

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY WAYNE WARD,

Defendant-Appellant.

UNPUBLISHED

May 12, 2009

No. 284314

Wayne Circuit Court

LC No. 03-006707-FC

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Defendant appeals by leave granted the partial denial and partial grant of his motion for a new trial, in which he was resentenced for his jury trial convictions of one count of criminal sexual conduct, first degree, MCL 750.520b(1)(a), and four counts of criminal sexual conduct, second degree, MCL 750.520c(1)(a). The court resentenced defendant to concurrent sentences of 81 months to 18 years for the first-degree criminal sexual conduct conviction and 81 months to 15 years for the second-degree criminal sexual conduct convictions. We affirm, but remand for correction of inaccuracies in the sentencing information report and the correction of errors in defendant's presentence investigation report.

Following a jury trial, defendant was found guilty of four counts of second-degree criminal sexual conduct for which the victims were his live-together girlfriend's two daughters, both of whom were under the age of 13, and one count of first-degree criminal sexual conduct against one of the daughters.¹ He was sentenced and appealed his convictions, which this Court affirmed.² He then brought this motion for relief from judgment claiming ineffective assistance of counsel at trial and at sentencing and newly discovered evidence. The trial court denied defendant's motion for a new trial based on ineffective assistance of counsel and newly discovered evidence, but granted defendant a resentencing hearing and reduced his sentence

¹ For the purposes of this opinion, the victims will be referred to as "victim one" and "victim two."

² *People v Anthony Wayne Ward*, unpublished memorandum opinion of the Court of Appeals, issued March 1, 2005 (Docket No. 251407).

based on incorrect scoring of the guidelines and a miscalculation of credit for time served. The trial court also ordered a correction of the presentence investigation report.

Defendant argues that the trial court abused its discretion in the scoring of the sentencing guidelines. “This Court reviews a sentencing court’s decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). In his motion for relief from judgment, defendant argued that his counsel was ineffective for failing to object to the scoring of offense variables (OVs) 3, 4, and 9. Although it is clear from the transcript of the sentencing hearing that the parties agreed to score OV 3 and 9 at zero points, rather than ten, the corrections were not made on the Sentencing Information Report. Furthermore, that report mistakenly states that the trial court scored OV 4, which is at issue on appeal and discussed below, at zero points, rather than ten points as the court stated at the sentencing hearing. The Sentencing Information Report, therefore, lists a total OV of 55 points and Level III. The Sentencing Information Report should reflect a total OV of 45 points, which is still Level III. Defendant was sentenced to the minimum sentence within the corresponding guidelines range of 81 to 135 months.

The trial court did not abuse its discretion in scoring OV 4 at ten points. MCL 777.34 provides that OV 4 is scored at ten points if the victim suffered serious psychological injury that may require psychological treatment and notes that the fact that treatment was not sought is not conclusive. The prosecution stipulated that victim one, the victim of first-degree criminal sexual conduct, did not seek psychological treatment. However, the testimony of the very young victim regarding her tearful supplication to defendant not to assault her, along with defendant’s parental relationship to the victim, support the trial court’s determination that the victim one may require psychological services in the future. Therefore the trial court did not abuse its discretion in scoring OV 4 at ten points.

Although defendant’s OV was scored incorrectly on the Sentencing Information Report, the error was harmless because the recommended minimum sentence range of the sentencing guidelines would not change with the corrected score. See *People v McGee*, 280 Mich App 680, 686; ___ NW2d ___ (2008). Sentences within the appropriate guidelines range will not be disturbed on appeal. See *People v Melton*, 271 Mich App 590, 596; 722 NW2d 698 (2006). However, on remand for correction of defendant’s presentence investigation report (see below), the inaccurate scoring of OV 3, 4, and 9 on defendant’s sentencing information report should also be corrected. *Id.* at 593, 596.

Defendant’s presentence investigation report contains the inaccurate statements that the evidence showed that victim one had been penetrated by defendant’s penis, and victim two stated that she had been threatened with a whipping if she did not go along with defendant’s sexual demands. The evidence does not support these assertions, as defendant argued below and the prosecution conceded. MCL 771.14(6) provides that a trial court must order inaccuracies be corrected in presentence information reports before the reports are transmitted to the Department of Corrections. Although the trial court found that the presentence information report was inaccurate and trial court ordered correction of the presentence information report, both parties agree that the presentence information report was not corrected. Corrections of this type may be made at any time. MCR 6.435. Therefore, this matter is remanded for correction of the

presentence information report. The corrected presentence investigation report should be forwarded to the Department of Corrections.

Defendant's Standard 4 Brief

Defendant raises several issues in his supplemental brief, filed in propria persona and pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, none of which have merit.

First, defendant argues that the trial court erred by denying his motion for a new trial based on ineffective assistance of trial counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant first challenges his counsel's failure to impeach victim one with inconsistencies in her testimony regarding when these events occurred. The trial court correctly found that defendant did not suffer prejudice because, in criminal sexual conduct cases involving children victims, time is not of the essence nor is it a material element of the offense. *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). Defendant's arguments that his case is distinguishable do not establish prejudice where there was no confusion regarding the charged offenses.

Defendant next claims that trial counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments. Prosecutors may not make statements that are not supported by the facts in evidence, but may make arguments based on the evidence and reasonable inferences that arise from the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Although there were instances where the prosecutor misstated the facts in evidence, the misstatements were minor and no instance was so prejudicial to defendant that it was not cured by the trial court's instruction that the prosecution's argument was not evidence. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Because the prosecutor's misstatements of the facts were not prejudicial, defendant was not prejudiced by his counsel's failure to object to the alleged prosecutorial misconduct.

Next, defendant argues that his counsel was ineffective for failing to address the second-degree criminal sexual conduct charges in his closing argument. Although brief, counsel noted in his closing that defendant denied all of the charges and that the case hung on the credibility of the witnesses and then specifically addressed the first-degree criminal sexual conduct charge. "This Court will not substitute its judgment for that of counsel in matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Defendant has not established that counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by the closing argument. *Strickland, supra* at 668.

Finally, defendant argues that his counsel was ineffective for failing to advance a so-called medical diagnosis defense to the first-degree criminal sexual conduct charge. Defendant testified that he examined victim one's vagina for injury, but that he did not touch her, instead motioning with his thumbs for her to open her vagina. An element of the offense of first-degree criminal sexual conduct is that it be sexual penetration, and clearly penetration for legitimate medical purposes is not sexual penetration. MCL 750.520b. Defense counsel did not argue that the touching was for medical purposes, but instead argued that there was no penetration. Again, "this Court will not substitute its judgment for that of counsel in matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey, supra* at 76-77. Further, defendant cannot establish that he was prejudiced by the failure to make this argument where he made the argument himself during his testimony. The trial court did not err in finding that defendant failed to establish ineffective assistance of counsel.

Next, defendant argues that the trial court abused its discretion by denying his motion for a new trial based on recanted testimony. "For a new trial to be granted on the basis of newly discovered evidence, it must be shown that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably produce a different result; and (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial." *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). Here, recanted testimony of one of the victims in a criminal sexual conduct case would qualify as the type of newly discovered evidence for which a trial court could grant a new trial. However, this Court must give due regard to the trial court's "superior opportunity to appraise the credibility of the recanting witness and other witnesses." *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). The trial court denied defendant's motion for a new trial, finding the recantation unreliable because the recantation was not unequivocal and victim one did not recant her entire testimony, because victim two did not recant her testimony, and because defendant's testimony supported some of victim one's testimony, including the basis for the first-degree criminal sexual conduct count.

The basis of defendant's claim is a letter sent to him in prison by victim one, stating that "I'm really sorry you got put in jail. I was not the one who told it was [victim two], but you did not even do that stuff to use (sic) in the first place." The trial court was present for victim one's testimony and had a better opportunity than this Court to determine if victim one's testimony was reliable. Further, we agree with the reasons listed by the trial court for finding the recantation unreliable. Therefore, the trial court did not clearly err in finding that the recantation was unreliable and did not abuse its discretion by denying defendant's motion for a new trial based on recanted testimony.

Affirmed but remanded for the correction of defendant's sentencing information report and presentence investigation report and forwarding the corrected reports to the Department of Corrections. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens