STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2007
v	No. 271383 Kent Circuit Court
TORRY JAY TURNER, Defendant-Appellant.	LC No. 05-004043-FH

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of assault with intent to commit criminal sexual conduct (CSC) involving penetration, MCL 750.520g(1), and fourth-degree CSC, MCL 750.520e(1)(b). The trial court sentenced him, as a third-offense habitual offender, MCL 769.11, to two to 20 years' imprisonment for the assault conviction and one to four years' imprisonment for the fourth-degree CSC conviction. We affirm.

Defendant first argues that the victim's mother improperly vouched for her daughter's trustworthiness by testifying that the victim was an honest Christian woman. Defendant maintains that he was prejudiced by this error because this case was a credibility contest between defendant and the victim. Defendant did not preserve this issue below; therefore, our review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, a defendant must show actual prejudice." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). The defendant bears the burden with respect to establishing prejudice and must show that the error affected the outcome of the lower court proceedings. *Carines*, *supra* at 763. Additionally, reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763-764.

"It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, since matters of credibility are to be determined by the trier of fact." *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987). However, defendant has failed to show that any error with respect to this issue was clear or obvious and also outcome-determinative, thereby affecting his substantial rights. *Carines*, *supra* at 763. First, the prosecutor did not ask the witness to comment on the victim's general level of credibility. Instead, the prosecutor asked if there was any indication on the evening of the assault that the

victim was trying to cover up something that she may have consensually engaged in. "As a general rule," nonresponsive answers to a prosecutor's questions by a prosecution witness do not deprive the defendant of a fair trial unless the prosecutor "knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." See *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). There is no evidence of such knowledge, conspiracy, or encouragement here. Second, the victim gave ample, consistent testimony; her story withstood cross-examination and, looking at the record as a whole, there is nothing to suggest that the mother's brief statement unduly influenced the jury's ability to judge the victim's credibility. In addition, the trial court instructed the jury on credibility and, as a part of the instruction, told the jury to question whether the witnesses had a personal interest in the case or could possibly be biased. "Jurors are presumed to follow their instructions . . . ." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Under all the circumstances, we conclude that defendant has not met his burden for obtaining relief. *Carines, supra* at 763-764.

Defendant next argues that the trial court erred by allowing the victim's mother to testify regarding matters about which she had no personal knowledge. Again, this issue is unpreserved, and our review is therefore under the plain error doctrine. *Carines, supra* at 763-764.

MRE 602 restricts witnesses' testimony to matters about which they have personal knowledge. Here, the victim's mother testified that she refreshed her memory by talking to the victim a few days before trial and by reviewing a transcript of the victim's preliminary examination testimony. She admitted that she testified regarding one fact about which she had no personal knowledge.

Even though it was improper for the witness to testify regarding something about which she did not have personal knowledge, the trial court's instruction to the witness to limit her testimony to matters about which she had personal knowledge, her admission that she did not have an independent recollection of one fact that she testified about, and defense counsel's cross-examination all cured the error by calling into question the witness's recollection of the events and her credibility as a witness. Thus, defendant has failed to prove that the error was outcome-determinative. *Carines, supra* at 763. Reversal is unwarranted.

Next, defendant raises three sentencing issues. He contends that (1) the trial court erred by ordering him to serve his sentences consecutively to a federal sentence in contravention of the plain language of MCL 768.7a(2), because he was on federal supervised release and not on "parole" at the time of the offenses;[1] (2) the trial court should not have considered his status on

[1] MCL 768.7a(2) states:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

federal supervised release in scoring Prior Record Variable (PRV) 6, MCL 777.56, because the pertinent statute does not contain the phrase "federal supervised release;" and (3) he was sentenced in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

Defendant's first argument is without merit because there is no evidence in the record that he is currently serving a federal term of imprisonment before the commencement of his state sentence; therefore, the issue is not ripe for review, and, moreover, there is no current remedy we can fashion. See *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

Defendant's second argument is that the trial court gave him an erroneous score under PRV 6. However, we note that, even if the score were adjusted as suggested by defendant, his assault sentence would still fall within the changed recommended sentencing range. As noted in *People v Francisco*, 474 Mich 82, 91 n 8; 711 NW2d 44 (2006):

> [I]f the defendant failed to raise [an alleged] scoring error at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals, and the defendant's sentence is within the appropriate guidelines range, the defendant cannot raise the error on appeal except where otherwise appropriate, as in a claim of ineffective assistance of counsel. MCL 769.34(10) ("[a] party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals"); [*People v*] *Kimble*, [470 Mich 305,] 310-311[; 684 NW2d 669 (2004)] ("if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand").

Defendant did not raise the alleged scoring error at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals.[2] Accordingly, the instant issue has been waived and we need not consider it.[3]

Defendant's third argument, that he was sentenced in violation of *Blakely*, *supra*, is meritless. The holding in *Blakely* does not affect Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

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[2] We note that defendant did file a motion to remand in this Court, but the motion was denied "for failure to satisfy the requirements of MCR 7.211(C)(1)." *People v Turner*, unpublished order of the Court of Appeals, entered January 26, 2007 (Docket No. 271383).

[3] In his appellate brief, defendant does raise the issue in the context of ineffective assistance of counsel, which is allowable under *Francisco*, *supra* at 91 n 8. This argument is discussed *infra*.

Defendant further argues on appeal that his trial attorney was ineffective for failing to object to the sentencing errors raised on appeal and for failing to object to the victim's mother's testimony. Defendant did not move for an evidentiary hearing or a new trial before the trial court; therefore, this issue is unpreserved. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). For that reason, our review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error or errors, the result of the proceedings would have been different; and (3) the 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). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's performance must be evaluated without the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant first argues that counsel was ineffective for failing to object to the alleged sentencing errors defendant raises on appeal. However, we conclude that counsel's representation did not fall below an objective standard of reasonableness under prevailing professional norms. With regard to the *Blakely* issue, the *Blakely* holding does not affect Michigan's indeterminate sentencing scheme, and therefore there was no valid basis on which counsel could have objected. Defendant's additional sentencing arguments are based on his claim that "federal supervised release" should not be deemed equivalent to "parole." However, there is no binding Michigan authority differentiating parole and federal supervised release upon which trial counsel could have relied to protest the trial court's sentencing decisions. Under the circumstances, we conclude that it did not fall beneath an objective standard of reasonableness under prevailing professional norms for defendant's attorney to fail to object to the trial court's use of defendant's supervised release status as if it were a parole equivalent.

Defendant also argues that trial counsel was ineffective for failing to object to the testimony of the victim's mother as discussed above. However, we conclude that any errors with regard to her testimony were not outcome-determinative and did not render the proceedings fundamentally unfair or unreliable. Accordingly, defendant has not established that he is entitled to relief based on ineffective assistance of counsel. *Toma*, *supra* at 302; *Rogers*, *supra* at 714.

Defendant lastly argues that he was deprived of his statutory right to a preliminary examination because he was tried on charges different from those listed in the felony complaint and warrant. Defendant was bound over and tried on the same charges listed on the complaint and warrant: assault with intent to commit sexual penetration and fourth-degree CSC. Defendant was not deprived of his statutory right to a preliminary examination.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter