

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY WILLSON,

Defendant-Appellant.

UNPUBLISHED

January 21, 2010

No. 289430

Bay Circuit Court

LC No. 06-010190-FC

Before: Bandstra, P.J. and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b) (victim between age 13 and 16; victim related to offender), and one count of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(d). Defendant was sentenced to serve concurrent terms of 225 months to 30 years on the CSC I convictions and 10 to 15 years on the CSC III conviction. We affirm defendant's convictions and the sentence imposed for CSC III, but we remand for resentencing on his CSC I convictions.

Defendant first argues on appeal that the trial court abused its discretion when it denied defendant's motion for a bill of particulars. We disagree. This Court reviews a trial court's denial of a defendant's motion for a bill of particulars for an abuse of discretion. *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

Defendant was originally charged with four counts of CSC I and one count of CSC III. The information provided that the offenses allegedly occurred on or about September 1, 1992 to May 1, 1996. At defendant's preliminary examination, the victim testified that defendant sexually abused her multiple times throughout the state of Michigan, with a least 75 happening in Bay County. During cross-examination, the victim recalled that the abuse took place on May 2 (the victim's birthday), June 5 (defendant's birthday), and June 6 (defendant's anniversary) in 1995, 1996, 1997, and 1998. "Where a preliminary examination adequately informs a defendant of the charge against him, the need for a bill of particulars is obviated." *People v Harbour*, 76

Mich App 552, 557; 257 NW2d 165 (1977). We believe that defendant was adequately informed of the essential facts of the charges pending against him, MCR 6.112(E), and thus the trial court acted within its discretion in denying defendant's motion for a bill of particulars.¹

Defendant also argues that the prosecutor committed misconduct by misstating the evidence during her closing argument. Specifically, defendant asserts that the prosecutor misstated the evidence regarding (1) the victim's mother finding a red tin before an incident of defendant fondling the victim in his bed while her mother slept, (2) the victim being in the bed so defendant could fondle her, and (3) testimony by a police officer about the incriminating tin. Because defendant failed to preserve any of these alleged instances of misconduct, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Prosecutorial misconduct issues are decided on a case-by-case basis, *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004), with the prosecutor's remarks considered as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial, *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

After reviewing the record, we conclude that the evidence adduced at trial clearly supports the prosecutor's characterization of the evidence cited in defendant's first two claims of misconduct. However, we agree that the prosecutor erred in stating that a particular police officer testified about the tin; it was actually another officer who so testified. Nonetheless, the prosecutor's misstatement was harmless in light of the other officer's testimony that defendant told both officers about the tin, and in light of the weight of the other evidence presented. Moreover, the trial court instructed the jury several times that they were the sole judges of the evidence and that the attorneys' statements and arguments were not to be considered as evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Although not addressed by either party, the sentencing court erred in using the legislative sentencing guidelines in determining a proper sentence for the CSC I convictions. Defendant's two CSC I convictions are based in part on the victim being at least 13 but less than 16 years of age. The victim was born on May 2, 1980. Thus, the sentencing offense must have occurred some time between May 2, 1993 and May 1, 1996. In Michigan, the statutory sentencing guidelines apply to offenses committed on or after January 1, 1999, and the judicial guidelines apply to offenses committed before January 1, 1999. MCL 769.34(1). On remand, the court should address any challenge to the scoring of the prior record and offense variables under the judicial scheme.

Finally, we note that the sentencing court did not err in determining a proper sentence for the CSC III conviction. The statutory maximum for this offense is 15 years. MCL 750.520d(2). Thus, the trial court did not err in sentencing defendant to 10 to 15 years on this offense because

¹ Moreover, time is not of the essence or a material element in a criminal sexual conduct prosecution involving a child victim. *People v Dobek*, 274 Mich App 58, 82-83; 732 NW2d 546 (2007).

defendant's maximum sentence is within the statutory maximum and defendant's minimum sentence does not exceed two thirds of the statutory maximum. *People v Tanner*, 387 Mich 683, 689-690; 199 NW2d 202 (1972).

We affirm defendant's conviction and his sentence for CSC III, and we also affirm his convictions for CSC I, but we vacate his sentences for CSC I and remand for resentencing. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ David H. Sawyer

/s/ Donald S. Owens