

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ALAN GEORGE HAUGHTON,

Defendant-Appellant.

UNPUBLISHED

March 18, 2004

No. 243962

Oakland Circuit Court

LC No. 2001-175478-FC

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant Alan George Haughton was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), stemming from allegations of sexual assaults occurring during the summer of 1990 against his then six-year-old daughter. The trial court sentenced defendant to concurrent terms of twenty to fifty years in prison on both counts. Defendant now appeals as of right. We affirm.

On appeal, defendant first contends that he is entitled to resentencing because the trial court incorrectly scored offense variables (OV) 5, 6, and 12. Defendant argues that the trial court consequently erred in computing the minimum sentences for his convictions under the judicial sentencing guidelines.¹

Generally, “a sentencing court has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score.” *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 56 (1997). “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). Defendant preserved his challenges to the scoring of OV 5 and OV 6 by objecting at the sentencing hearing. MCR 6.429(C); *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999). However, because defendant failed to preserve his claim that OV 12 was incorrectly scored, he must show plain error affecting his substantial rights in order to avoid forfeiture of

¹ Defendant’s sentences are controlled by the judicial sentencing guidelines because the charged offenses occurred before January 1, 1999. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

this issue. *People v Kimble*, 252 Mich App 269, 277-278; 651 NW2d 798 (2002), lv gtd 468 Mich 870 (2003).

Defendant first contends that the trial court erred in scoring OV 5 at fifteen points. Fifteen points may be scored for OV 5 if there is evidence that the victim was moved to another place of greater danger or to a situation of greater danger, or was held captive beyond the time necessary to commit the offense. In the instant case, the victim testified that on two separate occasions, defendant called her to his bedroom, shut the door, and committed sexual assaults on her, thus concealing his sexual activity with her. Under the circumstances, the trial court could reasonably conclude that the then six-year-old victim was in greater danger by being removed and shut away from the presence of other family members. Accordingly, the trial court was within its discretion to score OV 5 at fifteen points. See *Dilling, supra* at 54-55.

In regard to the trial court's scoring of OV 12 at fifty points, we conclude that no plain error occurred that affected defendant's substantial rights. The scoring of fifty points is appropriate where two or more criminal sexual penetrations have occurred, not including the one penetration that forms the basis for the conviction offense. Defendant submits that he should have received a score of only twenty-five points for this variable as there were only two penetrations involved, one of which arose out of the conviction offense. Moreover, defendant maintains that there was no testimony at trial that there was any penetration whatsoever with regard to the two charges of which he was acquitted.

The scoring of the guidelines need not be consistent with the jury verdict; a sentencing factor need be proved only by a preponderance of the evidence. *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994); *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). There is "no requirement that a jury find the facts that form the basis for the scoring of the guidelines. Rather, all that is required is that evidence exists that is adequate to support a particular score." *People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991).

Here, defendant was charged with three counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. The victim testified regarding digital penetration, fellatio, and anal penetration on three separate occasions. Although the jury found defendant guilty of two counts of first-degree criminal sexual conduct (digital penetration and fellatio) and acquitted him on the remaining counts, the victim's testimony regarding three penetrations provided adequate evidence to support the trial court's exercise of discretion in the scoring of OV 12 at fifty points. *Williams, supra*. In any event, any error in the scoring of OV 12 would not have affected defendant's recommended minimum sentence range for the first-degree CSC conviction. Even if twenty-five points were scored for OV 12, defendant would remain in Offense Severity Level IV because his total offense variable score remained over fifty points. Thus, any error in this regard was harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

In light of our conclusion that there was sufficient record evidence to support the scoring of OV 5 and OV 12, we need not consider whether OV 6 was correctly scored because it would not affect defendant's placement in the guidelines range. See *Johnson, supra*.

Finally, even assuming arguendo that the guidelines were incorrectly scored, defendant would not be entitled to relief. The former judicial sentencing guidelines do not have the force of law and are only a means by which to achieve a proportionate sentence. *People v Raby*, 456 Mich 487, 497-498; 572 NW2d 644 (1998), superseded by statute as noted in *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001); *People v Mitchell*, 454 Mich 145, 177-178; 560 NW2d 600 (1997). Where, as in this case, defendant received a proportionate sentence, an error in the scoring of the guidelines does not provide a basis for appellate relief. *Raby, supra; Mitchell, supra*. Accordingly, we conclude that defendant is not entitled to resentencing under the circumstances.

Next, defendant argues that he was denied a fair trial as a result of improper and prejudicial remarks made by the prosecutor during closing argument. Defendant failed to object to the alleged prosecutorial misconduct during trial. Thus, we will only review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Prosecutorial misconduct issues are decided case by case . . . and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. . . . Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. . . . Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. . . .

. . . Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel. . . . No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. [*Id.* at 721, citations omitted.]

Defendant contends that certain remarks made by the prosecutor improperly appealed to the jurors' sympathy. We disagree. The prosecutor specifically stated that "it's clear, *based on the evidence*, that [the victim's] memories are not happy ones of her childhood." (Emphasis added.) The prosecutor then related the victim's memories of the assaults by her father, as supported by her testimony, and compared his own childhood memories with those of the victim. "[P]rosecutors may use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). "Emotional language may be used during closing argument and is 'an important weapon in counsel's forensic argument.'" *Id.* at 679, quoting *People v Mischley*, 164 Mich App 478, 483; 417 NW2d 537 (1987). The victim's testimony showed that her memories were atypical, and the prosecutor properly used this particular tactic to demonstrate the seriousness of the events in question. Moreover, the trial court instructed the jury that they should not let sympathy or prejudice influence their decision. The jury was also instructed that they alone must decide the facts of the case and determine the outcome, that their decision must

be based only on the evidence, and that the attorneys' arguments were not evidence. Considering the prosecutor's remarks in context, defendant has not established outcome-determinative plain error. *Schutte, supra*.

Affirmed.

/s/ Richard Allen Griffin

/s/ Helene N. White

/s/ Pat M. Donofrio