STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND JOSEPH EBEL,

Defendant-Appellant.

UNPUBLISHED
December 16, 2004

No. 249862
Berrien Circuit Court
LC No. 2001-412041-FC

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree criminal sexual conduct, MCL 750.520b(1), and breaking and entering with intent to commit a larceny, MCL 750.110. The trial court sentenced defendant to serve concurrent terms of life for one count of CSC, 480 months to life for the other count of CSC, and 120 to 270 months for breaking and entering. Defendant appeals as of right. We affirm in part and remand for resentencing. This case is being decided without oral argument pursuant to MCR 7.214(E).

This case arises from an incident that took place in May 1992, in Niles Township. The complainant was not able to identify an assailant, and the initial investigation ended without charges being filed. But, in 2001, the police took advantage of developments in DNA identification, analyzed DNA taken from the evidence in this case, and matched it to defendant, then incarcerated in Indiana, who was in turn extradited to Michigan.

Defendant admitted having sexual relations with the complainant, but maintained that it was consensual. Defendant also admitted taking money from the complainant's apartment.

On appeal, appellate counsel's sole issue is whether defendant was sentenced, in one particular, in violation of the indeterminate sentencing statute. In his brief *in propria persona*, defendant argues that he was charged with breaking and entering an occupied dwelling in violation of the applicable statute of limitations and that the trial court erred in refusing to grant motions for a mistrial.

Appellate counsel argues that the sentence of 480 months to life for one of the CSC convictions violates a statutory requirement not to impose a maximum term of life if the minimum term is set forth as a term of years. There was no objection to this at sentencing,

restricting this Court's review to ascertaining whether there was plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCL 769.9(2) provides as follows (emphasis added):

> In all cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years. If the sentence imposed by the court is for any term of years, the court shall fix both the minimum and the maximum of that sentence in terms of years or fraction thereof, and sentences so imposed shall be considered indeterminate sentences. *The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.*

In light of the clear statutory language, defendant's sentence for the second of his two counts of CSC I is invalid. This was plain error, and warrants correction.

Where a court imposes a sentence that is partially invalid, the Legislature has decreed that the sentence is not to be wholly vacated, but is to be set aside only to the extent necessary to remedy the unlawful excess. MCL 769.24; *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994). The trial court had the authority to sentence defendant to a 480-month minimum sentence on the CSC count, and, independently, it had the authority to sentence defendant to life on the CSC count, but those terms could not be part of the same sentence on that single count of CSC. Therefore, we remand this case to the trial court for resentencing in a manner consistent with MCL 769.9 and any other relevant sentencing statutes. See *People v Harper*, 39 Mich App 134, 142-143; 197 NW2d 338 (1972)(prison term of twenty years to life invalid under MCL 769.9; cause remanded for resentencing).

Defendant *in propria persona* argues that he was invalidly charged with breaking and entering several years after the six-year statute of limitations for that offense had run. MCL 767.24(4).[1] There is no dispute that the crime in question took place in May 1992 and that defendant was named in a complaint and warrant in October 2001; he was bound over for trial in October 2002.

Defendant fails to indicate whether or where this issue was raised below. "It is well established in Michigan that a statute of limitations defense, MCL 767.24, in a criminal case is a nonjurisdictional, waivable affirmative defense." *People v Burns*, 250 Mich App 436, 439; 647 NW2d 515 (2002). This Court's review is thus limited to ascertaining whether there was plain error affecting substantial rights. *Carines*, *supra*.

MCL 767.24(5) provides that "[a]ny period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments shall be found and filed." Defendant's presentence investigation report states that

[1] There is no time limitation on prosecutions for first-degree criminal sexual conduct. MCL 767.24(1).

"defendant has spent much of the last decade incarcerated in the Indiana Prison System, released just long enough to violate and return to prison for new crimes committed." The report continues, "It appears that [the instant sexual assaults] took place while the defendant was just out of prison and residing in the community."

Because this defense was not raised below, and indications are that defendant has resided in Indiana, not Michigan, since the instant crimes took place, defendant has not shown that failure to dismiss pursuant to the statute of limitations was plain error or affected his substantial rights.

Finally, defendant argues that the trial court erred in declining to grant motions for a mistrial. This Court reviews a lower court's decision on a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *Id.* (citations omitted).

Defendant first makes issue of police testimony describing the instant crimes as constituting "a very vicious case." There was no objection at that time, but later defense counsel requested a mistrial on the ground that this testimony was highly prejudicial. The trial court denied the motion, but instructed the jury "to disregard any characterization of this alleged offense," and reminded the jury that its "consideration has to be based upon the facts and the evidence as you determine those to be, and the opinion of one person about what is or what is not an offense, that was his opinion and you're to disregard that." Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because the witness' depiction was a fair characterization of the evidence, and because the trial court admonished the jury to disregard it, reversal is unwarranted.

Defendant next argues that a mistrial was warranted because the jury learned that the police identified him as a suspect by matching his DNA to a database available to them. A specialist in the area described the state DNA database as one "of convicted offenders." There was no objection at the time, but later, when the jury was out of the courtroom, defense counsel requested a mistrial, on the ground that it is commonly understood that such databases track only persons implicated in criminal activity. Defense counsel additionally compounded the potential prejudice, having himself mentioned in opening statements that defendant had been in prison.[2] In denying the motion, the trial court observed that there was no implication that any earlier conviction on defendant's part involved criminal sexual conduct and that the court had instructed the jury that how defendant's information came to be in a DNA registry was not relevant to the instant crime. Assuming that defense counsel's reference, during opening statements, to defendant's imprisonment did not constitute waiver of this issue, there was little emphasis on defendant's earlier incarceration and no indication what crimes might have given rise to it; therefore, reversal is unwarranted.

[2] Error to which the aggrieved party contributed, by plan or negligence, does not normally warrant reversal. See *Phinney v Perlmutter*, 222 Mich App 513, 537-538; 564 NW2d 532 (1997).

For his final argument, defendant points out that defense counsel objected to allowing a police witness to testify that when he confronted defendant about the crimes, defendant indicated that he did not wish to talk further. A defendant's assertion of the right to remain silent may not be used as substantive evidence of guilt. *People v Bobo*, 390 Mich 355, 361; 212 NW2d 190 (1973). However, this discussion took place outside the presence of the jury. When proceedings resumed the next day, the prosecutor indicated that he would not try to admit defendant's statement. Defendant fails to show that this subject matter ever came to the jury's attention.

There was no cumulative error that denied defendant a fair trial. See *People v Skowronski*, 61 Mich App 71, 77; 232 NW2d 306 (1975).

Affirmed with respect to the convictions, but remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly