STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 16, 2002
V	No. 227578 Leelanau Circuit Court
STEPHEN JAY BRYAN, Defendant-Appellant.	LC No. 00-001098-FC

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and five counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b). Defendant was sentenced to concurrent prison terms of 71 to 180 months for his conviction of third-degree criminal sexual conduct and 16 to 24 months for each fourth-degree criminal sexual conduct conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that he was denied a fair trial when the prosecutor argued that a not guilty verdict would "discredit" the victim. Defendant asserts that this argument was an improper appeal for the jury to sympathize with the victim and consider the consequences of its verdict. We disagree.

Because defendant did not object to the alleged misconduct at trial, we review this issue for outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Generally, such error will not be found in cases involving prosecutorial misconduct unless the prejudicial effect of improper remarks was so great that it could not have been cured by an appropriate instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A prosecutor may not appeal to the jury to sympathize with a victim. *Id*. at 591. Likewise, a prosecutor may not argue it is the civic duty of jurors to convict a defendant. *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984). These, and similar arguments, are condemned because they encourage jurors to decide a case based on issues broader than evidence of a defendant's guilt or innocence of the charges. *People v Crawford*, 187 Mich App 344, 354;

467 NW2d 818 (1991). However, a prosecutor's comments must be reviewed by this Court in context, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and must be read in light of defense arguments and the relationship they bear to the evidence admitted at trial, *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

In the present case, the defense was fabrication and the entire closing argument of the prosecutor addressed that theory by arguing the credibility of the victim. Prosecutors are accorded great latitude to argue the evidence and all reasonable inferences arising from the facts as they relate to their theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), including arguing the credibility of witness, *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Here, the prosecutor did not ask the jury to sympathize with the victim or to consider the consequences of its verdict. Rather, the prosecutor argued that by coming forward with the allegations the victim had already "lost" and would gain nothing from the outcome of the trial, whatever the jury decided. Defendant misconstrues the prosecutor's remarks and ascribes to them a meaning wholly out of the context in which they were made. *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988). Defendant was not denied a fair and impartial trial by the prosecutor's argument.

II

Defendant next argues that the prosecutor violated his ethical duty and denied defendant due process when he failed to advise defense counsel that, during a warrant review meeting, the victim indicated that the police report was not completely accurate with respect to her oral statement. Again, we disagree.

Although there is no general constitutional right to discovery, *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), due process requires that the prosecutor disclose evidence that is both favorable to the defendant and material to the determination of guilt or punishment, *People v Fink*, 456 Mich 449, 453-454; 574 NW2d 28 (1998). However, evidence is material only if there is a reasonable probability that the trial result would have been different had the evidence been disclosed. *Id*. Here, in ruling on defendant's motion for a new trial, the trial court found that it was not reasonably probable that the trial outcome would have been different had the defense been advised of the minor discrepancies between the police report and the victim's expected testimony. We agree.

Inasmuch as the discrepancies were disclosed at trial through defense counsel's cross-examination of the victim and investigating officer, and defense counsel effectively used that evidence at trial to impeach the victim and attempt to discredit the police investigation, we agree with the trial court that there is no reasonable probability that the result of the trial would have been different had the defense been advised of the victim's contradictions sooner. Moreover, although a prosecutor has an ethical duty to timely disclose to the defense all evidence and information known which tends to negate the defendant's guilt or mitigate the degree of the offense, MRPC 3.8(d), *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001), in this case, defendant was provided the police report containing the inconsistencies for use to impeach the victim at trial, and defendant makes no claim that the victim made any statements to the prosecutor or investigating officer at the warrant review meeting inconsistent with her later trial testimony. Accordingly, we find no error requiring reversal. MCR 2.613(A).

III

Defendant next argues that the trial court abused its discretion and denied defendant due process by denying a defense motion for a mistrial premised on the trial court's decision to permit a late-endorsed corroborating witness to testify that the victim had told her of the sexual abuse before a defense-alleged motive to fabricate existed. Again, we disagree.

Defendant argues that in denying the motion the trial court erred in focusing on whether a mistrial was manifestly necessary, a standard that defendant asserts need not have been met to preclude double jeopardy from barring retrial because defendant requested the mistrial. However, while consent by a defendant to declaration of a mistrial precludes application of the bar of double jeopardy, *People v Tracey*, 221 Mich App 321, 328; 561 NW2d 133 (1997), a defendant's consent does not require that a trial court grant a mistrial upon demand. Rather, it remains within the trial court's discretion to grant or deny a defendant's motion for mistrial, *People v Ortiz-Kehoe*, 237 Mich App 508, 512-513; 603 NW2d 802 (1999), and a trial court's refusal to grant a mistrial will be an abuse of discretion only where a trial irregularity would otherwise deny the defendant a fair trial. *Id.* at 513-514. Moreover, what a trial court concludes to be consent during a trial may turn out not to be consent on appeal, see *People v McGee*, 247 Mich App 325, 332-333; 636 NW2d 531 (2001), even where mistrial is premised upon a defense motion, see *People v Hicks*, 447 Mich 819, 831-834; 528 NW2d 136 (1994). Accordingly, the trial court's concern whether a mistrial was manifestly necessary was justified.

Moreover, the trial court did not err by concluding that, because no prosecutorial or police misconduct was involved, allowing the late discovered witness with probative evidence to testify would not be unfair. The trial court correctly concluded that although the corroborating witness' testimony was damaging, the defense theory that the alleged crimes were a fabrication of a troubled teen remained intact. Moreover, although defense counsel implied that had he known of the late-endorsed witness' testimony, the defense theory might have been changed to consent, counsel conceded that the defense theory was determined by what defendant told him and, here, defendant testified that he did not sexually abuse the victim. In any event, there is no record evidence that defendant ever desired to assert consent as a defense. Thus, we find the trial court correctly concluded that although damaging to defendant, in the absence of police or prosecutorial misconduct, it was not unfair to permit a "material untainted and thoroughly reliable witness" to testify. See *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995) ("unfair prejudice" does not mean merely "damaging."). The trial court therefore did not abuse its discretion by denying defendant's motion for mistrial. *Ortiz-Kehoe*, *supra* at 512-513.

IV

Next, defendant argues that he was denied the effective assistance of counsel as a result of several errors by his trial counsel. We again disagree. A defendant alleging ineffective assistance of counsel must establish that counsel's performance fell below an objective level of reasonableness and that a reasonable probability exists that but for counsel's errors the outcome of the proceedings would have been different. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

In challenging counsel's performance at trial, defendant first argues that counsel was ineffective in failing to object to the lack of complete and accurate discovery, or to the prosecutor's closing argument. However, as discussed above, the prosecutor's argument was proper. Accordingly, counsel was not ineffective in failing to object to the argument. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (trial counsel is not required to raise meritless objections, and failure to do so does not constitute ineffective assistance of counsel). Further, because defense counsel effectively used the discrepancies between the police report of the victim's statement and the victim's trial testimony to impeach the victim and discredit the police investigation, defendant cannot show that counsel's failure to raise an objection to the alleged discovery violation affected the outcome of the trial.

Defendant further argues that counsel was ineffective because it was he who laid the foundation for the testimony of the late-endorsed corroborating witness. Thus, defendant asserts, the witness would not have testified but for counsel's actions. However, as noted by the trial court in denying defendant's motion for a new trial on this same ground, once the victim disclosed (during direct examination by the prosecutor) that she had confided the abuse to a friend, it is unreasonable to conclude that the witness' identity and what she knew would not have been discovered before the end of the trial even if defense counsel had taken different action. Accordingly, there is no basis to conclude that, but for counsel's further inquiry into the matter, the outcome of the trial would have been different.

V

Finally, defendant argues that prior record variable five (PRV 5) was inaccurately scored. We disagree.

Because the instant offenses were committed after January 1, 1999, the legislative sentencing guidelines apply to the present case. *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). Proper application of the statutory sentencing guidelines is a question of law reviewed de novo on appeal. *Id*. at 436.

In addition to a prior juvenile adjudication for second-degree retail fraud, defendant's criminal history includes misdemeanor convictions for receiving and concealing stolen property and "allowing a fire to escape." Defendant argued at sentencing and argues on appeal that "allowing a fire to escape" should not have been counted in scoring PRV 5 because offenses of a similar nature (e.g., willfully or negligently setting fire to woods or prairies, see MCL 750.78), are classified in the legislative sentencing guidelines as "public safety" offenses. At issue is the interpretation of MCL 777.55, which, at the time of the instant offenses, provided:

> (2) All of the following apply to scoring record variable 5:
>
> (a) Except as provided in subdivision (b), count a prior misdemeanor conviction or prior misdemeanor juvenile adjudication *only if it is a crime against a person or* ***property***, a controlled substance crime, or a weapon offense enumerated in chapter XXXVII of the Michigan penal code, 1931 PA 328, MCL 750.222 to 750.239a. Do not count a prior conviction used to enhance the sentencing offense to a felony. [(Emphasis added).]

The primary goal of statutory interpretation is to give effect to the intent of the Legislature in enacting the statute. *People v Sartor*, 235 Mich App 614, 619; 599 NW2d 532 (1999). If a statute is clear and unambiguous, judicial construction or interpretation is unnecessary, and therefore, precluded. *Id*.

The statutory sentencing guidelines do not define the phrase "a crime against a person or property." Moreover, neither the record nor the parties disclose the specific statute under which defendant was convicted, but it appears likely the conviction stemmed from a violation of MCL 320.25(b), which requires a person to take "reasonable precautions to . . . prevent the escape" of any fire set. Failure to take such precautions was deemed a misdemeanor under MCL 320.34.[1] The trial court, however, concluded that the violation of a statute prohibiting allowing a fire to escape was intended to protect property and is therefore "a crime against property." Because fire always damages or destroys property, we find that the trial court's interpretation and application of MCL 777.55(2)(a) is consistent with the plain, ordinary, and unambiguous meaning of the language of the statute and that, therefore, the trial court correctly counted defendant's misdemeanor conviction for "allowing a fire to escape" when scoring PRV 5. *Sartor*, *supra*.

In reaching this conclusion, we reject defendant's claim that the guidelines offense categories established by the Legislature have any bearing on the scoring of misdemeanor and juveniles offense under PRV 5. These categories apply only to those enumerated felonies to which the guidelines apply, and are used merely to determine which offense variables to score. MCL 777.21(1)(a), MCL 777.22. The guidelines offense categories have no application to the scoring of prior record variables. See MCL 777.21(1)(b); MCL 777.50 *et seq*. While the Legislature could have established "offense categories" for the purpose of specifying what prior misdemeanor convictions or juvenile adjudications should be counted to score PRV 5, it did not do so. Thus, whether a prior offense is to be counted for purposes of scoring PRV 5 is dependent on the nature of the crime for which the offender was convicted or adjudicated, not on the offense category of similar felonies, which are used for scoring sentence guidelines offense variables. The trial court correctly discerned and effectuated the intent of the Legislature in so concluding.

Defendant also argues that the trial court erred in failing to grant defendant's challenge to his misdemeanor conviction for receiving and concealing stolen property as constitutionally infirm for lack of representation by counsel. See *People v Moore*, 391 Mich 426; 216 NW2d 770 (1974). However, we note that defense counsel conceded that he had obtained no records from the sentencing court, but rather relied on the presentence report to establish a prima facie case of constitutional infirmity.

In *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994), our Supreme Court reaffirmed that when a defendant collaterally challenges the constitutional validity of a prior

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[1] Both MCL 320.25 and MCL 320.34 were repealed by 1994 PA 451, § 90104, but were later reenacted by 1995 PA 57, § 1, as part of the Natural Resources Environmental Protection Act. See MCL 324.51504, 51512.

conviction the burden is upon the defendant to establish a prima facie case of the infirmity with record evidence from the sentencing court or with evidence that the records were requested and the sentencing court either refused to provide the records or refused to reply to the defendant's request for records within a reasonable time. Once a defendant satisfies his initial burden by making a prima facie case of constitutional infirmity, the burden shifts to the prosecutor to prove otherwise. *Id*. We reject defendant's argument that the presentence report was sufficient to meet his burden to present a prima facie case that his 1983 misdemeanor conviction was constitutionally infirm.

More must be shown to establish a prima facie case that a misdemeanor conviction or juvenile misdemeanor adjudication was constitutionally infirm than that the defendant was without counsel. *People v Reichenbach*, 459 Mich 109, 124, 126; 587 NW2d 1 (1998); *People v Daoust*, 228 Mich App 1, 18-19; 577 NW2d 179 (1998). Specifically, to establish constitutional infirmity, the defendant must have been indigent, must not have validly waived counsel, and the conviction or adjudication must have resulted in actual incarceration. *Reichenbach*, *supra*; *Daoust*, *supra.* In *People v Walker*, 428 Mich 261, 267-268, n 19; 407 NW2d 367 (1987), abrogated in part on other grounds 454 Mich 145, 176 (1997), our Supreme Court established the preponderance of evidence standard for determining contested factual matters at sentence proceedings, and held that a trial court could rely upon a verified presentence report. However, while a trial court may rely upon a verified presentence report to establish a contested fact at sentencing, the trial court in the instant case was able to verify only that the author of the presentence report had obtained a notice of a date for a plea and was thus unable to verify a constitutional infirmity regarding counsel. Moreover, no verification was provided for the strange entries in the presentence report indicating that defendant was arrested on March 15, 1983, sentenced on March 17, 1983, to "30 days county jail," and yet "discharged" on March 17, 1983, the same day that he was sentenced. Thus, the facts in the presentence report that might have satisfied defendant's burden of presenting a prima facie case of constitutional infirmity as to his 1983 misdemeanor conviction were not verified, and the trial court could properly rely instead on the presumption of regularity from the silent record. *Carpentier, supra* at 36-37 (Brickley, J.), 59-60 (Riley, J., concurring). Accordingly, the trial court did not err in rejecting defendant's challenge to consideration of the 1983 conviction for purposes of scoring PRV 5.

We affirm.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra