STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD FRANKLIN COCHRANE,

Defendant-Appellant.

UNPUBLISHED
December 20, 2007

No. 269470
Macomb Circuit Court
LC No. 2005-003243-FC

Before: Jansen, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of 12 counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under 13), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under 13). He was sentenced to concurrent prison terms of 18 to 30 years for each first-degree CSC conviction and 57 months to 15 years for the second-degree CSC conviction. He appeals as of right. We affirm defendant's conviction for first-degree CSC and his convictions and sentence for second-degree CSC, but vacate his sentence for first-degree CSC and remand for resentencing.

I. Underlying Facts

Defendant, a 67-year-old grandfather, was convicted of sexually assaulting his granddaughter in 1999 and 2000, when she was nine and ten years old. The victim, age 15 at the time of trial, testified that she spent some Saturdays with defendant in his Sterling Heights apartment. The victim further testified that during the first incident, she and defendant were sitting on a couch and defendant asked her if she "ha[s] hair down there?" When the victim responded affirmatively, defendant replied, "it was probably only peach fuzz." The victim showed defendant her pubic hair, and defendant "put his fingers" in her vagina, which "hurt." Neither party said anything afterward. Thereafter, defendant digitally penetrated the victim's vagina "almost every time [she] went over there to stay the night."

The victim testified that on one Saturday when she was still nine, she was in defendant's kitchen, reached for a bowl of ice cream on the counter, and hit her head. When defendant came to help her, "he pulled [her] pants down and stuck his tongue [in her] vagina." Defendant thereafter orally penetrated the victim's vagina "almost every time" she visited. Each act would generally last about five minutes. The victim indicated that after defendant orally penetrated her, he would occasionally tell her, "[I]f [he] gave - - or if [she] received, then [she] should give."

The victim explained that defendant meant that "he wanted [her] either to lick or suck his penis, or play with it." She recalled "twice sucking and licking on [defendant's penis] and once playing with it" "with her hand."

The victim testified that on another Saturday when she was ten, she and defendant were in defendant's bedroom. The victim indicated that she was "on top of [defendant]," "he had his penis out," he put his penis "in [the] lips . . . of [her] vagina," and eventually ejaculated on her. Defendant had previously told the victim "that one time a boy's going to try to show [her] how to do things and [she'll] already know everything."

The victim and her mother both testified that when the victim was about ten years old, she stopped wanting to go to defendant's house. The victim explained that she did not tell anyone what defendant was doing because she was scared, believed her father would attack defendant, did not want to hurt defendant, and because defendant told her "never to tell anybody, it would be [their] little secret." She further explained that she believed that defendant "loved [her] and . . . that was his way of loving [her]." She indicated that she "started to like it" and would not tell defendant to stop, but now "hate[s] herself for that" and feels "disgusted."

In 2003, the victim moved from her mother's house into her father's house because she and her mother's boyfriend did not get along. In late 2004, the victim told her mother that defendant "touched her inappropriately." The victim's mother did not believe the victim, go to the police, confront defendant, or tell anyone. In April 2005, the victim told a classmate, who persuaded her to speak with a school social worker. After speaking with the social worker, the police became involved. An officer thereafter took the victim to the Oakland County Care House, where she spoke with a forensic interviewer. The victim's mother testified that, in June or July 2005, her father came to her mother's house and, when confronted with the victim's allegations, defendant said, "oh my God, I'm going to jail." The victim's mother described defendant as "very, very nervous and very scared."

The defense denied any wrongdoing. Rather, the defense argued that the victim was "attention seeking" and fabricated the "outlandish" charges against defendant to take revenge on her mother, who had chosen her boyfriend over the victim, and noted the victim's delay in reporting the incidents. The defense presented defendant's son, daughter, and granddaughter to testify on his behalf. The witnesses testified that the victim did not stay at defendant's house often, was never uncomfortable around defendant, and had problems with her mother's boyfriend. They also denied that defendant had ever inappropriately touched his other granddaughter.

II. Adjournment

Defendant argues that the trial court abused its discretion when it denied his motion for an adjournment of trial. We disagree.

Defendant was originally tried in November 2005, but the court declared a mistrial after the jury was unable to reach a verdict. Defendant's second trial was scheduled to begin on January 4, 2006. On December 12, 2005, defendant moved for a 30-day adjournment of trial because he was "in dire straits financially and needs more time for additional attorney fees in order to defend this case appropriately." Defendant also argued that he needed to retain an

expert witness. At the hearing on the motion, defendant argued that he needed the adjournment to "have [his] experts review witness testimony, transcripts, documentation," and noted that the defense "do[es]n't even have the transcript from the first trial." The trial court denied defendant's motion and told defendant to talk to the stenographer about the transcript. The trial court noted that it had planned to start the trial immediately after the first trial, and that the January 4, 2006 date would not be adjourned.

A trial court's ruling on a motion for an adjournment is reviewed for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). When deciding whether the trial court abused its discretion, this Court considers whether the defendant asserted a constitutional right, had a legitimate reason for asserting the right, had been negligent, and had requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). A defendant must also show prejudice as a result of the trial court's alleged abuse of discretion in denying an adjournment. *Snider*, *supra*. "No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown . . . ." MCL 768.2.

We find no abuse of discretion. Defendant claims that he needed more time to "hire an expert that he believed was essential to rebut the testimony of Amy Allen."[1] But the record shows that Allen interviewed the victim in April 2005. The prosecution listed Allen on its witness list that was filed on August 22, 2005, nearly three months before defendant's first trial. Allen testified at defendant's first trial in November 2005. Defendant did not seek to introduce expert testimony at the first trial. Subsequently, defendant waited until one month after the first trial and three weeks before the scheduled date of the second trial to request an adjournment to address Allen's opinions. Although defendant claims that he needed time to employ an expert, the record shows that when he filed his motion for an adjournment on December 12, 2005, he had already identified the expert he intended to introduce at the second trial, Dr. Marcus Degraw, and provided his curriculum vitae. Furthermore, apart from making a general statement that he needed an expert, defendant did not make an offer of proof at the hearing below, nor does he explain on appeal how an expert would have actually been valuable to his defense.

Defendant also makes a general claim that the trial court's denial of an adjournment "interfered with counsel's ability to prepare an effective defense." But the charges and evidence, including the prosecution witnesses, were essentially the same in both trials. Further, defense counsel represented defendant at both trials. Thus, defense counsel was fully aware of the facts in the case, which were not overly complex. Under these circumstances, the trial court did not abuse its discretion by denying defendant's request for adjournment of trial.

III. Psychological Examination

[1] Amy Allen is a social worker and forensic interviewer for Care House, which is a child abuse and neglect council in Oakland County. During direct examination, Allen testified about the creation, purpose, and use of the forensic interview protocol, and about the general characteristics and behavior of child victims of sexual abuse based on relevant research and literature.

Next, defendant argues that the trial court erred when it denied his request to have the victim undergo an independent psychological examination. Defendant asserted that the victim examination was necessary because the forensic interviewer, Allen, was viewed as an expert, was hostile to the defense, and had no practical experience. We disagree.

This Court reviews a trial court's decision to deny a defendant's request for a psychological examination of a victim for an abuse of discretion. *People v Freeman (After Remand)*, 406 Mich 514, 516; 280 NW2d 446 (1979); *People v Graham*, 173 Mich App 473, 477; 434 NW2d 165 (1988). A psychological examination of a victim is permissible only where there is a "compelling" reason for the examination. *Id.* at 478; *People v Payne*, 90 Mich App 713, 723; 282 NW2d 456 (1979). This Court has cautioned against sanctioning "fishing expeditions." *Graham, supra* at 477. "[T]he trial court should consider whether the defendant's rights can be fully protected by cross-examination." *Id.*

Defendant did not offer a compelling reason to conduct a psychological examination of the victim. The fact that defendant found Allen unqualified, adverse, and hostile is not a sufficient basis for such a request. As the trial court aptly noted, the reason asserted by the defense is "great for cross-examination" of Allen. The court further indicated that defendant "was able to get [his] own [expert] witness to testify." Indeed, at trial, defendant did cross-examine Allen about her qualifications, among other things. Defendant also cross-examined the victim and thoroughly explored issues of her credibility. In sum, the trial court did not abuse its discretion when it refused to order an independent psychological examination of the victim.

IV. Inadmissible Hearsay

Defendant also argues that he is entitled to a new trial because the prosecutor bolstered the victim's testimony by eliciting improper hearsay evidence of the victim's prior consistent statements. We disagree. Because defendant did not object to this evidence at trial, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Defendant asserts that, through the victim's own testimony, the prosecutor "presented testimony of every individual the [victim] told her tale of assault to before it was referred to the police for prosecution." During direct examination, the victim testified that in late 2004, she told her mother that defendant had inappropriately touched her, but her mother did not believe her and did nothing. Six months later, in April 2005, the victim told a classmate, who persuaded her to tell a school social worker.[2] From that point, the police became involved.

Defendant has not demonstrated plain error. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802, and *People v Ivers*, 459 Mich 320, 331; 587 NW2d 10 (1998) (Boyle, J). Here, the victim primarily testified about statements of which she

[2] Neither the classmate nor the school social worker testified at trial.

was the declarant, and it is not apparent that the statements were offered to prove the truth of the matter asserted, i.e., that defendant sexually assaulted her. Rather, the statements presented a chronology of events that ultimately led to the proceedings in this case. As argued by the defense, the evidence showed that the victim did not immediately disclose what had occurred, and that there was a five- or six-year delay in reporting the incidents to the police. Because it is not plainly apparent that the victim's statements could not have been received successfully and correctly, defendant has failed to demonstrate plain error in this regard.

Furthermore, even if the testimony could be considered hearsay, defendant has not demonstrated that his substantial rights were affected. *Carines, supra*. It is highly unlikely that the victim's testimony disclosing the events that led to the court proceeding caused the jury to convict an otherwise innocent person. *Id.* The victim testified at trial regarding the alleged acts. Moreover, defendant's defense was complete denial, and defendant argued that the victim's "tale" was motivated by "attention seeking" and her desire to take revenge against her mother. Evidence that the victim repeated her accusations to others played into this defense theory. Consequently, defendant is not entitled to appellate relief.

In a related claim, defendant summarily asserts that defense counsel was ineffective for failing to object to the victim's testimony. In light of our conclusion that any error was not prejudicial, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Therefore, he cannot establish a claim of ineffective assistance of counsel.

V. Sentence

Defendant argues that he is entitled to resentencing because the trial court improperly considered his failure to admit guilt when it refused to sentence him at the lower end of the guidelines range. We disagree that the trial court relied on an improper factor when imposing sentence, but conclude that defendant is entitled to resentencing on his first-degree CSC convictions because the trial court inadvertently departed from the sentencing guidelines range without articulating substantial and compelling reasons for a departure.

This Court must affirm a sentence within the guidelines range absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). But this requirement cannot be applied where the trial court erroneously considered a defendant's refusal to admit guilt in violation of the defendant's constitutional right against self-incrimination. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006), lv den 477 Mich 931 (2006). "A sentencing court cannot base its sentence even in part on a defendant's refusal to admit guilt." *Id.* at 314. "Resentencing is warranted if 'it is apparent that the court erroneously considered the defendant's failure to admit guilt, as indicated by action such as asking the defendant to admit his guilt or offering him a lesser sentence if he did.'" *Id.* (citation omitted).

Review of the record reveals that the trial court made an isolated remark regarding the fact that the victim had been through two trials as a result of what happened with defendant. It is apparent that the trial court's sentence was not based on defendant's refusal to admit guilt. The trial court did not ask defendant to admit guilt or offer him a lesser sentence if he did. Moreover,

the court clearly listed the factors it considered critical to defendant's sentence, including the victim's age and maturity, and defendant and the victim's relationship. Also, the court opined that *the offense, itself,* warranted a higher guidelines range. Consequently, defendant is not entitled to resentencing on this basis.

However, although not specifically raised by defendant, we agree that defendant is entitled to resentencing on his first-degree CSC convictions. Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the calculated guidelines range. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). A court may depart from the appropriate sentence range only if it "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure." MCL 769.34(3). The sentencing guidelines range for defendant's first-degree CSC convictions was 126 to 210 months (or 17-1/2 years). It is apparent from the trial court's statements at sentencing that it intended to sentence defendant within the guidelines range. But the trial court's minimum sentences of 18 years for each first-degree CSC conviction exceeded the guidelines range by six months, without articulating any substantial and compelling reason for doing so.[3] Consequently, as plaintiff concedes, defendant is entitled to be resentenced for those convictions. MCL 769.34(11). On remand, the trial court may impose a minimum sentence within the appropriate guidelines range, or a sentence that exceeds that range if the court finds that a departure is warranted for substantial and compelling reasons. MCL 769.34(3).

Within this issue, defendant summarily argues that this case should be assigned to a different judge for resentencing. Because defendant failed to move for disqualification in the trial court pursuant to MCR 2.003, this Court's review of this unpreserved issue is limited to plain error affecting substantial rights. *Carines, supra* at 763-764. In deciding whether resentencing should occur before a different judge, this Court considers (1) whether the original judge would reasonably be expected on remand to have substantial difficulty in putting aside previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable for the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

Defendant contends that the trial judge's reliance on his refusal to admit guilt warrants resentencing before another judge. But the judge did not rely on an improper reason when imposing sentence. Further, although the judge exceeded the guidelines range by six months, the departure was not deliberate. The judge indicated that he intended to "follow the guidelines" and believed that the sentencing factors on which he was relying were embodied within the guidelines. Under the circumstances, resentencing before a different judge is not warranted.

[3] As noted by plaintiff, it appears that the trial court's upward departure was inadvertent.

Affirmed in part, vacated in part, and remanded for resentencing with regard to the sentences for first-degree CSC only. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood