STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 3, 2008
v	No. 277151 Wayne Circuit Court
PETER CHRISTOPHER MOSES, Defendant-Appellant.	LC No. 06-007376-01

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b). He was sentenced to concurrent prison terms of 12 to 20 years for each first-degree CSC conviction, and 10 to 15 years for the second-degree CSC conviction. He appeals as of right. We affirm defendant's convictions, but remand for further proceedings regarding defendant's sentences. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The complainant, defendant's stepdaughter, testified that one night in April 2004, sometime around Easter, she was sleeping in her bedroom and awoke to find defendant rubbing her buttocks with his hand inside her pajamas. He shifted his hand and began touching her vagina. Before departing, defendant told her not to tell anybody because doing so would "mess up our family."

The complainant testified that the same thing happened on a subsequent night. At that time or on a third occasion, defendant removed the complainant's pajama bottoms, performed cunnilingus, and then penetrated her vagina with his penis. The complainant testified that defendant performed the same acts on at least one other occasion.

The complainant confided in a friend, who advised her to tell her mother, but she declined to do so because she thought "[i]t was going to break up our family." She also feared that her mother would not believe her or that the information would so upset her mother that it could jeopardize her mother's health. The stress of what had happened led the complainant to mutilate herself by carving her name into her arm with a knife. The complainant's mother noticed the markings, but thought they were inked on. When she later realized that the complainant had cut herself, she confronted her. The complainant would not speak, but

expressed herself in writing. She wrote that she was "mad at myself for letting something happen that shouldn't have. . . . The thing that happened to me is the same thing that happened to Shanice in that book A Day Late And A Dollar Short. W/her stepfather George." She also explained why she had not come forward immediately. The mother recognized the reference to the book as a reference to sexual molestation and questioned her daughter further. She then sent her to her aunt's house before confronting her husband and calling the police.

The police were called and took a report on July 12, 2004, but did not investigate the case until a year later. The parties stipulated that on July 5, 2005, the complainant gave a statement in which she used slang terms to indicate that defendant had performed cunnilingus and had ejaculated on her stomach. The complainant denied using such language but admitted to signing the statement.

Defendant denied that he ever molested the complainant. He speculated that she had invented the allegations because of two incidents that occurred earlier in the year. One incident, which occurred in January or February 2004, culminated in defendant refusing the complainant's request for a cell phone. The other incident occurred in March 2004. Defendant found the complainant sitting on a boy's lap. He confronted them both and embarrassed the complainant in front of her friend. He also reported the incident to the complainant's mother. Defendant further testified that he had frequent contact with children over the past 20 years through his work as a lifeguard and swimming instructor and no one had ever accused him of doing anything inappropriate.

Angela Davenport, defendant's new girlfriend, testified that defendant moved in with her in March 2006. At that time, she had five daughters between the ages of 14 and 18 living with her. Davenport stated that there were no problems between defendant and her daughters. She further testified that defendant had a reputation for honesty.

Defendant had testified that after the investigation was reopened, the police never contacted him and asked for an interview. If they had, he would have appeared for one. The officer in charge testified that he spoke to defendant on the telephone about the allegations. Defendant agreed to come in a few days later for an interview but failed to appear.

Defendant first contends that the trial court erred in admitting the complainant's written statement into evidence. Defendant preserved this issue by objecting at trial. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review the trial court's decision to admit the statement for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

If the statement was offered to prove the truth of the matters asserted, it constituted hearsay. MRE 801(c). Although hearsay, it could be admitted as evidence of the complainant's then existing state of mind, emotion, sensation, or physical condition, excluding any statement of memory or belief to prove a fact remembered or believed. MRE 803(3). In this case, the trial court admitted the statement under MRE 803(3) to show the complainant's emotional state and to explain her reasons for failing to disclose the abuse earlier as explained in the note. The complainant's state of mind at the time she disclosed the abuse was not relevant to any issues to

be determined at trial and thus the trial court erred in admitting the note. However, the statement was cumulative of other properly admitted evidence, principally the complainant's trial testimony, and thus its admission was harmless error. *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003); *People v Rodriguez* (*On Remand*), 216 Mich App 329, 332; 549 NW2d 359 (1996).

Defendant next contends that the trial court erred in ordering him to reimburse the county for court-appointed counsel. Because this issue was not raised below, it has not been preserved for appeal and is thus reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Although a trial court is not required to make a specific finding on the record regarding a defendant's ability to pay unless the defendant contemporaneously and specifically objects, it must "provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004). In this case, the court assessed attorney fees in the amount of $400 without any explanation or comment whatsoever. Therefore, defendant has shown a plain error and we remand to the trial court to "reconsider its reimbursement order in light of defendant's current and future financial circumstances." *Id.* at 255.

Defendant next argues that he is entitled to have the presentence report corrected to the extent that it incorrectly states that his convictions arose from a guilty plea. This issue has been waived because counsel specifically advised the trial court that the presentence report was "accurate. No omissions, deletions or corrections." *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000).

Defendant alternatively argues that counsel was ineffective for failing to raise the issue at sentencing. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby* (*After Remand*), 215 Mich App 472, 476; 547 NW2d 48 (1996). Relief is not available unless defendant shows that counsel's representation was unreasonable and counsel's error affected the outcome of the proceedings. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001). The presentence report indicates in various places both that defendant was convicted following a bench trial and that he pleaded guilty. The record plainly shows that he did not plead guilty and thus counsel erred in failing to object to the inaccuracy. The prosecutor agrees that defendant is entitled to relief. Thus, on remand the trial court is directed to correct the misstatement in the presentence report and send a corrected copy to the Department of Corrections. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003); *People v Martinez* (*After Remand*), 210 Mich App 199, 203; 532 NW2d 863 (1995).

Defendant's convictions are affirmed, but we remand for reconsideration of the trial court's order requiring defendant to reimburse the county for attorney fees and for correction of the presentence report in accordance with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering