

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HORACE HADDEN,

Defendant-Appellant.

UNPUBLISHED

May 28, 2002

No. 228028

Wayne Circuit Court

LC No. 99-009632

Before: Hood, P.J., and Gage and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct (victim under thirteen), MCL 750.520c(1)(a). The trial court sentenced defendant to twenty months' to fifteen years' imprisonment. Defendant appeals as of right. We affirm defendant's conviction, but remand for resentencing.

Defendant first contends that the trial court erred in admitting testimony by the victim's mother that defendant remained silent in response to her questions concerning whether he sexually assaulted the victim, and allowing the prosecution to use that testimony to argue defendant's guilt. Because defendant did not preserve this issue at trial with an objection made on the same basis that he asserts on appeal, we review only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-763, 774; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A criminal defendant may obtain relief from an unpreserved error if the error is plain, i.e., clear or obvious, and it affected substantial rights, i.e., the error affected the outcome of the proceedings. *Id.* at 763. Reversal is warranted only when an appellate court, in its discretion, determines that the error resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *Id.*

The challenged evidence of defendant's silence did not occur during a custodial interrogation situation or in reliance on *Miranda*¹ warnings. Accordingly, defendant's silence was not constitutionally protected. *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

312 (1992). Rather, the issue is whether the testimony regarding defendant's failure to respond to accusations of criminal sexual conduct was admissible under the Michigan Rules of Evidence. *Id.* at 167. Generally, admission of evidence of a defendant's silence in response to an accusation as a tacit admission of guilt is prohibited, unless the defendant has manifested his adoption of or belief in the truth of the accusation. MRE 801(d)(2)(B); *People v Bigge*, 288 Mich 417, 420; 285 NW 5 (1939); *Schollaert*, *supra*.

The record shows that the initial testimony concerning defendant's silence was elicited by defense counsel. Defense counsel specifically asked the complainant's mother, "Did he say he did it?" and, "He did not admit to you that he touched your daughter, did he?" Because defendant himself put his response to the victim's mother's accusations at issue, defendant "will not be heard to introduce and use evidence to sustain his theory at trial and then argue on appeal that the evidence was prejudicial and denied him a fair trial." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Error requiring reversal must be that of the trial court, not error to which the aggrieved party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). We conclude that the admission of the testimony regarding defendant's silence did not constitute plain error affecting defendant's substantial rights.

We further conclude, however, that the prosecutor's use of testimony regarding defendant's silence to argue his guilt constituted plain error. *Bigge*, *supra*; see also *People v Hackett*, 460 Mich 202, 214-215; 596 NW2d 107 (1999). Given the absence of physical evidence linking defendant to the crime, we find it possible that the error had some effect on the outcome of the proceedings. Nonetheless, it is not clear that defendant was actually innocent, and the error did not seriously affect the fairness, integrity or public reputation of the proceedings. *Carines*, *supra*. We note that defendant apparently made a strategic decision to forego any objection to the prosecutor's comments and instead responded by pointing out that the testimony regarding defendant's silence was contradicted. Under these circumstances, the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000) ("No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction.").

Defendant next argues that the prosecutor improperly appealed to the jurors' sympathy for the victim. Because defendant did not object to the prosecutor's remarks in the trial court, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, *supra*; *Schutte*, *supra* at 720.

Prosecutorial misconduct issues are decided on a case by case basis, with the reviewing court examining the prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "Appeals to the jury to sympathize with the victim constitute improper argument." *Id.* at 591. However, a prosecutor may argue from the facts that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Our review of the record shows that the prosecutor's remarks addressed the credibility of the victim, which constituted the central issue in this case. To the extent that the prosecutor's remarks portrayed the victim in a sympathetic light, they were not so blatant or inflammatory that defendant was prejudiced. *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370

(1999). Moreover, any prejudice could have been cured by an objection and request for a curative instruction. *Schutte, supra* at 721. Because the prosecutor's comments did not give rise to plain error affecting defendant's substantial rights, we conclude that reversal of his conviction on the basis of prosecutorial misconduct is not warranted.

Defendant lastly asserts that the trial court erred in failing to articulate on the record substantial and compelling reasons for its upward departure from the statutory sentencing guidelines. Because the offense for which defendant was convicted occurred after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Under the statutory sentencing guidelines, a court must impose a sentence within the appropriate sentence range. MCL 769.34(2); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). A court may depart from the recommended range, however, "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001); *Babcock, supra*. Furthermore, if the upper limit of a guidelines range is eighteen months or less, the court must impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the defendant to imprisonment. MCL 769.34(4)(a). The factors relied on by the trial court as constituting substantial and compelling reasons for departure must be objective and verifiable. *Babcock, supra* at 75.

The statutory guidelines' minimum sentence range applicable to defendant's crime was five to seventeen months. The court sentenced defendant to twenty months' to fifteen years' imprisonment. The court acknowledged that the sentence imposed exceeded the guidelines, but made no mention of the necessity of stating a substantial and compelling reason for the departure. Rather, the court indicated that the guidelines were not "adequate to address the situation at hand," and noted the crime's emotional ramifications for the victim. The court then simply incorporated by reference "the entirety of the pre-sentence report."

Because the trial court failed to articulate a substantial and compelling reason for departing from the guidelines, we vacate defendant's sentence and remand for resentencing. We remind the trial court that on remand it may not depart from the applicable guidelines range unless it finds a substantial and compelling reason for doing so and explains its reason on the record. We note that because the sentencing information report shows that defendant was assigned ten points under offense variable four, MCL 777.34, which already takes into account psychological injury to the victim, the court may not premise a sentence departure on that factor unless it finds from facts in the record that the factor was given inadequate weight. MCL 769.34(3)(b).

We affirm defendant's conviction, but vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ Christopher M. Murray