STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2007
v	No. 270572 Wayne Circuit Court
WILLIAM BRUCE KNAPPENBERGER, Defendant-Appellant.	LC No. 06-000027-01

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a), and sentenced to 7 to 15 years' imprisonment. He appeals by right. We affirm in part, vacate in part, and remand for resentencing.

Defendant's conviction arises out of the sexual assault of the complainant, who was six years old at the time of trial. The complainant testified that defendant pulled down his pajamas and "licked his butt" while he was playing a game with defendant in his backyard.[1] Defendant denied sexually assaulting the complainant and playing the game with him. Although defendant was charged with first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), the jury was instructed on CSC II and convicted him of the latter offense.

Defendant first argues that his conviction must be vacated because he was not charged with CSC II, and the trial court "constructively amended" the information to add this offense after the close of proofs. He further contends that CSC II is not a necessarily included lesser offense of CSC I and that, as such, the trial court erred by instructing the jury pursuant to CSC II. As subsequently discussed further, we hold that defendant has waived appellate review of these issues by specifically requesting that the jury be instructed on CSC II.

In *People v Nyx*, 479 Mich 112; 734 NW2d 548 (2007), our Supreme Court recently addressed whether a defendant charged with CSC I may properly be convicted of CSC II as a

[1] The complainant also testified that defendant engaged in similar conduct with the complainant's brother, but the jury acquitted defendant of additional charges involving the complainant's brother.

lesser offense. The defendant in *Nyx* was charged with three counts of CSC I, but, following a bench trial, was convicted of two counts of CSC II. The defendant appealed, arguing that the trial court erred by considering the cognate lesser offense of CSC II. *Id.* at 115-116. Chief Justice Taylor, joined by Justice Markman, opined that "it is possible to commit CSC I without first having committed CSC II, and the elements of CSC II are not 'completely subsumed' in the greater offense of CSC I." *Id.* at 136. Thus, the lead opinion concluded that CSC II is a cognate lesser offense, rather than a necessarily included lesser offense, of CSC I, and that MCL 768.32(1) barred the defendant's CSC II convictions. *Id.* Justices Cavanagh and Kelly concurred in the result of the lead opinion, stating that the defendant's CSC II convictions violated his due process rights because he did not have adequate notice that he faced such charges. *Id.* at 143 (Cavanagh, J).

Unlike in *Nyx*, defendant in the instant case specifically requested that the jury be instructed on CSC II and approved the verdict form which allowed the jury to convict him of CSC II as a lesser offense of CSC I. Moreover, defense counsel expressed satisfaction with the jury instructions following the trial court's reading of the instructions. Accordingly, defendant has waived any error regarding the trial court's instruction on CSC II and the addition of CSC II as a possible verdict. *People v Carter*, 462 Mich 206, 215-219; 612 NW2d 144 (2000). A waiver extinguishes appellate review of the right waived. *Id*. at 215.

Defendant next argues that the trial court erred by failing to swear the complainant before he testified and by failing to determine whether he was competent to testify. Because defendant did not timely object before the complainant testified, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *Id*.

MRE 603 provides:

> Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Further, MRE 601 provides:

> Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

Before the complainant testified, the following colloquy ensued:

THE COURT: Do you know what it means to tell the truth, [complainant's name]?

THE WITNESS: Yes.

THE COURT:	And do you know what it means to lie?
THE WITNESS:	Yes.
THE COURT:	What is better, is it better to lie or is it better to tell the truth?
THE WITNESS:	Better to tell the truth.
THE COURT:	I think the youth understands the difference between telling the truth and a lie, and that is sufficient for me.

Although MRE 601 did not require the trial court to make a finding of competency, the court's discussion with the complainant sufficiently demonstrated his competence and his sense of obligation to testify truthfully. Defendant contends that the complainant's testimony was sometimes contradictory, but any inconsistency in his testimony affected his credibility and not his competency under MRE 601. *People v Watson*, 245 Mich App 572, 583-584; 629 NW2d 411 (2001). Moreover, although the trial court did not ask the complainant to affirm that he would testify truthfully, the trial court's inquiry whether it is better to lie or to tell the truth, and the complainant's response that it is better to tell the truth, was sufficient to impress upon the complainant his duty to testify truthfully. Thus, the trial court minimally complied with MRE 603, and no plain error occurred. As such, defense counsel's failure to timely object did not deprive defendant of the effective assistance of counsel. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Further, we note that the complainant averred that the events about which he testified actually occurred and that nobody told him to "make up" the story. Accordingly, even if the trial court's failure to swear the complainant constituted plain error, reversal would not be warranted considering the complainant's affirmation that he testified truthfully. *Carines, supra* at 763.

Defendant next contends that he is entitled to resentencing in part because the sentencing court failed to articulate substantial and compelling reasons to support its upward departure from the sentencing guidelines range of 10 to 19 months.[2] In reviewing a departure from the sentencing guidelines range, we review the existence of a particular factor supporting a departure for clear error, the determination whether the factor is objective and verifiable de novo, and whether a reason is substantial and compelling for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). We also review the extent of a departure for an abuse of discretion. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

Under MCL 769.34(3), a trial court may depart from the sentencing guidelines range "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." A substantial and compelling reason must be objective and verifiable, must keenly or irresistibly grab the court's attention, be recognized as of considerable worth in deciding the length of a sentence, and exists in only exceptional cases. *Babcock, supra* at 258, citing *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). An "objective and

[2] As discussed *infra*, the trial court properly scored 15 points for offense variable (OV) 10.

verifiable" reason must be based on "actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *Abramski, supra* at 74. Further, a departure may not be based on characteristics already taken into account in determining the appropriate sentencing guidelines range unless the court determines from facts in the record that the particular characteristic at issue has been given inadequate or disproportionate weight. *Id.*; MCL 769.34(3)(b).

Here, the trial court explained its departure from the sentencing guidelines range as follows:

> The presentence report has recommended a probationary period of two years. How can I in good conscience impose a two-year probationary sentence on someone who a jury has found guilty of criminal sexual conduct of a tender child. I can't do that. I cannot do that.
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> * * *
>
> [T]he substantial and compelling reasons which the court has relied on in justifying that specific departure are as follows:
>
> The guidelines do not adequately address the psychological injury of the victim's family members; and secondly, because remorse has been – because remorse has not been expressed in regard to the victim's family and therefore rehabilitation of the defendant is therefore questionable.

Although the sentencing guidelines take into consideration the psychological injury to a victim, the trial court specifically determined that the guidelines did not adequately address the psychological injury to the complainant and his family in this case. The complainant's mother discussed the family's psychological injury at sentencing. Because the trial court determined that the guidelines did not adequately account for this characteristic, the court did not err by departing on this basis. MCL 769.34(3)(b); *Abramski, supra* at 74.

Defendant primarily focuses on the second reason that the trial court articulated for departing above the guidelines recommended range, i.e., that because he did not express remorse regarding the victim's family, rehabilitation is questionable. We agree with defendant that this factor is not objective and verifiable; therefore, it is not substantial and compelling. *Babcock, supra* at 257. Further, resentencing is required because it is unclear from the record below whether the trial court would have departed to the same extent on the basis of the psychological injury to the complainant and his family alone. See *Babcock, supra* at 260. Consequently, because we must remand this case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure, we need not address defendant's argument that his minimum sentence is disproportionate.

Defendant also contends that resentencing is required because his sentence was increased based on facts that were not proven beyond a reasonable doubt contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In particular, defendant argues that his properly scored sentencing guidelines entitled him to an intermediate sanction and that the sentencing court constitutionally erred by scoring 15 points for offense variable (OV) 10. Our

Supreme Court has recently reaffirmed that under Michigan's intermediate sentencing scheme, a sentencing court does not violate *Blakely* by engaging in judicial fact-finding to score the OVs to determine a defendant's minimum sentence even if the defendant would have been entitled to an intermediate sanction absent the OV scoring. *People v McCuller*, 479 Mich 672, 676-678, 698; 739 NW2d 563 (2007). Therefore, the sentencing court's assessment of 15 points under OV 10 for "predatory conduct" did not violate *Blakely*. Moreover, for purposes of resentencing, we note that the trial court properly scored 15 points under OV 10. MCL 777.40(3)(a) defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." The sentencing court based its scoring decision on the fact that defendant sought out the complainant before the offense and attempted to see the child while he was taking a bath. Because the evidence, in particular the testimony of the complainant's mother, supported the court's reasoning, the scoring decision was proper. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Defendant further contends that the sentencing court violated *Blakely* by departing from the sentencing guidelines. In *People v Harper*, 479 Mich 599; 739 NW2d 599 (2007), our Supreme Court held that *Blakely* is not offended when a defendant's sentencing guidelines place him in an intermediate sanction cell, but the sentencing court departs upward based on substantial and compelling reasons. The Court stated that "[w]hen a defendant's minimum sentence range under the guidelines is in an intermediate sanction cell, the defendant has a *statutory right* to an intermediate sanction, *conditioned on the absence of substantial and compelling reasons to depart upward.*" *Id.* at 637 (emphasis in original). The Court further stated that, "in the intermediate sanction cell context, because the defendant's sentence never exceeds the maximum sentence authorized by the jury verdict or the guilty plea, the sentencing judge may exercise his statutorily granted discretion to depart upward on the basis of facts not found by a jury." *Id.* at 637-638. The same reasoning applies here: defendant's corrected minimum sentence range placed him in a "straddle cell," entitling him to either an intermediate sanction or to imprisonment with a minimum term within that range *absent a departure*. MCL 769.34(4)(c). Therefore, the sentencing court did not violate *Blakely* by departing from the sentencing guidelines.

We affirm in part, vacate in part, and remand for resentencing and/or rearticulation of substantial and compelling reasons for its departure. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey