STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES B. MABLE, JR.,

Defendant-Appellant.

UNPUBLISHED
December 6, 2005

No. 257352
Oakland Circuit Court
LC No. 2003-192593-FC

Before: Whitbeck, C.J., and Saad and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration involving a person under the age of thirteen). He was sentenced to concurrent prison terms of 8 to 20 years on each charge. He appeals as of right. We affirm.

The victim, CG, is the granddaughter of defendant's wife, and was four years old at the time of the offense. The offense occurred when CG spent the night with her grandmother at defendant's house. CG testified that defendant woke her during the night and performed cunnilingus on her. She then performed fellatio on him at his direction. Testifying on his own behalf, defendant denied the allegations, and insinuated that another person sexually abused the victim. Defendant's wife testified that defendant was asleep in bed with her throughout the night, and that the complainant behaved normally and showed no signs of distress in the morning. Defendant's pastor and the wife's sister testified as character witnesses on defendant's behalf.

Defendant argues that reversal is required because the prosecutor engaged in misconduct during her cross-examination of defense witnesses. We disagree. "The test of prosecutorial misconduct is whether [the plaintiff] was denied a fair and impartial trial." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The prosecutor's questions and comments must be read together in the context of the whole trial and evaluated in light of their relationship to defense arguments and the evidence admitted. *Id.* We will not review "misconduct" to which defense counsel fails to object unless a timely objection could not have cured the prejudice or manifest injustice otherwise requires review. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). As long as the attempt to introduce evidence does not itself unduly prejudice the defendant, a prosecutor's good-faith attempt to admit evidence is not misconduct. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Of the several incidents that allegedly constituted trial misconduct, defense counsel only objected to one of them. This objection arose when the prosecutor asked defendant's wife how long it had been between her previous romantic relationship and her involvement with defendant. The trial court overruled defendant's objection and allowed the background evidence, and the wife provided the unresponsive answer that she had never been married before she married defendant. If the wife had answered the question, the jury could have used her lack of involvement with other men as an indication of the strength of her relationship with defendant, which consequently may have undermined her objectivity. In any event, because the solicited evidence related to the wife's credibility and the unresponsive answer was generally innocuous, we do not find anything that could approach misconduct depriving defendant of a fair trial. *Noble*, *supra*; *Rodriguez*, *supra*.

The remaining unpreserved allegations of misconduct relate to the prosecutor's insinuations of defendant's wrongdoing, such as squandering his wife's money on personal effects, pornography, and strip clubs while obtaining and then quickly losing jobs, once for embezzlement. In context, however, most of this evidence counteracted defendant's evidence from his pastor and sister-in-law that he had strong moral character. Some of the evidence also demonstrated the willingness of his wife and her family to overlook his wrongdoings and preserve defendant's relationship with his wife, perhaps to the extreme of excusing his behavior in this case. All of this evidence was directly relevant to the credibility of defendant's witnesses, including defendant himself, and defendant fails to demonstrate that the evidence deprived him of a fair trial, *Rodriguez*, *supra*, or that a timely curative instruction could not have cured any undue prejudice in each instance. *Launsburry*, *supra.*

In a related issue, defendant argues that his constitutional right of confrontation was violated when the prosecutor read from a detective's notes of his interview with the wife. We disagree. The wife testified at trial that she rose frequently during the night to use the bathroom, and that each time she awoke, she saw that defendant was in bed and CG was in her room. On cross-examination, the prosecutor questioned the wife about a statement she made to a detective in which she acknowledged that defendant might have gotten up without her knowledge. The wife denied making the statement and accused the detective of fabricating it. The detective did not testify, but the prosecutor quoted the detective's notes in one of her questions regarding the statement. Citing *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004), defendant argues that the prosecutor's use of the detective's notes about the wife's prior statement violated the Confrontation Clause because defendant did not have an opportunity to cross-examine the detective. Defendant did not object to the prosecutor's use of the statement, so we review this issue for plain error affecting defendant's substantial rights. MRE 103.

In *Crawford*, *supra*, the United States Supreme Court held that testimonial statements by a non-testifying witness are admissible against a criminal defendant only if a declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Id.* In this case, however, the detective's notes were not testimonial in nature, but a recording to document the investigation. Also, the original declarant, defendant's wife, was available for cross-examination, and she was the true witness, whether for or against defendant. Therefore, although reading the detective's notes in open court published hearsay to the jury contrary to MRE 803(8), the questions did not plainly violate defendant's right to confront the witnesses against him. Further, the direct reference to the detective's notes did not add appreciably to the prejudice that

arose from the prosecutor's appropriate insinuation that the wife had changed her story, so the question did not violate defendant's substantial rights. MRE 103.

Defendant next argues that the evidence was insufficient to prove penetration on the second count of first-degree CSC, which was based on CG's allegation that defendant licked her vagina. For purposes of CSC, the definition of "sexual penetration" includes "cunnilingus." MCL 750.520a(o). CG testified that defendant licked her, and she pointed to her vaginal area to indicate where. This testimony was sufficient to establish that defendant performed cunnilingus, which establishes the statutory element of sexual penetration. *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987).

Finally, defendant contends that his eight-year minimum sentences violate the principle of proportionality. However, defendant's minimum sentences were within the applicable legislative sentencing guidelines range of 81 to 135 months. When a minimum sentence is within the sentencing guidelines range, we must affirm unless the trial court erred in scoring the guidelines or it relied on inaccurate information. MCL 769.34(10). Here, defendant does not raise a scoring error or argue that the trial court relied on inaccurate information.[1] Therefore, he has not established a sentencing error, and we must affirm his sentences.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Peter D. O'Connell

[1] Defendant suggests that the trial court scored the guidelines in reliance on facts not found by the jury contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, defendant fails to specify any improper finding of fact, so this issue is waived. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Moreover, our Supreme Court has stated that *Blakely* is not applicable to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).