

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES HARPER,

Defendant-Appellant.

UNPUBLISHED

May 14, 2009

No. 283509

Wayne Circuit Court

LC No. 07-010580-FC

Before: Servitto, P.J., and O’Connell, and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a). He was sentenced, as a habitual offender, fourth offense, MCL 769.12, to life imprisonment. He appeals as of right. We affirm defendant’s conviction, but vacate his sentence and remand for resentencing.

Defendant was convicted of sexually assaulting his 11-year-old stepdaughter. The victim testified that after her mother went to work one morning, defendant instructed both her and her brother to go into his bedroom to sleep. The victim’s brother later left the room and defendant got into the bed with the victim. According to the victim, defendant subsequently inserted his “thing” inside her vagina. A physical examination later that day revealed a small abrasion in the victim’s vagina that was consistent with sexual assault, but no evidence of sperm or DNA was discovered. Although the victim did not see defendant take anything off his penis during the assault, she felt something rubbery and wet by her arm.

I. Instructional Issues

Defendant first argues that he was denied a fair trial because of instructional errors. Because defendant did not object to the trial court’s instructions at trial and expressly approved the instructions as given, any claim of instructional error is waived. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Even if we considered defendant’s claims, however, appellate relief is not warranted.

Because defendant’s claims of instructional error were not raised at trial, defendant has the burden of establishing a plain error affecting his substantial rights. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003).

There was evidence at trial that the victim previously made statements that were inconsistent with portions of her trial testimony. Thus, an instruction advising the jury that the prior inconsistent statements could be used to evaluate the victim's credibility would have been proper upon request. CJI2d 4.5(1); see also *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003). However, defendant has not shown that the failure to give the instruction affected his substantial rights. *Id.*; *People v Bonner*, 116 Mich App 41, 46-47; 321 NW2d 835 (1982).

Contrary to what defendant argues, there is no basis for concluding that failure to give the omitted instruction was calculated to lead the jury to believe that it was not permitted to consider the inconsistent statements in evaluating the victim's credibility. The jury was otherwise instructed in accordance with CJI2d 2.6 on how to judge witness credibility, and nothing in that instruction precluded consideration of the victim's prior inconsistent statements as a factor in evaluating the credibility of her trial testimony.

Furthermore, a primary purpose of CJI2d 4.5(1) is to advise the jury on the limited use of prior inconsistent statements for the purpose of evaluating credibility, rather than as substantive evidence. In this case, however, nothing in the record suggests that the prior inconsistent statements were used substantively, and the prosecutor did not suggest that the statements could be used in that manner. Moreover, the prior inconsistent statements themselves were not substantively incriminatory, so the absence of an instruction advising the jury that prior inconsistent statements may not be considered as substantive evidence did not create a likelihood of prejudice. Accordingly, the failure to give an instruction advising the jury on the permissible use of prior inconsistent statements did not affect defendant's substantial rights.

Next, defendant argues that the trial court erred when, after instructing the jury on the elements of the offense, it further instructed:

To prove this charge, it is not necessary that there be other evidence than the testimony of [the victim] if that testimony proves guilt beyond a reasonable doubt. . . .

Defendant claims that this instruction created an impermissible presumption that the victim's testimony was credible. We disagree.

An instruction impermissibly creates a conclusive presumption of guilt when it takes an issue away from the jury for consideration. See *Sandstrom v Montana*, 442 US 510, 514-515, 523; 99 S Ct 2450; 61 L Ed 2d 39 (1979), overruled in part on other grounds in *Boyd v California*, 494 US 370, 380; 110 S Ct 1190, 1198; 108 L Ed 2d 316 (1990). The instruction here only informed the jury that evidence in addition to the victim's testimony was not required to establish defendant's guilt, which is consistent with MCL 750.520h. The instruction did not state that the jury was required to believe the victim's testimony, or that such testimony, if believed, necessarily established defendant's guilt. Those determinations were still left to the jury.

Defendant's reliance on *People v Gammage*, 2 Cal 4th 693, 695-697; 828 P2d 682; 7 Cal Rptr 2d 541 (1992), is misplaced. In that case, the California Supreme Court addressed whether there was a conflict between an instruction that advises a jury that a complainant's testimony

need not be corroborated and an instruction that asks the jury to carefully examine the complaint's testimony. The court found that there was no conflict between the two instructions and recognized the continuing vitality of an instruction reminding juries that corroboration is not necessary and that no harm results from such an instruction. *Id.* at 701. For these reasons, defendant has failed to establish a plain error associated with the challenged jury instruction.

II. Defendant's Sentence

Defendant next argues, and plaintiff concedes, that defendant is entitled to resentencing because the trial court departed from the sentencing guidelines recommendation without articulating substantial and compelling reasons for a departure. We agree.

Defendant was convicted of first-degree CSC for an offense committed in June 2007. At the time of the offense, defendant was 37 years old and the victim was less than 13 years old. Therefore, defendant was subject to the enhanced penalty provisions of MCL 750.520b(2)(b), as amended by 2006 PA 165 and 169, effective August 28, 2006, which prescribes a penalty of "imprisonment for life or any term of years, but not less than 25 years." However, a sentence imposed pursuant to MCL 750.520b(2) is also subject to the legislative sentencing guidelines. See MCL 777.16y. Therefore, the trial court was required to sentence defendant within the appropriate minimum sentence range of the guidelines, unless it had a substantial and compelling reason for departing from the guidelines recommendation and stated those reasons on the record.¹ MCL 769.34(2) and (3). See also *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003).

The guidelines as scored for defendant's first-degree CSC conviction placed him prior record variable (PRV) level E and offense variable (OV) level II of the sentencing grid for a class A offense, MCL 777.62, resulting in a minimum sentence range of 108 to 180 months. But because defendant was a fourth habitual offender, the upper end of that range is to be increased by 100 percent, resulting in an adjusted guidelines range of 108 to 360 months. Thus, the trial court could have imposed a minimum sentence of not less than 25 years (300 months) in accordance with MCL 750.520b(2)(a), and up to 30 years (360 months), without exceeding the guidelines recommendation. Instead, the court imposed a sentence of life imprisonment. However, the sentencing grid for class A offenses, MCL 777.62, prescribes a life sentence only for offenders who fall in PRV Level F and OV Level 5, or PRV Levels E or F and OV Level VI. Because defendant was within PRV level E and OV level II, which does not prescribe a life sentence, the trial court's life sentence represents a departure from the guidelines recommendation.

At sentencing, the trial court did not state any substantial and compelling reasons for departing from the guidelines. Indeed, the court did not even acknowledge that it was departing from the guidelines. Therefore, we vacate defendant's life sentence and remand for

¹ Under MCL 769.34(2)(a), if a statute mandates a minimum sentence for a particular defendant, the court is required to impose sentence in accordance with the statute and such a sentence is not a departure from the guidelines.

resentencing. On remand, the trial court shall sentence defendant in accordance with the sentencing guidelines, or articulate on the record a substantial and compelling reason for departing from the guidelines and for the extent of any departure, in accordance with *Babcock, supra*, and *People v Smith*, 482 Mich 292, 318; 754 NW2d 284 (2008).

III. Defendant's Supplemental Brief

In a supplemental brief, defendant argues that he did not testify at trial because he relied on defense counsel's advice that the prosecution would impeach him with his prior criminal record if he elected to testify. Defendant argues that counsel's advice was legally erroneous because none of his prior convictions involved offenses containing an element of dishonesty, false statement, or theft and, accordingly, they were not admissible for impeachment under MRE 609.² Defendant argues that counsel's erroneous advice deprived him of the effective assistance of counsel, entitling him to a new trial.

Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review is limited to errors apparent from the record. *Matuszak, supra* at 48. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on the defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Although defendant has submitted an affidavit in which he avers that he informed counsel of his desire to testify, and that counsel advised him not to testify because the prosecutor would impeach him with his prior criminal record, he has not submitted an offer of proof of his proposed testimony. The failure to call a witness constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Even assuming that counsel advised defendant in the manner alleged, without an offer of proof of defendant's proposed testimony, there is no basis for concluding that defendant was prejudiced by counsel's allegedly inaccurate advice. Thus, defendant has not established a claim of ineffective assistance of counsel.

² The record discloses that defendant has prior convictions for attempted carrying a concealed weapon, delivery of a controlled substance, prisoner in possession of a weapon, and assault with intent to commit murder. We agree that these convictions do not qualify for admission under MRE 609(a). *People v Parcha*, 227 Mich App 236, 241; 575 NW2d 316 (1997).

Defendant's conviction is affirmed, but his sentence is vacated and the case is remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Peter D. O'Connell

/s/ Brian K. Zahra