

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRENT ROBERT MAGYAR,

Defendant-Appellant.

UNPUBLISHED
November 9, 2004

No. 249025
Oakland Circuit Court
LC No. 2002-185030-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b, and sentenced to a term of ten to fifty years' imprisonment. He appeals as of right. We affirm.

In 2002, the eleven-year-old victim informed her mother that she had been sexually abused by a neighbor in 1997, when her family lived in the Stoneridge apartment complex in Wixom. The child recalled that the incident occurred a few weeks before her sixth birthday, which was April 14, 1997. The child was at home with her father, trying to write a letter, and she needed help spelling a word. The child went to the apartment next door, where defendant lived, and knocked on his door, because he had played with children in the complex. Defendant invited her in and gave her an electronic spell-checker to use in his apartment. While the child was sitting on the floor, defendant sat behind her, slipped his hand under her shorts, and put his fingers inside her vagina.

The child returned home but did not tell her parents because, she said, she was frightened. The child and her family later moved from the apartment. She kept the incident a secret until January 2002, when she revealed it to her mother after watching a television movie about a sexual abuse incident. The child showed the police where defendant's apartment was, described how the apartment had looked the day of the incident, and selected defendant's picture from a photographic array.

Defendant presented an alibi defense based on the probable time frame of the incident. Defendant attempted to show that he was never home alone on Saturdays or any other day of the week during the relevant time frame. Defendant lived with a male roommate, Scott Corwin, until May 1997. In May 1997, Scott left the apartment to move in with his girlfriend (later his wife), and, at the same time, defendant's then girlfriend (later his wife) moved into defendant's

apartment. Defendant and the two women all testified that in March and April 1997, defendant's girlfriend always spent the entire weekend with defendant, Scott was also at home, and Scott's girlfriend frequently visited. Defendant and his girlfriend/wife both testified that defendant always spent his weekdays at work and the evenings and weekends with his girlfriend, implying that there was no opportunity for him to be alone with the child in his apartment during the time period in question. Defendant anticipated that Scott would testify to further support his alibi, but Scott did not appear on either the second or third day of trial. The prosecutor cross-examined defendant about Scott's failure to appear. Defendant agreed that Scott had been a close friend since high school, and also agreed that Scott was "in the best position of anybody to know how often [defendant was] at the apartment alone." The prosecutor asked, "He didn't come to court today?" Defendant replied, "I'm deeply hurt he didn't."

Defendant contends that he was denied a fair trial when the prosecutor cross-examined him about Scott's failure to appear. Because defendant did not object to the prosecutor's cross-examination, this issue is not preserved. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). To avoid forfeiture under the plain error rule, a defendant must demonstrate that: (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant's substantial rights. *Id.*

Defendant relies on *People v Fields*, 450 Mich 94; 538 NW2d 356 (1995), to support his argument that this line of questioning was improper because a prosecutor may not ask a jury to infer that a witness a defendant failed to produce would have testified adversely to the defense. Once a defendant "advances evidence or a theory," however, the prosecutor is entitled to argue the inferences from that evidence. *Id.*, 115.

Defendant also argues that the trial court violated his constitutional rights by permitting the jurors to submit written questions for the witnesses. Defendant acknowledges that he did not object to this procedure, but he claims that this was a structural error, which is not subject to a harmless error analysis. *People v Bell*, 259 Mich App 583, 598; 675 NW2d 894 (2003), lv granted 470 Mich 870 (2004).

A defendant claiming that the trial court erred in permitting jurors to submit questions must show that the trial court abused its discretion in permitting the questions. *People v Heard*, 388 Mich 182, 184-185; 200 NW2d 73 (1972). Here, defendant does not argue that the trial court abused its discretion, but instead contends that the practice itself constitutes structural error, warranting reversal irrespective of prejudice. There is no merit to this issue. *Id.*

Defendant also claims that the trial court erroneously scored offense variable (OV) 5 when it calculated his minimum sentence range under the judicial sentencing guidelines.¹ There is no merit to this argument. Because the judicial sentencing guidelines do not have the force of

¹ Because the offense was committed before January 1, 1999, the legislative guidelines are not applicable; therefore, defendant was sentenced under the judicial sentencing guidelines. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

law, a sentence is not rendered invalid on the basis of a scoring error. *People v Raby*, 456 Mich 487, 496-497; 572 NW2d 644 (1998). “A putative error in the scoring of the sentencing guidelines is simply not a basis upon which an appellate court can grant relief.” *Id.* at 499.

Finally, defendant argues that the case should be remanded to the trial court to correct a clerical error in the judgment of sentence, which lists him as an habitual offender. Although a habitual offender charge was filed in this case, it was subsequently dismissed. Defendant was not sentenced as an habitual offender. The prosecutor agrees that the judgment of sentence should be amended. We agree and remand this case for correction of the judgment of sentence to delete the reference to habitual offender sentencing. MCR 7.216(A)(7).

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot