STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOWARD E. MCCLATCHER,

Defendant-Appellant.

UNPUBLISHED
June 13, 2000

No. 209520
Wayne Circuit Court
LC No. 97-002657

Before: Zahra, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of sexually assaulting two children, both of whom were under the age of thirteen, while they were at home without adult supervision. Defendant was convicted of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b; MSA 28.788(2), and two counts of second-degree CSC, MCL 750.520c; MSA 28.788(3). He was sentenced to concurrent prison terms of forty to sixty years each for the two first-degree CSC convictions and ten to fifteen years each for the two second-degree CSC convictions. We affirm.

Defendant's first claim is that the trial court's conduct deprived him of a fair trial. In considering the issue of trial court misconduct, "[p]ortions of the record should not be taken out of context in order to show trial court bias against defendant; rather, the record should be reviewed as a whole." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Defendant asserts two arguments: (1) the trial court's attitude and comments directed toward defense counsel impermissibly biased the jury against defendant; and (2) general questions and comments by the trial judge relating to the witnesses and the proofs presented by counsel were intimidating and argumentative and displayed an impermissible prosecutorial bias.

Defendant did not object to the trial court's conduct. Thus, he must show plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *Paquette, supra* at 340. In *Carines*, the Supreme Court, relying on *United States v Olano*, 507 US 725; 113 S Ct 1170; 123 L Ed 2d 508 (1993), set forth a stringent standard to be applied by this Court before setting aside a conviction on a claim of unpreserved error:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, and 3) the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Carines, supra* at 763-764 (footnote and citations omitted).]

It is with this stringent standard in mind that we review defendant's claim of trial court misconduct.

At times during the trial the demeanor of the trial judge could fairly be characterized as abrupt and inconsiderate. We note, however, that this behavior was not directed exclusively toward defense counsel. Thus, we cannot find that the trial court's conduct displayed an attitude of partisanship in favor of the prosecution. Similarly, we do not find reversible error arising from the questions posed to the witnesses and comments regarding the proofs made by the trial judge throughout the trial. A trial judge may question witnesses in order to clarify or elicit additional relevant information during the course of trial. MRE 614(b); *People v Pawelczak*, 125 Mich App 231, 236; 336 NW2d 453 (1983). Further, the trial court has the discretion to comment on the proceedings while presiding over the administration of the trial. While we conclude that the trial court was unusually active in its participation in this trial, we do not find plain error that affected the substantial rights of defendant. Examining the record as a whole, we find that the trial court's conduct did not deprive defendant of a fair trial. See generally *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996); *People v Davis*, 216 Mich App 47, 51-52; 549 NW2d 1 (1996); see also *People v Hampton*, 237 Mich App 143, 154-155; 603 NW2d 270 (1999).

Defendant also claims that there was insufficient evidence of sexual penetration to support one of the first-degree CSC convictions. To determine if evidence is sufficient to sustain a conviction, a court must "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). MCL 750.520a(l); MSA 28.788(1)(l) 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* . . . . [Emphasis added.]

The prosecution relies upon the following testimony to argue there was evidence of an intrusion, however slight, in the anal opening of the victim:

Q. How did he lick you?

A. On my—with his tongue.

([Prosecutor], continuing): I know this is very hard to answer, when you say his tongue was on your butt, the area where you go to the bathroom back there, was it near there or no?

A. Yes.

THE COURT: She may understand, do you know the—do you know what opening is where you defecate or whatever, you know what that's called?

THE WITNESS: No.

THE COURT: You don't. Okay. But you know that in that part of your anatomy there is such an opening, is that correct?

THE WITNESS: Yes.

THE COURT: Okay.

([Prosecutor], continuing): And did his tongue touch that area or no?

A. Yes.

The prosecutor argues that the jury could reasonably conclude that defendant's tongue slightly penetrated the victim's anal opening. We agree. It was the duty and responsibility of the jury to observe the demeanor of the witness and the prosecutor during the questioning and to provide meaning to the questions posed by the prosecutor and the responses provided by the witness. The jury heard the tone and emphasis of each person's voice and the manner in which the victim provided each answer.

Viewing the evidence in the light most favorable to the prosecution we must assume that the jury understood the ten year old's affirmative response to the question, "did his tongue touch that area" to mean that she felt defendant's tongue touch her anal opening. As a general matter, evidence of "touching" is not necessarily sufficient to support the conclusion that the touching constituted slight penetration.[1] However, given the area of the anatomy at issue in this case, we conclude that the jury could reasonably infer from the evidence that in touching the opening, defendant must have pierced the plane of the opening and touched the interior tissue of the anus. This conclusion is supported by the closing argument of defendant's counsel, who conceded that the testimony of the victim was sufficient to sustain the first-degree CSC conviction for anal penetration. Defendant's counsel argued, however, that the victim lacked credibility and could not be believed.[2] However, the jury disagreed with defense counsel.

Defendant next argues that his sentence of 40 to 60 years is disproportionate and based upon improper considerations by the sentencing judge. We disagree. The sentencing guidelines recommended minimum sentence range for defendant's first-degree CSC convictions was 20 to 40 years or life. Defendant's minimum sentence of forty years for each first-degree CSC conviction is within the guidelines recommended range for either a term-of-years or life sentence. The parties agreed at sentencing that the range was accurate, with both the offense and defendant's prior criminal record being scored in the severest level. The prior record score reflected that defendant had three prior felonies and three prior misdemeanor convictions. The presentence report disclosed two prior convictions for rape. The instant offenses occurred less than one year after being released from incarceration for his most recent rape conviction.

Under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), a sentence is reviewed for an abuse of discretion in light of the principle of proportionality. The trial court abuses its discretion when it imposes a sentence that is not proportionate to the seriousness of the matter. *People v Merriweather*, 447 Mich 799, 806-807; 527 NW2d 460 (1994). In general, a sentence within the guidelines is presumed to be neither excessive nor disparate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996).

Given the record in this case, defendant has not shown that his guidelines sentences for two counts of first-degree CSC are disproportionate.

Finally, defendant claims that he was penalized for exercising his right to trial, instead of tendering a plea. Defendant maintains he is entitled to a presumption of vindictiveness because the sentence imposed after trial exceeded the sentence offered in a *Cobbs*[3] evaluation. We disagree. The presumption of vindictiveness discussed in *People v Mazzie*, 429 Mich 29; 413 NW2d 1 (1987), arises when a trial court imposes a greater sentence for the same offense at a resentencing hearing conducted after reconviction. *Id.* at 34-35. This presumption does not arise where a trial court has made a preliminary evaluation of a sentence under *Cobbs*. The preliminary evaluation does not bind the trial court's sentencing discretion because additional facts may emerge during later proceedings that affect the sentencing decision. *Cobbs*, *supra* at 283. The remedy afforded to a defendant, should he tender a plea in reliance on the preliminary evaluation, is to withdraw the plea if the trial court exceeds the preliminary evaluation. *Id.*

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Joel P. Hoekstra

[1] In order for the first degree CSC conviction to be sustained, there must be evidence of an "intrusion however slight of any part of a person's body . . . ." MCL 750.520a(l); MSA 28.788(1)(l).

[2] Defense counsel argued during her closing argument:

> The first two witnesses, the complainants in this case, very charming young ladies. But this situation is sad, this is a tragedy any way you slice it. I didn't cross examine on licking the anus or tongue in the anus . . . . We submit that they knew that they were gonna [sic] say that. They had been programmed to say it. *Those were the essential elements.* It had to be said and they said it. *And saying it, if you believe it, is sufficient*. And the judge when he instructs you, that will be one of the instructions, that you can[,] by their testimony alone[,] convict Mr. McClatcher. [Emphasis added.]

Thus, it was apparent to all present in the courtroom, including defendant's counsel, that the victim testified about the defendant's tongue penetrating, however slight, the victim's anal opening.

[3] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).