

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JARRON DONTI GEORGE,

Defendant-Appellant.

UNPUBLISHED

November 20, 2007

No. 271892

Oakland Circuit Court

LC No. 2005-205374-FC

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13). Defendant was sentenced, as a third habitual offender, MCL 769.11, to 28 to 80 years in prison. We affirm defendant's conviction and sentence, but remand for correction of the sentencing information report.

I. Evidentiary Issues

Defendant first contends that the trial court erred by admitting the victim's statements to her sister under MRE 803A, known as the tender years exception to the hearsay rule. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This Court defers to the trial court's judgment when its ruling falls within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 803A, the tender years exception to the hearsay rule, provides:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

(1) the declarant was under the age of ten when the statement was made;

(2) the statement is shown to have been spontaneous and without indication of manufacture;

(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

(4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement. [MRE 803A; *People v Dunham*, 220 Mich App 268, 271-272; 559 NW2d 360 (1996).]

Defendant contends that the victim's statement was not spontaneous and her delay in making the statement was not excusable. Although there was testimony from the victim's sister and mother that the victim may have first talked to a friend about the incident, the victim insisted in her testimony that she first reported the incident to her sister. This was consistent with the victim's preliminary examination testimony. The victim's sister testified that the victim told her that, on the night of their cousin's birthday party, defendant pulled up her dress, "pulled his thang out and stuck it in her," that defendant put his hand over her mouth and locked her upstairs that night. The victim's sister warned the victim that she would get in a lot of trouble if she was lying, and the victim stated that she was not lying. The victim's sister asked the victim why she did not tell their mother about the incident the next day, and the victim replied that she was scared. Thus, the record demonstrates that the victim's 11-month delay in disclosing the incident was excusable as having been caused by her fear. See *Dunham*, *supra* at 272.

Defendant also contends that the prosecutor failed to provide sufficient pretrial detail of the statements. At the preliminary examination, about seven months before trial, the victim testified that she first told her sister about the incident, but could not remember what she told her. About six months before trial, the prosecution notified defendant of its intent to introduce hearsay evidence pursuant to MRE 803A in the form of the victim's sister's testimony. The notice specified that the content of the testimony could be found in the police report and preliminary examination transcript that was provided to defense counsel. In addition, the victim's sister was made available to defense counsel the day before trial, but defense counsel did not wish to speak to her. Thus, the record demonstrates that defendant had a fair opportunity to prepare for the victim's sister's testimony.

Defendant also contends that the trial court failed to hold a "taint hearing" outside the jury's presence. But there is no requirement that the trial court hold a separate hearing on the admissibility of hearsay testimony. MRE 104(c) provides, "Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or when an accused is a witness, and so requests." *People v Berkey*, 437 Mich 40, 53 n 23; 467 NW2d 6

(1991). Beyond a mere assertion, defendant has not demonstrated that the interests of justice required a hearing outside the jury's presence. The trial court considered the evidence and ruled that it was admissible. It did not abuse its discretion.

Next, defendant contends that the trial court abused its discretion when it admitted the victim's mother's testimony about the victim's statement. We disagree.

The trial court ruled that the victim's mother's testimony was admissible to correct any impeachment of the victim, and the prosecutor could rehabilitate the victim by a prior consistent statement under MRE 801. A prior consistent statement is admissible as nonhearsay if the declarant testifies at trial and is subject to cross-examination regarding the statement, and the statement is consistent with the declarant's testimony and offered to rebut a charge of recent fabrication or improper influence or motive. MRE 801(d)(1)(B); *People v McCray*, 245 Mich App 631, 641-642; 630 NW2d 633 (2001). In this case, the record does not reflect a charge of recent fabrication or improper influence or motive. Therefore, trial court improperly classified the victim's mother's testimony as a prior consistent statement admissible under MRE 801.

But the testimony was admissible for impeachment purposes. The prosecution may impeach its own witness. MRE 607. "When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement." *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). Such evidence is admissible to show that the witness made the prior inconsistent statement but not to prove the contents of the statement. *Id.*

Accordingly, the victim's mother's brief testimony was properly used to demonstrate that the victim made the prior inconsistent statement regarding defendant's actions that could explain why the victim was afraid to disclose the incident sooner. The victim's mother's testimony was not necessary as substantive evidence because the victim's sister had already testified that the victim claimed to cry during the incident, defendant put his hand over her mouth, and defendant locked the victim upstairs that night. The victim's sister asked the victim why she did not tell their mother about the incident the next day, and the victim replied that she was scared. Because the victim's mother's testimony was admissible for the purpose of impeachment, there was no error in its admission. But even if the admission of the victim's mother's testimony was erroneous, it was cumulative to that of the victim's sister and, therefore, did not prejudice defendant. *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996) (citation omitted).

II. Prosecutorial Misconduct

Next, defendant argues that he was deprived of a fair trial by the prosecutor's remarks during the jury selection and closing argument. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court examines the record and evaluates the remarks in context, taking into consideration defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant takes issue with the prosecutor's statements during the jury selection that the burden of proof was beyond a reasonable doubt, which was a lesser burden than 100 percent because that would require the jurors to have actually witnessed the incident. However, it is correct that the prosecution is required to prove each element of the crime beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Further, the trial court gave the standard jury instruction regarding the definition of reasonable doubt:

A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that -- a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case. [CJI2d 1.9(3).]

And the jury is presumed to follow the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). There was no plain error in the jury selection process.

Defendant also argues that the prosecutor improperly vouched for the victim's credibility. Contrary to defendant's contention, the prosecutor properly argued that the victim was worthy of belief based on the evidence presented at trial and the victim's and the victim's mother's demeanor during their testimony. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In addition to the testimony itself, the jury may base its credibility determination on several factors, including "tonal quality, volume, speech patterns, and demeanor." *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). There was no misconduct in this regard.

Defendant also contends that the prosecutor misstated the evidence to the jury. The first comment that defendant contests is the prosecutor's statement that there was no record evidence of any other activity that could have ruptured the victim's hymen. This is not a misstatement of the evidence. The prosecutor first acknowledged that the expert testimony established that other activities could rupture a hymen, such as gymnastics, falling with the legs apart, or horseback riding. The prosecutor merely commented that there was no evidence that the victim did any of these other activities. The prosecutor's argument that the injury was physical evidence that corroborated the victim's testimony was a reasonable inference from the evidence presented as it relates to the prosecutor's theory. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant also asserts that the prosecutor misled the jury to believe that the victim was taken from her home because of defendant's acts. The prosecutor did not mislead the jury to believe defendant's acts caused the victim to be taken from her home. The prosecutor reasonably inferred that an eight-year-old child may not be able to disconnect her placement in foster care from her disclosure of the incident where the two events happened so close in time. Viewing the prosecutor's comments in context, it would be unreasonable to conclude that they affected defendant's right to a fair and impartial trial.

In any event, the court instructed the jury that the lawyers' statements and arguments were not evidence, that the jury alone was the finder of facts, including determining the credibility of the witnesses, and that it must not let sympathy or prejudice influence its decision. Therefore, any possible error was dispelled by the court's instruction. *Bahoda, supra* at 281. Defendant was not deprived of a fair trial by the prosecutor's remarks.

III. Ineffective Assistance of Counsel

Defendant also contends that he was denied the effective assistance of counsel. We disagree.

Because defendant failed to move for a new trial or *Ginther* hearing with the trial court, review is limited to the evidence on the record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989), citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). There is a strong presumption that defendant received effective assistance of counsel, and the burden is on defendant to prove counsel's actions were not sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002) (citations omitted). To prevail on a claim of ineffectiveness of counsel, defendant must show: (1) "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v Washington*, 466 US 668, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *LeBlanc*, *supra* at 578. A defendant must show that, but for trial counsel's errors, there would have been a different outcome. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994).

Defendant asserts that nearly every question the prosecutor asked the victim and the victim's mother was leading but does not provide any specific example of what was objectionable or any legal analysis on this issue. Therefore, it is considered abandoned on appeal. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). In any event, "a considerable amount of leeway may be given to a prosecutor to ask leading questions of child witnesses," so there is no indication that the questions posed to the victim were improper. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted). Defendant has not demonstrated prejudice to warrant reversal.

Defendant also asserts that defense counsel was ineffective for failing to address the prosecutor's conduct addressed above. But we have concluded that defendant's arguments regarding these issues are without merit and "[t]rial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

IV. Trial Court's Conduct

Defendant also argues that he was deprived of a fair and impartial trial by the trial judge's comments to defense counsel or conduct during trial. We disagree.

A trial judge has wide discretion in matters of trial conduct but must maintain judicial impartiality. *People v Sharbnaw*, 174 Mich App 94, 99; 435 NW2d 772 (1989). A defendant has a right to representation by an attorney who is treated with due consideration. *People v Anderson*, 166 Mich App 455, 461; 421 NW2d 200 (1988). "Trial judges who berate, scold and demean a lawyer, so as to hold him up to contempt in the eyes of the jury, destroy the balance of impartiality necessary to a fair hearing." *Id.* at 462 (citations omitted). However, the trial judge may admonish or fine counsel in the jury's presence and tell the jury to disregard improper questions or comments where counsel and witnesses persistently continue to ignore the court's warnings. *People v Williams*, 162 Mich App 542, 546-547; 414 NW2d 139 (1987). Reversal is necessary only when the trial court's conduct unduly influenced the jury, thus denying the

defendant a fair and impartial trial. *People v Wigfall*, 160 Mich App 765, 774; 408 NW2d 551 (1987).

Defendant challenges several comments the trial court made outside the presence of the jury, which could not have influenced the jury and denied defendant of a fair trial. Defendant also claims that the trial judge improperly refused to listen to defense counsel's objection to the victim's sister's testimony. Shortly after the prosecutor began direct examination of the victim's sister, the victim's sister identified defendant as her uncle. The trial court asked if there was any objection to the identification, and defense counsel responded, "No objection, your Honor. I do have one point, though, before this witness continues." The trial court responded that the prosecutor could finish the examination of the victim's sister. The trial court's comment was not improper because it had already ruled on the admissibility of the victim's sister's testimony and warned defense counsel not to challenge the ruling during trial.

Defendant also asserts that the trial court committed misconduct by failing to obtain the prosecutor's rationale for the victim's mother's testimony. Defense counsel objected to the testimony, and the trial court immediately ruled on the objection. There is no indication that such conduct had any influence on the jury. It appears from the record that the trial court was expedited the trial because defendant's witness had a flight scheduled. Keeping the trial moving to accommodate a witness's schedule is a matter of trial conduct within the trial court's discretion. Defendant was not deprived of a fair trial by the trial judge's conduct.

V. Cumulative Error

Defendant contends that the cumulative effect of the errors in this case deprived him of a fair trial. We disagree. The only error defendant has demonstrated is the trial court's improper admission of the victim's mother's testimony as a prior consistent statement under MRE 801. But the testimony was admissible for impeachment purposes. Therefore, there was no cumulative effect of errors. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

VI. Sentencing

Defendant also contends that he is entitled to resentencing because points were erroneously assessed for prior record variable (PRV) 7, offense variable (OV) 3, OV 4, and OV 8. In reviewing the number of points scored at the trial level, this Court determines whether there was an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *Id.*

PRV 7 covers subsequent or concurrent felony convictions. MCL 777.57. Defendant should receive ten points under PRV 7 if he has one subsequent or concurrent conviction. MCL 777.57(1)(b); *People v Jarvi*, 216 Mich App 161, 163-164; 548 NW2d 676 (1996). Habitual offender convictions are not counted as concurrent convictions because they are not substantive offenses. *People v Connor*, 209 Mich App 419, 426; 531 NW2d 734 (1995).

The presentence report does not support the finding that defendant had a concurrent or subsequent felony conviction. There is evidence that defendant had an assault and battery charge pending in Ingham County at the time of sentencing, but there is no evidence that the charge was

felonious assault or that defendant was convicted. The prosecution contends that, although defendant should not have received ten points for PRV 7, defendant should have received ten additional points for PRV 2 because he had three prior low severity felony convictions rather than two: one conviction in 1998 for third-degree domestic violence, a felonious assault conviction in 2001, and a felonious assault conviction in 2005. The domestic violence conviction is referred to in the prosecution's notice of intent to seek sentence enhancement as a third habitual offender. Defendant does not contest the accuracy of this assertion. These convictions would raise defendant's score in PRV 2 from 10 to 20 points. With this correction defendant's total PRV score would remain unchanged. Accordingly, we remand for correction of PRV 7 and PRV 2, but defendant is not entitled to resentencing. A defendant is not entitled to resentencing where an error in scoring does not change the guidelines range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Defendant also contends that OV 3 was improperly scored. OV 3 is used when there is physical injury to a victim. MCL 777.33; *People v Cathey*, 261 Mich App 506, 512; 681 NW2d 661 (2004). Defendant should receive ten points under OV 3 if The victim suffered bodily injury requiring medical treatment, or five points if the bodily injury did not require medical treatment. MCL 777.33(1)(d) and (e). "Requiring medical treatment" does not mean that the victim actually obtained medical treatment. MCL 777.33(3).

The evidence shows that the victim's vaginal hymen was ruptured, and the victim felt pain during the penetration. While the ruptured hymen is a bodily injury, there is no evidence on the record that such injury required medical treatment. Although the victim's mother took the victim to the hospital, it was 11 months after the incident, and the purpose was an examination to determine whether the victim had been sexually penetrated. Defendant should have received five points for OV 3. With all other offense variables remaining the same, defendant's total OV points would be 65 rather than 70, which remains in OV Level IV. MCL 777.62. Nonetheless, on remand, the trial court should correct the scoring for OV 3.

Offense variable 4 covers psychological injury to a victim. MCL 777.34(1). Defendant should receive ten points under OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). This includes psychological injury that may require professional treatment. MCL 777.34(2). There is no requirement that the victim actually receive professional treatment, and it is sufficient that the victim was fearful during the encounter. MCL 777.34(2); *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). There was evidence on the record that the victim was scared during the incident and after the incident because defendant threatened her. Therefore, OV 4 was properly scored.

Offense variable 8 covers victim asportation or captivity. MCL 777.38. Defendant should receive 15 points under OV 8 if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a); *People v Spanke*, 254 Mich App 642, 646-647; 658 NW2d 504 (2003). It is sufficient that the victim was moved to a location out of the observation of others, even if the movement was not forcible. *Id.* at 647-648.

The record shows that defendant carried the victim to the upstairs bedroom when she fell asleep and committed the offense out of the sight of the victim's mother. The victim tried to go downstairs to tell her mother what happened, but defendant saw her, hit her, and told her to go

back upstairs. Defendant locked the victim upstairs that night. Therefore, the evidence supports the scoring of 15 points for OV 8.

Defendant also argues that, under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), he is entitled to resentencing. However, our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Therefore, this argument is without merit.

We affirm defendant's conviction and sentence, but remand for corrections to the sentencing information report consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Patrick M. Meter