# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 17, 2016 |
| v | No. 324787<br>Chippewa Circuit Court |
| DALE ALLEN BETLEM,<br><br>Defendant-Appellant. | LC No. 13-001286-FH |

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Dale Allen Betlem, appeals by right his jury conviction of third-degree criminal sexual conduct (CSC III). MCL 750.520d(1)(a). The trial court sentenced him as a second-offense habitual offender, MCL 769.10, to serve 12 to 22 and 1/2 years in prison for his conviction. For the reasons stated below, we affirm Betlem's conviction, but remand for resentencing.

Officers arrested Betlem on June 26, 2013, and the prosecutor charged him with one count of CSC III for engaging in sexual penetration with TB. The prosecutor alleged that the offense occurred between January 1, 2003, and September 15, 2005. The evidence at trial showed that Betlem had a sexual relationship with TB beginning when she was 13 years old. TB subsequently married Betlem, but divorced him in 2013 and cooperated with the police department's investigation. Testimony demonstrated that Betlem impregnated TB in 2005, when she was still 15 years of age. A DNA test confirmed the child's paternity and Betlem admitted that he was the child's father in an interview.

The prosecutor also charged Betlem in a separate case for sexual crimes committed against his daughter. That case went to trial first and TB testified against Betlem. The court in that case convicted Betlem of four counts of first-degree criminal sexual conduct (CSC I), MCL

750.520b(1)(a), and providing obscene material to a minor, MCL 722.675. The trial court sentenced him to serve concurrent prison terms of 30 to 60 years each for his CSC I convictions.[1]

## I. 180-DAY RULE AND SPEEDY TRIAL

Betlem argues that this case should be dismissed for violation of the statutory 180-day rule, MCL 780.131, and violation of his constitutional right to a speedy trial. Betlem preserved this claim of error by raising it before the trial court. *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010). However, there is no indication that he asserted his right to a speedy trial in the trial court. Therefore, the speedy trial claim is unpreserved. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). We review de novo a legal issue presented under the 180-day rule. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). We review an unpreserved speedy trial issue for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

### A. 180-DAY RULE

A prisoner must generally be brought to trial within 180 days after the Department of Corrections (the Department) "causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint." MCL 780.131(1); MCR 6.004(D)(1). The 180-day period starts on the day after the prosecutor receives written notice that a defendant is incarcerated in a state facility and is awaiting trial on pending charges. *People v Williams*, 475 Mich 245, 256-257 n 4; 716 NW2d 208 (2006). The prosecution is not required to commence trial within the 180-day period; rather, the prosecution must act in good faith to move the case forward and not engage in undue delay. *People v Lown*, 488 Mich 242, 246-247; 794 NW2d 9 (2011).

The court arraigned Betlem on the charge in this case on June 26, 2013. In January 2014, while this case was pending, the trial court tried him on the CSC charges regarding his daughter and found him guilty. Betlem contends that, after he was sentenced to prison in that case, which occurred on February 19, 2014, the prosecution had notice that he was in the Department's custody. He argues that the 180-day period can begin when the prosecution knows or should know that the defendant is in the Department's custody, or when the Department knows or should know that a charge is pending against a defendant in its custody.

Betlem relies on *People v Hill*, 402 Mich 272; 262 NW2d 641 (1978), overruled in part by *Williams*, in support of his argument. He acknowledges that *Williams* overruled *Hill* to the extent that *Hill* held that the 180-day period could begin when the Department knew or had reason to know that a charge was pending against an inmate, but maintains that *Hill* is still good law for the proposition that the 180-day period can begin when the prosecution knows or should

[1] This Court affirmed Betlem's convictions and sentences in that case. See *People v Betlem*, unpublished opinion per curiam of the Court of Appeals, issued August 13, 2015 (Docket No. 320690).

know that a defendant against whom a charge is pending is in the Department's custody. However, although our Supreme Court overruled *Hill* because the Court in that case expanded the scope of the 180-day rule "by requiring the prosecutor to bring a defendant to trial within 180 days of the date that the Department of Corrections knew or had reason to know that a criminal charge was pending against the defendant." The "statutory trigger," it explained, "is notice to the prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges." *Williams*, 475 Mich at 259. Thus, contrary to Betlem's assertion, the 180-day period does not begin when the prosecution knows or should know that a defendant against whom a charge is pending is in the Department's custody. Rather, as our Supreme Court clarified, the period begins only when the prosecution receives the requisite notice from the Department.

Betlem does not claim that the Department gave the prosecution the required notice. And, although there is a letter from the Department, which is dated March 19, 2014, and purports to notify the prosecutor of Betlem's location and the pending charge, Betlem does not discuss this letter and the record does not clearly establish whether the letter was sent by certified mail as required under MCR 6.004(D)(1), or whether the prosecutor even received it.

Even assuming that this letter satisfied the notice requirements, there is no support in the record for the proposition that the prosecutor violated the 180-day rule. The trial court held a pretrial hearing on April 2014, and Betlem moved to dismiss the case for violation of the 180-day rule and on double jeopardy grounds in July 2014. Assuming the 180-day period commenced shortly after March 19, 2014, the 180-day period clearly would not have expired by either July 2014, which is when Betlem moved to dismiss, or by August 25, 2014, which is when the trial court issued its written opinion and order denying his motion. Furthermore, Betlem's trial took place on October 9, 2014. As noted, the prosecution was not required to commence trial within 180 days, but rather was required to act in good faith to move the case forward and not engage in undue delay. *Lown*, 488 Mich at 246-247. There is no evidence of undue delay and Betlem had his trial approximately 6-1/2 months after the March 19 letter was sent.

Therefore, there is no basis for granting relief under the 180-day rule.

## B. SPEEDY TRIAL

For similar reasons, Betlem cannot show that the delay in his trial violated his constitutional right to a speedy trial. See US Const, Am VI; Const 1963, art 1, §20. To determine whether a defendant has been denied a speedy trial, courts will examine the following factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant resulting from the delay. *Williams*, 475 Mich at 261-262. The period of delay begins when the defendant is arrested. *Id*. at 261.

Betlem was arrested in June 2013, and his trial took place in October 2014. Because his trial was less than 18 months after his arrest, Betlem has the burden of proving prejudice. *Williams*, 475 Mich at 262. Delays caused by court scheduling are attributable to the prosecutor, but should be given a neutral tint and minimal weight. *Id*. at 263. Betlem moved to dismiss the case based on the 180-day rule, but he did not separately assert his right to a speedy trial. This

factor weighs against his claim that he was denied his right to a speedy trial. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987). Betlem also has not shown that he was prejudiced by the delay. The charge against him, CSC III, required the prosecutor to prove that he engaged in sexual penetration with a person between 13 and 16 years of age. MCL 750.520d(1)(a). Although he asserts that the length of the delay could have resulted in the loss of memory for witnesses, TB did not express any memory difficulties. Further, the prosecution presented evidence that Betlem fathered TB's child, who was conceived when TB was 15 years old, and paternity testing confirmed that he was the child's father. This evidence was not dependent upon witnesses' memories.

Considering the relevant factors, there is no evidence that the prosecution engaged in dilatory tactics or that any delay in Betlem's trial prejudiced him. Betlem has not established plain error warranting relief.

## II. DOUBLE JEOPARDY

Betlem also argues that the trial court erred in denying his motion to dismiss on double jeopardy grounds. Specifically, Betlem maintains that his prosecution in this case was barred by double jeopardy because TB testified in the separate case involving his daughter, and the trial court in that case found that he had committed a sexual offense against TB. We review de novo whether double jeopardy applies. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

The prohibition against double jeopardy protects against: (1) a second prosecution for the same offense after a defendant has been acquitted of that offense; (2) a second prosecution for the same offense after a defendant has been convicted of that offense; and (3) multiple punishments for the same offense. *Id.* at 574. A successive prosecution for the same offense is barred if the second prosecution would require proof of the same elements as did the first proceeding. *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932); *People v Smith*, 478 Mich 292, 315; 733 NW2d 351 (2007).

In the prior case, Betlem was tried in a bench trial on four counts of CSC I for acts he committed against his 10-year-old daughter, and one count of providing obscene material to a minor. TB testified and provided other acts testimony under MRE 404(b)(1) and MCL 768.27a. The trial court, in its findings of fact, found that Betlem had engaged in sexual relations with TB when she was 15 years old. In order for double jeopardy to apply, Betlem had to have been placed in jeopardy of criminal prosecution for the acts at issue. *People v Burks*, 220 Mich App 253, 256; 559 NW2d 357 (1996). However, in the first case, Betlem was not in jeopardy of criminal prosecution for offenses against TB—he was in jeopardy for offenses he committed against his daughter. The trial court's finding that Betlem engaged in sexual intercourse with TB was not a finding that he was guilty of a crime involving TB. Because he was not prosecuted for any offense against TB in the prior case, Betlem's prosecution in this case did not implicate double jeopardy.

The trial court did not err when it denied Betlem's motion to dismiss on double jeopardy grounds.

## III. SENTENCING

Betlem argues that he is entitled to resentencing because the trial court erroneously scored 50 points under offense variable (OV) 11 of the sentencing guidelines. We agree with the prosecutor's contention that this issue is waived because Betlem's trial lawyer expressed satisfaction with the trial court's scoring of the guidelines. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Nevertheless, Betlem also argues that his lawyer's failure to object amounted to ineffective assistance. Because the trial court did not hold a hearing on the ineffective assistance claim, our review is limited to mistakes that are apparent on the record alone. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). To the extent that this issue involves the sentencing guidelines, this Court reviews de novo whether the trial court properly interpreted and applied the statutory guidelines and reviews for clear error the trial court's findings. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

In order to establish an ineffective assistance of counsel claim that warrants relief, Betlem must show that his lawyer's failure to object fell below an objective standard of reasonableness under prevailing professional norms and that it is more likely than not that, but for the error, the outcome would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The trial court assessed 60 total offense variable points, placing Betlem in OV Level V, and assessed 40 total prior record variable points, placing him in PRV Level D, which resulted in a recommended minimum sentence range of 78 to 130 months. MCL 777.63. Because he was a second-offense habitual offender, the upper end of that range was increased by 25%, to 162 months. MCL 777.21(3)(a).

Under OV 11, all "sexual penetrations of the victim arising out of the sentencing offense" must be scored. MCL 777.41(2)(a). Fifty points are scored if "[t]wo or more criminal sexual penetrations occurred." MCL 777.41(1)(a). A criminal sexual penetration "arises out of the sentencing offense" when there is a connective relationship between penetrations that is more than incidental. *People v Johnson*, 474 Mich 96, 101-102; 712 NW2d 703 (2006).

Betlem admits that there was evidence that he had an ongoing sexual relationship with TB that included multiple sexual penetrations over time, but argues there was no evidence that more than one sexual penetration arose out of the offense for which he was sentenced. On appeal, the prosecutor concedes that "no evidence supported a finding that any one penetration arose out of any other penetration." Because the occurrence of ongoing sexual activity does not itself support the scoring of OV 11, and the parties agree there was no evidence of any other sexual penetration arising out of the sentencing offense, the trial court erred when it scored 50 points under OV 11.

For this reason, it was objectively unreasonable for Betlem's lawyer to fail to object. Likewise, the error prejudiced Betlem. If 50 points are deducted, the reduction alters the guidelines range. See MCL 777.63. And the trial court's minimum sentence exceeds the maximum provided under the revised guidelines range. Where a scoring error affects the guidelines range, the appropriate remedy is to remand for resentencing. *People v Francisco*, 474 Mich 82, 89-90 n 8; 711 NW2d 44 (2006).

The prosecutor argues that resentencing is not required because the evidence of Betlem's other acts of sexual misconduct against TB can be scored under OV 13, which provides that 25 points may be scored if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). Although there is merit to the prosecutor's claim that the trial court should have scored 25 points under OV 13, see *Williams*, 475 Mich at 102 n 3, the adjustment would still affect the appropriate guidelines range. As such, resentencing would still be necessary. See *Francisco*, 474 Mich at 91.[2] Accordingly, we vacate Betlem's sentence and remand for resentencing.

## IV. BRIEF ON HIS OWN BEHALF

Betlem also raises several issues in a brief submitted on his own behalf.

### A. EFFECTIVE ASSISTANCE OF COUNSEL

Betlem argues that he did not receive the effective assistance of counsel. Our review of this claim is limited to errors apparent on the record. *Heft*, 299 Mich App at 80. To establish ineffective assistance of counsel, he must show both 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. *Carbin*, 463 Mich at 599.

Betlem argues that his trial lawyer failed to investigate the case and should have presented evidence that TB's parents did not object to TB's sexual relationship with him. The failure to investigate may amount to ineffective assistance if the failure deprived the defendant of evidence that might have made a difference in the outcome of the trial. *People v Marshall*, 298 Mich App 607, 612; 830 NW2d 414 (2012), vacated not in relevant part 493 Mich 1020 (2013).

A person who is at least 13 years old but younger than 16 years old cannot consent to sexual penetration. *People v Starks*, 473 Mich 227, 235; 701 NW2d 136 (2005). Because TB's parent's approval of Betlem's sexual relationship with TB would not be a legally viable defense to the charged conduct, the failure to present evidence in support of that theory could not have altered the outcome of Betlem's trial. In addition, the record shows that Betlem's lawyer tried to present evidence on this issue, but was prevented by the trial court. The trial court did not allow the questions because consent is not a defense to the charge of CSC III. Betlem's trial lawyer cannot be faulted for failing to present evidence that the trial court precluded.

Betlem also argues that his lawyer should have moved to suppress the DNA results. He suggests that his lawyer might have moved to suppress on the ground that the evidence was obtained as a result of an illegal search and seizure, but he does not actually argue as much and

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[2] Betlem also asserts that the trial court's erroneous scoring of OV 11 justifies remand for a "*Crosby*" hearing. See *United States v Crosby*, 397 F3d 103 (CA 2, 2005). That procedure, however, has no application where, as here, the defendant does not allege improper judicial fact-finding in scoring the OVs.

does not otherwise identify a ground for suppressing the DNA evidence.[3] "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Green Oak Twp v Munzel*, 255 Mich App 235, 244; 661 NW2d 243 (2003). Moreover, Betlem has the burden of establishing the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Betlem states that the record supports his claim, but he does not explain how, or support this allegation with specific references to the record. Accordingly, Betlem has not overcome the presumption that counsel rendered effective assistance. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

## B. STATUTE OF LIMITATIONS

Betlem also argues that his prosecution was barred by the applicable statute of limitations, and that his lawyer was ineffective for failing to assert that ground for dismissal. We review de novo whether a prosecution is time-barred. *Nutt*, 469 Mich at 573. Because this issue is unpreserved, however, review is limited to plain error. *Carines*, 460 Mich at 763-764.

The prosecutor must bring a charge of CSC III within 10 years of the offense. MCL 767.24(3). The Information filed in the trial court lists the date of the offense as January 1, 2003, to September 15, 2005. The evidence presented in support showed that Betlem impregnated TB at some point in 2005, when TB was 15 years old. Betlem was arrested and charged in June 2013, within the 10-year period set out in MCL 767.24(3)(a). Therefore, the charge was not time-barred and Betlem's lawyer was not ineffective for failing to raise this issue.

## C. PROBABLE CAUSE

Betlem argues that the officers did not have probable cause to arrest him, and that his lawyer was ineffective for failing to challenge the validity of his arrest. We review this unpreserved claim of error for plain error affecting Betlem's substantial rights. *Carines*, 460 Mich at 763-764.

"Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). Betlem was arrested in June 2013, after TB decided to cooperate with the police investigation. A DNA test conducted early in 2006 showed that he was the father of the child, who was conceived when TB was 15 years old. The results of this test served as probable cause that Betlem engaged in sexual penetration with TB when she was 15 years old. Although Betlem contends that his arrest was the product of an illegal search, nothing in the record indicates that the officers conducted the DNA test as part of an unauthorized search. Thus, the record does not support his argument that his arrest was illegal, and his lawyer was not ineffective for failing to raise this issue.

[3] Nothing in the record indicates that the samples were obtained by any means other than consent.

## D. SPEEDY TRIAL

We have already rejected Betlem's argument that his right to a speedy trial was violated. In his own brief, Betlem additionally argues that his prolonged incarceration before trial resulted in the impairment of his liberty and his forced reliance on appointed counsel. However, when he was arrested on the present charge in June 2013, Betlem was already in custody awaiting trial on the charges involving his daughter. The trial court sentenced Betlem in that case on February 19, 2014. Thus, the charge in this case was not solely responsible for his loss of liberty. Betlem's incarceration would also not have been shortened had this case proceeded at a faster pace. Moreover, whether Betlem was effectively represented by appointed counsel has no bearing on his speedy trial claim. As explained above, consideration of the relevant factors does not support a conclusion that Betlem was denied a speedy trial.

## E. DISCOVERY

Betlem did not raise a discovery violation in the trial court, or object to the filing of the prosecution's witness or exhibit lists. Therefore, review of these issues is limited to plain error. *Carines*, 460 Mich at 763-764.

Although Betlem refers generally to the prosecution's duty to disclose any known exculpatory information or evidence, as well as other types of information upon request, see MCR 6.201(B) and *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), he does not identify any evidence that was withheld or suppressed. Instead, he complains that the prosecution did not timely file its witness or exhibit lists.

The prosecution must provide the defendant or defense counsel with a list of witnesses to be called at trial no later than 30 days before trial. MCL 767.40a(3). The prosecution's witness list is dated September 30, 2014. Betlem's trial took place on October 9, 2014. But even if Betlem could demonstrate plain error because the witness list was not timely filed, he still has the burden of demonstrating that this error affected his substantial rights. *Carines*, 460 Mich at 763. Betlem did not request any adjournment of trial or other relief on the ground that the witness list was untimely filed, or allege that the late filing hindered his trial preparation. Further, he does not explain on appeal how the tardy filing prevented him from effectively cross-examining each witness called by the prosecution. Accordingly, Betlem has not met his burden of establishing that the late filing affected his substantial rights.

## F. JUDICIAL BIAS

Betlem argues that he was denied due process because the trial court was biased in favor of the prosecution. A defendant in a criminal proceeding has the right to have a neutral and detached magistrate. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). "[A] trial judge is presumed to be impartial, and the party asserting partiality has the heavy burden of overcoming that presumption." *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009). Betlem's claim of judicial bias is premised on his position that the trial court expressed agreement with the prosecution's position that if it elected to dismiss Betlem's case, the statute of limitations could preclude later reinstatement of the charge. The record does not disclose that the trial court ever made a formal ruling on the statute of limitations issue. However, even if the

trial court had made a ruling that was not favorable to Betlem, or expressed agreement with the prosecution's legal position regarding a potential statute of limitations problem if the case was dismissed, there is no basis for inferring that the court was biased against Betlem. See *People v Jackson*, 292 Mich App 583, 598; 808 NW2d 541 (2011). Betlem has not met his burden of overcoming the presumption that the trial court acted impartially. *Wade*, 283 Mich App at 470.

There were no errors warranting a new trial.

We affirm Betlem's conviction, but remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Michael J. Kelly