

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CESARE RASHARD GREER,

Defendant-Appellant.

UNPUBLISHED

December 23, 2008

No. 280083

Wayne Circuit Court

LC No. 07-006332-01

Before: Servitto, P.J., and Owens and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC) involving a person less than 13 years of age, MCL 750.520b(1)(a). Defendant was sentenced as a second habitual offender, MCL 769.10, to 215 to 480 months in prison for each count. We affirm.

I. Jury Instructions

Defendant first argues that the trial court's jury instruction created a presumption that the victim was more credible than defendant, thereby improperly bolstering the victim's credibility, and also created a presumption that defendant was guilty of the crime charged. Because defendant failed to object to the instruction and affirmatively approved of it, he has waived any challenge to the instruction on appeal and any error has been extinguished. *People v Unger*, 278 Mich App 210, 234; 749 NW2d 272 (2008).

Nevertheless, defendant contends that defense counsel's failure to object to the instruction constituted ineffective assistance of counsel. We disagree. Claims alleging ineffective assistance of counsel raise mixed questions of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008). Because there was no evidentiary hearing below on defendant's ineffective assistance claim, our review is limited to errors apparent on the record. *Id.* To prevail, a defendant must show that defense counsel acted below an objective standard of reasonableness under prevailing professional norms, and that but for counsel's error, the outcome of the trial would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

In the present matter, defendant asserts that counsel erred because counsel should have objected to the following instruction: “Now, to prove this charge, it is not necessary that there be evidence other than the testimony of [the victim], if that testimony proves beyond a reasonable doubt that the defendant is guilty.” We find that counsel did not err because this instruction was proper. Stated plainly, the instruction is a correct representation of the law. MCL 750.520h explicitly provides that in prosecutions under section 520b, as in this case, a victim’s testimony need not be corroborated to sustain a conviction. See *People v Inman*, 315 Mich 456, 471-472; 24 NW2d 176 (1946). The instruction here merely informed the jury that it may convict defendant on the basis of the complainant’s testimony alone, if the testimony proved defendant’s guilt beyond a reasonable doubt. Thus, even if counsel had objected, the objection would have been futile. Defense counsel cannot be ineffective for failing to object to a proper instruction. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant nonetheless contends that the instruction was improper. We fail to see, however, how the trial court’s instruction allegedly created an improper presumption that bolstered the witness’s credibility and created a presumption of defendant’s guilt, as defendant contends. Rather, the instruction at issue used a conditional clause, “*if that testimony proves guilt beyond a reasonable doubt*,” and, therefore, did not require the jury to conclude that the witness’s testimony was credible or that defendant was guilty. The instruction also did not create an inference that the prosecution did not need to prove defendant’s guilt beyond a reasonable doubt, thereby improperly shifting the burden to the defense. *People v Wright*, 408 Mich 1, 25; 289 NW2d 1 (1980). No reasonable view of the trial court’s instruction supports defendant’s claim that an improper presumption was created.

II. Sentencing

Defendant next argues that the trial court erred by scoring certain offense variables (OVs) under the sentencing guidelines. We disagree. We review the trial court’s scoring of the sentencing guidelines for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Where there is any evidence to support the trial court’s scoring, its decision will be upheld on appeal. *Id.*

Defendant argues that insufficient evidence existed on the record to support the trial court’s scoring of ten points for OV 12, which considers contemporaneous felonious criminal acts. MCL 777.42. Ten points are scored if a defendant committed two contemporaneous felonious criminal acts involving crimes against a person. MCL 777.42(1)(b). Contemporaneous, for purposes of this OV, means the act occurred within 24 hours of the sentencing offense. MCL 777.42(2)(a)(i). Each scored act must not result in a separate conviction. MCL 777.42(2)(a)(ii).

In the instant case, the victim testified that defendant sexually assaulted her nearly every weekend during the summer of 2006 and provided particular detail about two instances. She further testified that each time defendant penetrated her vagina with his finger, tongue, and penis. The jury convicted defendant of only two counts of first degree CSC based on the two penetrations of the victim’s vagina with defendant’s penis. The penetrations with defendant’s mouth and fingers did not result in convictions and occurred within 24 hours of the sentencing offenses. Thus, there was sufficient evidence based on the victim’s testimony for the trial court to score OV 12 at ten points.

Defendant next argues that the trial court erred by scoring OV 13 at 50 points based on conduct that the jury did not find him guilty of beyond a reasonable doubt in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). OV 13 permits a trial court to score 50 points if the offense was part of a pattern of felonious criminal activity involving three or more sexual penetrations against a person less than 13 years of age. MCL 777.43(1)(a). The trial court allotted 50 points under this OV on the basis of sexual penetrations not found by the jury beyond a reasonable doubt. This was not improper. First, there is no requirement that the jury find the facts that form the basis of the trial court's scoring of the guidelines. *People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991). Second, although *Blakely, supra*, prohibits judicial fact-finding that increases an offender's maximum penalty beyond the statutory maximum, "[a] sentencing court's fact-finding in scoring the OVs does not increase the defendant's statutory maximum" *People v McCuller*, 479 Mich 672, 677; 739 NW2d 563 (2007). Therefore, there is no *Blakely* violation and the trial court did not err in scoring OV 13.

Affirmed.

/s/ Deborah A. Servitto

/s/ Donald S. Owens

/s/ Kirsten Frank Kelly