rendering his sentence cruel and unusual. In support of his contention, defendant relies on *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989). However, defendant's reliance on *Moore* is without merit.

In *People v Lemons*, 454 Mich 234, 257; 562 NW2d 447 (1997), the Michigan Supreme Court stated that *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990) and *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1990), decided after *Moore*, provide the standards for reviewing a defendant's sentence such as in the present case, and summarized those standards as follows:

Our decision in *Merriweather* makes clear that where a sentence "falls within the permissible range of sentences for defendants convicted of [CSC I]," which is "for life or for any term of years," MCL 750.520b(2); MSA 28.788(2)(2), and is indeterminate, because the judge fixes both the minimum and the maximum, the sentence is lawful as long as it meets the requirements of proportionality under *Milbourn*. [*Lemons, supra* at 258.]

Moreover, the Supreme Court stated that a defendant's sentence is not excessive merely because he will not be parole eligible until his minimum term is completed, *Id.*, quoting *Merriweather, supra* at 809-811, and that there is "no basis in [*Milbourn, supra* at 630] for a requirement that a the trial judge tailor every defendant's sentence in relationship to the defendant's age." *Lemons, supra* at 258. Furthermore, this Court has agreed that the holding of *Moore* was overruled by *Merriweather*. See *People v Kelly*, 213 Mich App 8, 15; 539 NW2d 538 (1995).

In the present case, defendant's sentence is for a term of years and is indeterminate. Moreover, although defendant makes reference to the rule of proportionality in his brief and cites case law,² he does not engage in any argument concerning the trial court's stated reasons for departure. Therefore, beyond his erroneous conclusion that the sentence is unconstitutional because of his age, defendant has failed to argue the merits of his assertion that his sentence violates his constitutional rights by violating the rule of proportionality and, therefore, has not

¹ The judicial sentencing guidelines govern defendant's sentence in this case because the crimes occurred before January 1, 1999. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

² In particular, defendant cites this Court's holding in *People v Cramer*, 201 Mich App 590, 596-597; 507 NW2d 447 (1993), which held that the rule was violated when a defendant received a sentence that was more than double the guidelines recommendation.

properly presented this issue for review. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage