# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 23, 2009 |
| v | No. 282485<br>Wayne Circuit Court |
| GEORGE KARVELIS,<br><br>Defendant-Appellant. | LC No. 06-002379-FC |

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13), and three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to 15 to 30 years' imprisonment for each first-degree criminal sexual conduct conviction and to 15 to 22-1/2 years' imprisonment for each second-degree criminal sexual conduct conviction.[1] For the reasons set forth below, we affirm in part, vacate in part, and remand for ministerial correction of defendant's judgment of sentence.

Defendant's convictions arise from the sexual assaults of "JX," who was 22 years old at the time of trial. JX testified that defendant, his grandmother's husband, touched his buttocks underneath his clothes when he was ten years old. JX recalled this activity occurring more than a dozen times. JX also testified that when he was approximately ten years old, defendant took JX's clothes off and touched his penis on more than one occasion. JX recalled that when he was 11 or 12 years old, defendant, on multiple occasions, exposed his penis to JX, placed JX's hand on his penis, and placed his penis on JX's face. No penetration occurred during those incidents. JX further recalled that, beginning when he was 12 years old or younger, defendant forced JX to perform fellatio on him on more than one occasion. At some point thereafter, defendant also performed fellatio on JX. Finally, JX recalled defendant forcing him to perform fellatio on

[1] The judgment of sentence erroneously indicates a sentence of 15 to 30 years' imprisonment for one of the second-degree criminal sexual conduct convictions and a sentence of 15 to 22-1/2 years' imprisonment for one of the first-degree criminal sexual conduct convictions.

defendant in defendant's car when JX was 13 or 14 years old. Defendant denied ever engaging in inappropriate conduct with JX.

Defendant first argues that the evidence was insufficient to support his convictions for two counts of first-degree criminal sexual conduct. When determining whether sufficient evidence exists to support a conviction, we must view the evidence in the light most favorable to the prosecution and determine whether a rational fact-finder could conclude that the prosecutor proved every element of the offense beyond a reasonable doubt. *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Defendant specifically asserts that the prosecutor failed to present evidence that two of the oral penetrations occurred when JX was less than 13 years old as required under MCL 750.520b, which provides, in relevant part:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

JX's testimony supports two of defendant's three first-degree criminal sexual conduct convictions. JX testified that when he was 12 years old or younger, defendant put his penis in JX's mouth and that this activity occurred on more than one occasion. JX also testified that defendant put his mouth on JX's penis, but that this activity occurred "afterwards" and not during the same incidents that JX performed fellatio on defendant. It is unclear from the record whether the activity involving defendant performing fellatio on JX occurred when JX was 12 years old or thereafter. JX merely testified that the activity occurred "afterwards." In addition, the oral penetration in defendant's car occurred when JX was 13 or 14 years old. Accordingly, we conclude that the prosecutor proved beyond a reasonable doubt only two of the three oral penetrations alleged to have occurred before JX's 13th birthday. Thus, the evidence supports only two first-degree criminal sexual conduct convictions and, accordingly, we must vacate one of defendant's convictions for first-degree criminal sexual conduct.

Next, defendant argues that the statute of limitations barred his second-degree criminal sexual conduct convictions. This issue presents a question of law that this Court reviews de novo. *People v Artman*, 218 Mich App 236, 239; 553 NW2d 673 (1996). The applicable statute of limitations provides, in pertinent part:

> (2) An indictment for a violation or attempted violation of section . . . 520c, . . . may be found and filed as follows:
>
> (a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later. [MCL 767.24(2)(a).]

JX testified that on multiple occasions when he was 11 or 12 years old, defendant placed JX's hand on his penis and placed his penis on JX's face. According to JX, no penetration occurred

during these incidents. JX's date of birth is July 16, 1985, and he turned 11 years old on July 16, 1996. On May 26, 2006, the prosecution filed a second amended felony information charging defendant with three counts of second-degree criminal sexual conduct.[2] Accordingly, because JX's testimony indicates that the offenses were committed after July 16, 1996, and defendant was charged with committing those offenses within ten years after that date, the charges were timely filed under MCL 767.24(2)(a).

Defendant next argues that his convictions are contrary to the great weight of the evidence. We review for an abuse of discretion a trial court's ruling on a motion for a new trial based on a claim that a verdict is against the great weight of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Further, a verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Defendant's contention is premised on his previously addressed arguments. As previously explained, the prosecutor failed to present sufficient evidence to support one of defendant's first-degree criminal sexual conduct convictions. Regarding defendant's remaining convictions, the evidence did not preponderate so heavily against the verdicts that it would be a miscarriage of justice to allow the verdicts to stand. The trial court apparently found JX's testimony more credible than that of defendant.

Defendant next argues that he was denied the effective assistance of counsel because his attorney failed to subpoena witnesses or discuss the case with him outside the courtroom before trial. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004), quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorer, supra* at 75-76. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma, supra* at 302.

Defendant contends that counsel was ineffective for failing to subpoena witnesses. Defense counsel's decisions regarding whether to call certain witnesses at trial, however, are presumed to constitute trial strategy, and this Court will not review such decisions with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). In any event, defendant identifies only one witness in particular who he alleges should have been called to testify. According to Annette Shaffer's affidavit, her three children often spent time with

[2] The original felony information in the lower court file is undated.

defendant in their grandmother's home along with JX. Shaffer avers that her children never reported any inappropriate activity directed toward them or anyone else. Shaffer's affidavit fails to establish that defendant was prejudiced by counsel's failure to call her to testify during trial. The activity alleged in this case occurred when only JX and defendant were present. Thus, Shaffer's purported testimony would have been of no assistance to defendant. Accordingly, defendant cannot establish that, but for counsel's failure to call Shaffer to testify, the result of the proceeding would have been different. *Toma, supra* at 302-303; *Moorer, supra* at 75-76.

Defendant also asserts that his counsel was ineffective for failing to meet with him before trial and inquire regarding possible witnesses. Defendant does not indicate how counsel's alleged failure to meet with him was prejudicial. In addition, as previously discussed, defendant has identified only one witness whose purported testimony would not have been helpful. Therefore, he has failed to establish prejudice resulting from counsel's alleged deficiencies. *Toma*, *supra* at 302-303; *Moorer*, *supra* at 75-76.

Defendant next argues that he is entitled to a new trial based on newly discovered evidence. We review for an abuse of discretion a trial court's decision on a motion for a new trial based on newly discovered evidence. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *Id.* at 692, quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).

Defendant asserts in particular that his affidavit and a default judgment for separate maintenance entered in JX's grandmother's civil action against him constitute newly discovered evidence. He contends that this evidence reveals the plan of JX's family to "get [him] out of the way" and then seek an inequitable division of marital assets while he is incarcerated. This evidence does not require a new trial because its purpose would be merely to impeach JX's credibility regarding the allegations. Newly discovered evidence does not require a new trial where it would merely be used for impeachment purposes or where it relates only to a witness's credibility. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993); *People v McWhorter*, 150 Mich App 826, 834; 389 NW2d 499 (1986). Further, the evidence does not make a different result probable on retrial. Defense counsel asked JX whether his allegations and testimony were truthful and JX responded affirmatively. Further, when asked whether he was fabricating the allegations to "get back" at defendant for something, JX responded, "What for?" Evidence that JX's grandmother received a favorable division of marital assets while defendant was incarcerated would not make a different result probable if defendant were retried. The trial court did not abuse its discretion by denying defendant's motion for a new trial on this basis. *Cress, supra* at 691.

Finally, defendant argues that he is entitled to resentencing because offense variables (OVs) 8 and 11 of the sentencing guidelines were erroneously scored. A sentencing court has discretion in determining the number of points to be assessed for each variable, provided that record evidence adequately supports a given score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id*.

Defendant asserts that the trial court erred by scoring 15 points under OV 8, MCL 777.38, involving victim asportation or captivity. MCL 777.38(1)(a) directs that 15 points should be scored 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[.]" The trial court scored 15 points for OV 8 based on JX's testimony that defendant sexually assaulted him while driving him to his parents' house after leaving his grandmother's home in Dearborn. Defendant correctly argues that the trial court erred by scoring 15 points under OV 8 because the incident in the car occurred when JX was 13 or 14 years old and, accordingly, did not relate to the offense being scored, which involved a conviction for an offense when JX was under the age of 13. In *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008), our Supreme Court held that, "unless stated otherwise, only conduct that relates to the offense being scored may be considered." Although the Court recognized that OV 8 specifically refers to conduct beyond the scoring offense, the Court also recognized that such conduct is limited to that which occurs "beyond the time necessary to commit the offense," as articulated in MCL 777.38(1)(a). *Id.* Because the trial court did not assess 15 points under OV 8 on this basis, the exception to the general rule requiring that only conduct relating to the offense being scored is inapplicable. Therefore, zero points should have been scored for OV 8.

Defendant also argues that he was improperly scored 50 points under OV 11, MCL 777.41, pertaining to criminal sexual penetrations. Defendant waived appellate review of this issue by agreeing during sentencing that 50 points should be scored under OV 11 instead of under OV 13, regarding a continuing pattern of criminal behavior. The trial court agreed and scored 50 points under OV 11 and zero points under OV 13. By specifically agreeing to the scoring of OV 11, defendant waived appellate review of this issue. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

While the trial court's erroneous assessment of fifteen points for OV 8 affects the appropriate guideline range, defendant is not entitled to resentencing. In general, when a defendant's sentence is predicated upon an inaccurate calculation of the guidelines range, the defendant is entitled to resentencing. *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006); *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006). But "[r]esentencing is . . . not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range." *Francisco, supra* at 89 n 8, citing *People v Mutchie*, 468 Mich 50, 51; 658 NW2d 154 (2003). Here, without the erroneous sentencing of this variable, defendant's guideline range decreases from 126 to 262 and 1/2 months to 108 to 225 months, with his second habitual offender enhancement. MCL 777.21; MCL 777.62. The trial court sentenced defendant to 180 months which is within the corrected guideline range and the record establishes the trial court's intent to sentence the defendant as it did. Where the sentencing intent can be determined and the sentence is within the corrected guidelines, resentencing is not required simply on the basis that the guidelines were misscored. *Francisco, supra* at 89 n 8, citing *Mutchie, supra* at 51.

Affirmed in part, vacated in part, and remanded for ministerial correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio