

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY JONATHAN NEWBERRY,

Defendant-Appellant.

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UNPUBLISHED  
December 6, 2005

No. 256567  
Berrien Circuit Court  
LC No. 2003-412008-FH

Before: Bandstra, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a), against a person under 13 years of age. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to 102 to 270 months in prison. We affirm.

Defendant first argues that the prosecutor engaged in misconduct by eliciting prejudicial testimony that he was in jail during the investigation of this case; that he failed to register as a sex offender; and that he would be placed on probation, and therefore must have had a prior conviction. We review de novo preserved claims of prosecutorial misconduct to determine if the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). We review unpreserved claims of prosecutorial misconduct for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). In order to avoid forfeiture under the plain error rule, defendant must demonstrate plain error that was outcome determinative. *Id.* When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995).

Defendant maintains that the prosecutor engaged in misconduct by eliciting testimony from a police officer that defendant was in jail during their interview. The police officer testified that the investigation into the instant charge began as a result of letters that were written by jail inmates indicating that defendant may have had inappropriate sexual contact with the victim. The police officer affirmatively indicated that in talking with defendant about the victim, defendant wanted to discuss "these other persons in jail." At trial, defense counsel objected on the grounds of hearsay and relevance, and the trial court overruled the objection. On appeal, defendant claims that this testimony was irrelevant, MRE 402, and prejudicial, MRE 403. Because an objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground, defendant's claim that the evidence was irrelevant is preserved, but

his claim that the evidence was prejudicial is unpreserved. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003).

MRE 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Here, the police officer explained that an investigation was opened after one of defendant’s fellow inmates reported that defendant talked about his feelings for and conduct towards the victim. The genesis of the charge against defendant and his subsequent attempt to discuss “these other persons in jail” was relevant because it established a foundation for testimony concerning their motivations. That is, evidence that the investigation was prompted by incarcerated individuals tended to make the reliability of their statements more or less likely than it would have been without the evidence. Because all relevant evidence is admissible, MRE 402, the prosecutor did not engage in misconduct by eliciting testimony from the police officer that defendant was in jail at the time of their interview.

MRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Here, evidence that defendant was in jail was probative of the impetus for and veracity of the inmates’ statements concerning defendant’s comments about his relationship with the victim, and was not substantially outweighed by the danger of unfair prejudice. Indeed, defense counsel attempted to impeach one of defendant’s fellow inmates by alleging that his testimony was given in exchange for a shorter sentence, which made defendant’s own incarceration evident. Moreover, defendant has not demonstrated that the prosecutor’s elicitation of evidence that he was in jail amounted to plain error that was outcome determinative. *Watson, supra* at 586. Accordingly, the issue is forfeited. *Id.*

Defendant next argues that the prosecutor engaged in misconduct by eliciting testimony from a probation officer that defendant failed to register as a sex offender. At trial, defense counsel objected on the grounds of relevance, and the trial court sustained the objection and instructed the jury to disregard the testimony. The following day, the trial court addressed the incident, and indicated that the jury members stated that they were unable to hear because of a heavy rainfall at the moment the probation officer offered the damaging testimony. Indeed, defense counsel agreed that the jury likely did not hear the harmful testimony and declined the trial court’s offer of another curative instruction, so as not to draw further attention to the matter. The trial court then inquired “[s]o you will give up that issue?,” to which defendant responded affirmatively, thereby intentionally relinquishing or abandoning a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A defendant may not waive an objection to an issue before the trial court and then raise it as an error on appeal—defendant’s waiver extinguished any error. *Id.* at 219.

Further, in light of the fact that defense counsel conceded that the jury did not hear the testimony that defendant failed to register as a sex offender, we find no merit to defendant’s argument that the testimony was unfairly prejudicial in violation of MRE 403. Moreover, defendant did not object on that ground at trial, and he has failed to demonstrate that such testimony amounted to plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Because evidence was introduced at trial that defendant had been and was currently sexually attracted to young children and that he took measures to

control his urges, defendant is unable to meet his burden of showing prejudice, i.e., that the error affected the outcome of the trial. *Id.* Accordingly, the issue is forfeited. *Watson, supra* at 586.

Defendant next argues that the prosecutor engaged in misconduct by eliciting unduly prejudicial testimony from a probation officer that she told defendant that he would be placed on probation, consequently implying that he had a prior conviction. Defense counsel failed to object to this alleged claim of misconduct, and has not demonstrated the prosecutor's elicitation of this evidence amounted to plain error that was outcome determinative. *Id.* The prejudicial effect of evidence implying that defendant had a prior conviction could have been cured by a timely instruction; therefore, no error requiring reversal will be found. *Id.* Accordingly, the issue is forfeited. *Id.*

Defendant next argues that he is entitled to resentencing because the trial court erred by engaging in an upward departure from the statutory sentencing guidelines, where the departure was based on factual findings not determined by the jury.<sup>1</sup> Defendant relies on the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) to support his argument. However, our Supreme Court and this Court have concluded that *Blakely* does not apply to sentences imposed in Michigan. *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005), citing *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) and *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd in part 472 Mich 881; 693 NW2d 823 (2005).

Defendant also argues that the trial court's departure from the statutory minimum sentencing guidelines range was unwarranted. The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). The trial court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). The trial court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a), (b).

We review the trial court's determination that a particular factor warranting departure existed for clear error. *People v Babcock*, 469 Mich 247, 273; 666 NW2d 231 (2003). We review de novo as a matter of law the trial court's determination that a particular factor is objective and verifiable. *Id.* Finally, we review a trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence for an abuse of discretion, which occurs if the sentence falls outside the permissible principled range of outcomes. *Id.* at 274. However,

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<sup>1</sup> Defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a), a Class C offense, and was sentenced as a second-offense habitual offender, MCL 769.10. Defendant's prior record variable score of 45 points yielded a PRV level D, and his offense variable score of 25 points yielded an OV level III, for a minimum sentence range of 29 to 71 months in prison. The statutory maximum for MCL 750.520c(1)(a) is 270 months in prison. The trial court departed from the minimum sentencing guidelines range and sentenced defendant to 102 to 270 months in prison.

defendant failed to object to the sentence imposed by the trial court; therefore, the issue is unpreserved and we review his claim of sentencing error for plain error affecting substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

Here, the trial court stated that the following aspects of the case led him to impose a sentence outside the recommended range:

[(1)The g]uidelines do not give adequate weight or consideration to the fact that the prior felony conviction was for criminal sexual conduct with a child[;] (2) offense variable 10 scores 15 points for defendant's predatory conduct, but does not also consider the fact that there was a disparity in the age of the victim and defendant, and that defendant was also a member of the same household as the victim and exploited those factors in sexually assaulting the victim; (3) insufficient weight is given to the numerous touchings/sitting of victim on defendant's lap for purposes of sexual gratification of the defendant throughout his course of conduct; (4) the offense variables do not consider or give sufficient weight to the fact that the victim was previously sexually abused by another person, thus making her more vulnerable; (5) defendant was on probation for failing to register as a sex offender, and deliberately sought out women to live with who had poor self esteem and who had children to whom he would have access.

Defendant argues that "[r]eason #3, sexual gratification, is not objectively verifiable." "Objective and verifiable factors are those that are external to the minds of the judge, defendant, and others involved in making the decision, and are capable of being confirmed." *People v Geno*, 261 Mich App 624, 636; 683 NW2d 687 (2004). Here, several witnesses testified that defendant admitted that he had sexual urges for the victim, had kissed her on the mouth, and enjoyed it when she sat on his lap. Moreover, one of defendant's fellow inmates testified that defendant become aroused when talking about the victim; specifically, when he would mention that he missed her sitting on his lap. While sexual gratification in general may not be objective and verifiable, the fact that defendant had the victim sit on his lap for purposes of sexual gratification became objective and verifiable when defendant revealed that fact to numerous individuals who confirmed that fact through their trial testimony.

Defendant also argues that the other reasons given by the trial court for the departure were given sufficient weight by the guidelines. MCL 769.34(3)(b) provides that "[t]he court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic had been given inadequate or undue weight."

Here, the trial court found that departure was warranted where, although defendant was assessed 25 points for PRV 1 for his prior high severity felony conviction, MCL 777.51(1)(c), inadequate weight or consideration was given to the fact that the previous conviction was for criminal sexual conduct with a child. The trial court also found that departure was warranted where, although defendant was assessed 15 points for OV 10 for exploitation of a vulnerable victim where predatory conduct, i.e., "preoffense conduct directed at a victim for the primary purpose of victimization" was involved, MCL 777.40(1)(a); (2)(a), consideration was not given

to the fact that there was an age disparity between defendant and the victim and that defendant was a member of the same household as the victim, and exploited those factors in sexually assaulting the victim, factors that would have warranted an assessment of 10 points for exploitation of a victim's youth and a domestic relationship. MCL 777.40(1)(b). The trial court also found that departure was warranted where the offense variables did not consider or give sufficient weight to the fact that the victim was especially vulnerable because she had been sexually abused in the past. Finally, the trial court found that departure was warranted where, although defendant was assessed 15 points for OV 10 for predatory conduct, the guidelines did not take into account that defendant was on probation for failing to register as a sex offender and deliberately sought out women with poor self esteem and who had children to whom he would have access.

We find that the trial court did not abuse its discretion in determining that the objective and verifiable factors present in this case constituted substantial and compelling reasons to depart from the statutory minimum sentence. *Babcock, supra* at 274. We also conclude that the extent of the departure, 31 months, is proportionate to the seriousness of defendant's conduct. *Id.* at 272. There was no plain error affecting defendant's substantial rights in the trial court's upward sentencing departure, and defendant is not entitled to relief on this basis.

We affirm.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Jane E. Markey