

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

JORDAN KELLY PARIS,

Defendant-Appellant.

UNPUBLISHED
September 27, 2012

No. 304569
Ottawa Circuit Court
LC No. 10-034945-FC

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree criminal sexual conduct, multiple variables, MCL 750.520b; and third-degree criminal sexual conduct, incapacitated victim, MCL 750. 520d(1)(c). He was sentenced to 9 to 20 years' imprisonment for first-degree criminal sexual conduct, and 9 to 20 years' imprisonment for third-degree criminal sexual conduct. We affirm his conviction but remand for resentencing.

FACTS AND PROCEDURAL HISTORY

According to the record, this case involves multiple sexual assaults on the victim by defendant and two co-defendants: Sage Lewis (Lewis) and defendant's father, Kelly Paris (Kelly). Defendant, the victim, and Lewis decided to hang out and drink at Kelly's house one evening. Defendant and Lewis were both 19 years old, and the victim was 17 years old. The victim had finished one mixed drink containing vodka before they all decided to go to the shed in the backyard that contained a hot tub. Someone prepared another drink for the victim before they went to the hot tub. The shed containing the hot tub was 10 feet by 15 feet and also contained a bed and a loveseat. Once they entered, the victim took off all her clothes and got into the hot tub; the defendant and Lewis followed wearing only their undershorts which they later removed. At some point, Kelly was also present, but it is unclear as to when he arrived. What happened after they entered the hot tub is highly disputed, but according to the victim, she began to feel dizzy, nauseous and eventually lost consciousness. Her next memory was being out of the hot tub, lying down on her back while defendant was on top of her, having vaginal intercourse with her. She lost consciousness again, and when she regained it, she felt Kelly having vaginal intercourse with her before losing consciousness again. She never agreed to any of the sex acts.

When she awoke, she saw that she was still in the shed with defendant, Lewis, and Kelly, all of whom were naked; she immediately wrapped a sheet around herself and eventually got dressed. They all went back into the house where they spent the night, but the victim never slept and just sat on the edge of the bed until she left to go to her babysitting job. When she arrived at the place where she babysits, she called her friend, Rose Pearson (Rose), and told her what happened. Her friend immediately drove to where the victim was and called the police once arriving. The victim went to the Center for Women in Transition where she was examined and multiple abrasions were found on her genitals that were consistent with the victim's complaint of sexual assault.

During subsequent police investigation, the police discovered that Kelly had recorded the sexual acts that occurred in the shed. A total of three separate recordings were taken, which were all admitted into evidence for trial. At trial, both defendant and Lewis testified in their own defense. Defendant testified that the victim was the initiator during the night of the sexual assault. Both claimed that the victim seemed conscious and consented to everything that took place. Both also testified that after they finished having intercourse with her, they left her alone in the shed with Kelly and did not know that he was going to also have intercourse with her. When they returned from getting more drinks inside the house, after knocking and finally entering, the victim was crying on the bed. They both also testified that they were not aware that Kelly had recorded the acts and when they found out the next morning, they both got very upset because they knew pornography involving anyone younger than the age of 18 was illegal.

The victim's consciousness during the sexual acts in the shed was an issue at trial. The victim testified that she usually does not have blackouts when drinking alcohol. A forensic scientist in the Toxicology Unit for the Michigan State Police Crime Lab testified that, after testing the victim's urine for drugs, none were found in her system. An expert in toxicology for the defense testified that the victim's blood alcohol concentration would not have exceeded .10 on the night of the incident. He also testified that the victim's behavior was not consistent with the presence of Gamma-Hydroxybutyrate (GHB) because GHB causes a victim not to have any memory of what happened before waking up and therefore, it was not probable that GHB was slipped into her drink.

The jury found defendant and Lewis guilty of first-degree criminal sexual conduct, multiple variables, and third-degree criminal sexual conduct, incapacitated victim. After initial sentencing, Lewis moved to correct an invalid sentence or for resentencing because the trial court erred in scoring offense variable (OV) 3. Lewis also argued that the trial court used an improper burden of proof at sentencing in scoring the OVs. Finally, Lewis argued that the trial court's original sentence violated the two-thirds rule for the criminal sexual conduct in the third degree.

The trial court heard Lewis's motion and entered an order that changed Lewis's sentence for third-degree criminal sexual conduct to 10 to 15 years' imprisonment, acknowledged that OV3 was scored at zero points at sentencing, noted that OV 10 was correctly scored at five points, and that OV 11 was correctly scored at 50 points. The trial court entered an amended judgment of sentence that reduced Lewis's sentence for third-degree criminal sexual conduct to 10 to 15 years' imprisonment.

ANALYSIS

A. JURY INSTRUCTION

Defendant first argues that the trial court erred in providing contradictory and confusing instructions regarding the requirement of a unanimous verdict. While defense counsel expressed concern about the instructions being confusing, he did not object and did not ask the court to repeat or clarify the instructions.

An unpreserved claim of instructional error is reviewed for plain error. *People v Kowalski*, 489 Mich 488, 505-506; 803 NW2d 200 (2011). To avoid forfeiture under the plain error rule, clear or obvious error must have occurred and affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Criminal defendants are guaranteed a unanimous jury verdict under the state constitution. Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). Where "the state provides evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense", the trial court must "instruct the jury that it must unanimously agree on the same specific act, if the acts are materially distinct" or where "there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt." *Id.* at 530. However, "[w]hen a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory." *People v Asevedo*, 217 Mich App 393, 397; 551 NW2d 478(1996). Thus, "when a defendant is tried on a charge of CSC I, and more than one aggravating circumstance is supported by the facts, it is not error for the trial court to instruct the jury, in the alternative, regarding each of the applicable aggravating circumstances alleged by the prosecution." *People v Gadomski*, 232 Mich App 24, 31-32; 592 NW2d 75 (1998).

In this case, the trial court instructed the jury that in order to find defendant guilty of first-degree criminal sexual conduct, the jury must find that defendant penetrated the victim with his penis or touched the victim's genital opening with his mouth or tongue; the victim was mentally incapacitated or physically helpless at the time of the alleged act; and one of three alternate aggravating factors occurred. The three alternate aggravating factors were that: the alleged sexual act occurred under circumstances that involved the commission of the felony of production of child sexually abusive material; the act occurred while defendant knew or had reason to know the victim was mentally incapacitated or physically helpless and defendant was aided and abetted by another person; or the act occurred while defendant knew the victim was mentally incapacitated or physically helpless and defendant caused the victim personal injury. The trial court twice instructed the jury that they need not unanimously agree on which alternate aggravating circumstance to apply, as long as each juror found at least one aggravating circumstance occurred beyond a reasonable doubt. Because the three alternate aggravating factors were supported by the facts, the trial court did not err in instructing the jury regarding unanimity. *Id.* Contrary to defendant's assertions on appeal, we do not find that the trial court's subsequent provision of a general unanimity instruction confused the jury in the context of the trial court's repeated, accurate instructions concerning the three alternate aggravating factors.

B. SCORING

Defendant next argues that the trial court erred in scoring offense variable (OV) 12, MCL 777.42 (contemporaneous felonious criminal acts), at five points. Defendant preserved this issue by filing a motion to remand on the ground that the trial court erred in scoring OV 12. *People v Kimble*, 470 Mich 305, 310- 311; 684 NW2d 669 (2004); MCL 769.34(10). Where the issue is preserved, a trial court's sentencing scoring decision is reviewed 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). "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

While it is somewhat ambiguous in the lower record as to whether OV 12 was scored at zero or five points, it would not be improper for OV 12 to be scored at 5 points. OV 12 may be scored at five points where "[o]ne contemporaneous felonious criminal act involving a crime against a person was committed." MCL 777.42(1)(d). A felonious criminal act is contemporaneous if the act occurred within 24 hours of the sentencing offense and the act "has not and will not result in a separate conviction." MCL 777.42(2)(a). Defendant claims that OV 12 should not have been scored at five points because there was no crime against a person that did not result in a conviction. We disagree.

A review of the record reveals that the trial court could have found that defendant participated in the production of child sexually abusive material. MCL 750.145c(2). The production of child sexually abusive material is a crime against a person for the purpose of scoring OV 12. *People v Wiggins*, 289 Mich App 126, 130-131; 795 NW2d 232 (2010). MCL 777.16g. Moreover, the production of child sexually abusive material in this case was contemporaneous to the acts that led to defendant's convictions for first-degree and third-degree criminal sexual conduct because those acts were recorded at the time they occurred. Defendant also aided and abetted numerous other acts of CSC on the victim with the two co-defendants. Thus, the trial court's decision to score OV 12 was not an abuse of discretion because it was supported by evidence in the record. *Hornsby*, 251 Mich App at 468.

Even if defendant is correct and OV 12 was erroneously scored 5 points, a 5-point reduction from a 65-point total produces a 60-point total and no change in the guidelines range. MCL 777.62. However, because this Court is ordering resentencing for reasons discussed below, we ask the trial court to clarify whether defendant was scored at a total of 60 points or 65 points.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that defense counsel was ineffective for failing to object to the trial court's unanimity jury instructions and the trial court's scoring of OV 12 at five points. Defendant raised these issues for the first time on appeal in a motion to remand for an evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), which this Court denied. Because no *Ginther* hearing was held, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To establish ineffective assistance of counsel, a defendant must “show that his attorney’s representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 675; 104 S Ct 2052; 80 L Ed 2d 674 (1984). As discussed above, the trial court properly instructed the jury concerning unanimity and while it is somewhat unclear as to whether defendant was scored on OV 12, it does not affect his sentence and is therefore not meaningful ineffective assistance. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

D. SENTENCING ISSUE RAISED BY THE PROSECUTION

Finally, we note an issue concerning defendant’s sentencing that was raised by the prosecution. First, the prosecution correctly points out that while defendant was sentenced to a maximum of 20 years’ imprisonment for third-degree criminal sexual conduct, the statutory maximum sentence for third-degree criminal sexual conduct is 15 years’ imprisonment. MCL 750.520d(2). We appreciate the prosecutor’s honesty in bringing this issue to our attention. Because defendant’s sentence for third-degree criminal sexual conduct exceeds the statutory maximum, it is invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). We vacate defendant’s sentence for his third-degree criminal sexual conduct conviction and remand the case to the trial court for the resentencing of that conviction.

CONCLUSION

We vacate defendant’s sentence for third-degree criminal sexual conduct and remand for resentencing to correct the maximum sentence of 15 years, and we also remand for clarification of the scoring of OV 12 for defendant’s first-degree criminal sexual conduct sentence consistent with this opinion. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause