

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM ERWIN MILLER,

Defendant-Appellant.

UNPUBLISHED
November 17, 2016

No. 328502
Ottawa Circuit Court
LC No. 14-038801-FC

Before: SAWYER, P.J., and MARKEY and O'BRIEN, JJ.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b)(iii) (sexual penetration of a child at least 13 but less than 16, and the actor is in a position of authority over the victim). He appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction. A challenge to the sufficiency of the evidence requires this Court to view the evidence de novo in a light most favorable to the prosecution and determine whether any reasonable juror would be warranted in finding that the essential elements of the crime were proven beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). To convict defendant of CSC I, the prosecution was required to prove that defendant engaged in sexual penetration with a child at least 13 but less than 16 years of age and that defendant was “in a position of authority over the victim and used this authority to coerce the victim to submit.” MCL 750.520b(1)(b)(iii). MCL 750.520a defines “sexual penetration” as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.”

Viewed in a light most favorable to the prosecution, the testimony in this case was sufficient to allow a reasonable jury to infer beyond a reasonable doubt that defendant committed CSC I. The victim testified that he was hired by defendant to work at defendant’s farm when he was 12 years old. The victim’s testimony reflects that the victim was present at defendant’s farm daily, and the victim and defendant often worked alone together. The victim testified that, while he was working on the farm, defendant would pull the victim aside from chores and ask him to go to isolated locations where defendant could perform sexual acts on the victim. The victim also testified that defendant sometimes gave him alcohol before engaging in sexual activities.

The victim testified that, on numerous occasions before he was 16 years old, defendant engaged in fellatio with the victim. Specifically, the victim testified that fellatio occurred on a couch in the farmhouse and in defendant's mother's bedroom. The victim also testified that, on one occasion before he was 16 years old, defendant inserted his finger into the victim's anal opening while engaging in fellatio. The victim testified that defendant continued engaging in sexual activities even after the victim told defendant "no." The victim testified that he felt embarrassed, shocked, confused, uncomfortable, and disgusted by defendant's actions. Viewed in a light most favorable to the prosecution, the evidence demonstrated that defendant engaged in sexual penetration with the victim when he was at least 13 but less than 16 years of age and that defendant's actions were the product of an abuse of his authority, which he used to coerce the victim into submission. Therefore, the evidence was sufficient to prove that defendant committed CSC I.

Defendant next argues that the trial court improperly excluded witness testimony at trial. "A defendant has a constitutionally guaranteed right to present a defense." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). However, this right is not absolute, and "the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Yost*, 278 Mich App at 379 (citations omitted). Decisions about the admissibility of evidence are within the trial court's discretion and should only be reversed where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). When a trial court chooses an outcome that is outside the range of reasonable and principled outcomes, there has been an abuse of discretion. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). But unless it is more probable than not that the error was outcome determinative, the error is not a ground for reversal. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

At trial, defense counsel sought to produce witness testimony that, after charges were filed in this case, the victim's father solicited a donation from defendant for a fundraiser for the victim's son, despite knowing about the allegations involving defendant and the victim. According to defendant, this testimony was relevant to show "a financial motivation," to contradict the victim's testimony regarding the time frame in which he told his family about the allegations, and to otherwise comment on the victim's credibility.

First, this testimony was properly excluded because it was irrelevant. In general, evidence is admissible if it is relevant and if its probative value is not substantially outweighed by the danger of unfair prejudice. MRE 402; MRE 403. Evidence is relevant if it is both material and probative. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). To be material, the proffered evidence must be related to a fact of consequence to the action, and to be probative, the evidence must have a tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. *Id.* at 389-391.

Here, defendant did not provide anything to support that the victim's father's motivation in soliciting the donation was in any way related to this case or that the request had any impact on defendant or his defense. The evidence was not related to any fact of consequence to the action and did not tend to make the existence of any fact of consequence any more or less probable than it would have been without the testimony. Therefore, the evidence was irrelevant and was properly excluded under MRE 402.

Moreover, even if the testimony was relevant, it was properly excluded under MRE 403. MRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The probative value of the evidence in this case was substantially outweighed by the risk of confusing the issues and the considerations of undue delay and waste of time. To the extent that the testimony contradicted the victim's testimony about when he told his family about the allegations, it may have been marginally relevant in order to discredit the victim's testimony. However, any probative value of this testimony was outweighed by the risk of confusing the issues and the considerations of undue delay and waste of time, especially given that the prosecution stated that it would produce multiple witnesses to support the victim's testimony. This would have resulted in a great deal of additional time taken for an issue that was only marginally relevant and would have focused the jury's attention on an immaterial issue. The probative value of the evidence was outweighed by the considerations of undue delay and waste of time. Therefore, the evidence was properly excluded. MRE 403.

Finally, even if the evidence was improperly excluded, defendant is not entitled to relief. Defendant has not produced anything to support that, had the evidence not been excluded, the result of this case would have been any different. Because it was not more probable than not that the error was outcome determinative, reversal is not warranted here. *Lukity*, 460 Mich at 495.

Defendant also brings several challenges to his sentence. At sentencing, defendant was scored with a total prior record variable (PRV) score of 20 points (Level C) and a total OV score of 70 points (Level IV). Defendant's recommended minimum sentence range under the legislative guidelines was established at 108 to 180 months' imprisonment. MCL 777.62. Defendant was sentenced within the guidelines to 180 months to 360 months' imprisonment.

First, defendant argues that the trial court erred in denying his request for a downward departure from the sentencing guidelines. According to defendant, his health issues, community ties, and remorse warranted a downward departure.

Prior to *People v Lockridge*, 498 Mich 358, 364-365; 870 NW2d 502 (2015), the trial court was required to choose a sentence within the guidelines range unless there was a "substantial and compelling" reason for departing from this range. *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). Under this rule, the trial court had discretion to depart from the guidelines, as long as it articulated a substantial and compelling reason. *Id.*; MCL 769.34(3). In *Lockridge*, the Court held that the guidelines are advisory only. *Lockridge*, 498 Mich at 399. The *Lockridge* Court also struck down the requirement "that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure." *Id.* at 364-365. Following *Lockridge*, a departure sentence need only be reasonable. *Id.* at 392.

Here, despite defendant's argument in favor of a downward departure, the trial court chose to impose a sentence within the guidelines range. A trial court is not required to depart downward given a certain set of facts. Instead, the decision to depart from the guidelines is left to the discretion of the sentencing court. *Babcock*, 469 Mich at 255-256. The record does not support that, had the trial court not been required to find a "substantial and compelling" reason in

order to depart from the guidelines at sentencing, it actually would have been moved to impose a sentence below the guidelines range. Notably, the guidelines range here was 108 to 180 months, and the trial court imposed a minimum sentence of 180 months—the highest possible minimum prescribed by the guidelines. Moreover, the trial court considered the issue again after *Lockridge* was decided when it considered defendant’s motion for resentencing, and it found that its original sentence was reasonable and appropriate. Given the facts of this case, and especially that the victim and his brother testified in great detail about sexual abuse by defendant and the impact that abuse had on their lives, the trial court’s decision to deny defendant’s request for a downward departure was not improper.

Defendant also argues that the trial court erred in scoring OV 11. Defendant brings both an evidentiary challenge and a constitutional challenge to his sentence. First, defendant argues that he is entitled to resentencing because the trial court improperly assessed points for OV 11. He also argues that his sentence was unconstitutional under *Lockridge* because the trial court erroneously assessed points for OV 11 using judicially found facts. These arguments represent two distinct challenges with distinct remedies. *People v Biddles*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (Docket No. 326140); slip op at 4.

When considering both evidentiary and constitutional challenges to the scoring of sentencing guidelines, this Court must first consider the evidentiary challenge. *Id.* at ___; slip op at 5. A trial court’s factual determinations under the sentencing guidelines are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). “Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Id.*

Defendant argues that the trial court should have assessed zero points for OV 11. OV 11 deals with criminal sexual penetration. MCL 777.41(1) provides that OV 11 must be assessed at 25 points if one criminal penetration occurred and 0 points if no sexual criminal penetration occurred. MCL 777.41(2) provides further:

- (2) All of the following apply to scoring offense variable 11:
 - (a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.
 - (b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13.
 - (c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.

Defendant was charged with three counts of CSC I. Counts one and two alleged that defendant engaged in fellatio with the victim, and count three alleged that defendant engaged in digital penetration of the victim’s anal opening. Regarding the offense that formed the basis for count three, the victim testified that defendant engaged in fellatio with the victim while he digitally penetrated the victim’s anal opening. Thus, the record reflects that, regarding count

three, two sexual penetrations occurred. Pursuant to MCL 777.41(2)(c), the trial court could not assign points for the digital penetration, since it formed the basis of the CSC I offense. Accordingly, because one additional sexual penetration occurred (fellatio) aside from the penetration that formed the basis of the offense, the trial court correctly assessed 25 points for OV 11.

Turning to defendant's constitutional challenge to the scoring of his sentencing guidelines, defendant argues that the trial court relied on facts not found by the jury or admitted by defendant when scoring OV 11, contrary to *Lockridge*, 498 Mich at 358. Defendant misinterprets *Lockridge*. *Lockridge* did not, as defendant argues, prohibit scoring based on judicially found facts. Rather, in *Lockridge*, our Supreme Court found that Michigan's sentencing scheme was constitutionally deficient to the extent "to which the guidelines require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that mandatorily increase the floor of the guidelines minimum sentence range." *Id.* at 364. To remedy the deficiency, the Court held that the guidelines are advisory only. *Id.* at 399.

Moreover, we need not employ the remand procedures set forth in *Lockridge* inasmuch as the trial court considered defendant's motion for resentencing post-*Lockridge*. At that hearing, the trial court was clearly aware of *Lockridge* and its holding and in light of *Lockridge*, chose not to resentence defendant.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Colleen A. O'Brien