STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS LEWIS PLAIR,

Defendant-Appellant.

UNPUBLISHED
August 7, 2008

No. 274575
Kent Circuit Court
LC No. 06-006379

Before: Markey, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his bench-trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b)(ii) (sexual penetration with a person at least 13 but less than 16 years of age and related to the defendant), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to prison terms of 39 to 60 years for the CSC I conviction and 30 to 50 years for each of the CSC II convictions. We affirm his convictions but remand for resentencing.

Defendant's 13-year-old daughter and 11-year-old niece and a seven-year-old neighbor of his niece alleged that defendant touched their genital areas and/or committed sexual penetration against them. Defendant denied these charges, which he said were fabricated by his daughter and niece in order to get defendant returned to prison.

Defendant first challenges the admission of certain evidence, which he claims was inadmissible hearsay. MRE 801(c); MRE 802. However, the first "evidence" he cites was not evidence at all but a reference in a prosecutor's question to a statement allegedly made by the seven-year-old victim regarding an instance of digital penetration. A prosecutor's question does not constitute evidence.[1]

Defendant also challenges the foster mother's testimony about disclosures made by the seven-year-old victim. However, this testimony was excepted from the hearsay rule under the "tender years" exception in MRE 803A. The disclosures were made without any prompting

[1] We note that the trial court rejected the claim of penetration of the seven-year-old victim and found defendant guilty of the lesser charge of CSC II.

from, or under any questioning by, the foster mother. Furthermore, the delay in disclosing was excused by the fact that the seven-year-old needed time to become comfortable with her foster mother and made the disclosures just three weeks after being placed in that foster home.

Lastly, the challenged testimony by the examining physician about the seven-year-old victim's disclosures to the medical social worker were not hearsay as defined in MRE 801(c) because they were not offered to prove the truth of the matter asserted but, rather, were offered in the context of explaining the physician's preparations for his imminent physical examination of the victim.[2]

Next, defendant challenges the sufficiency of the evidence to convict him of CSC II against the seven-year-old victim. When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the elements of the charged offense were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The seven-year-old victim testified that defendant pulled down her pants and touched her front private part, in the area under her underwear, with his front private part. This testimony was sufficient to establish beyond a reasonable doubt that defendant touched her genital area, which qualified as "sexual contact" under MCL 750.520a(d) and (o).[3]

Defendant next argues that reversal is required because CSC II should not have been considered by the trial court, given that the information charged him only with CSC I.

In *People v Nyx*, 479 Mich 112, 115; 734 NW2d 548 (2007), the defendant was charged with CSC I. After a bench trial, the trial court convicted the defendant of CSC II. *Id*. The defendant argued that "the trial court was without authority to consider the cognate lesser offense of CSC II." *Id*. at 116. Justices Taylor and Markman agreed, concluding:

> [E]ven if the crime is divided by the Legislature into degrees, the offense of a lesser degree cannot be considered under MCL 768.32(1) unless it is inferior, i.e., is within a subset of the elements of the charged greater offense. Given that all the elements of CSC II are not included within CSC I, the trial court was without authority to convict defendant of CSC II after it acquitted him of CSC I. [*Id*. at 121 (Taylor, C.J.), 137 (Markman, J.).]

Justices Cavanagh and Kelly concurred with the result reached by Justices Taylor and Markman, reasoning that "[d]efendant did not have adequate notice that he faced the charge of CSC II, so convicting him of that offense would violate his right to due process." *Id*. at 142-143. Justices

---

[2] Defendant also raises a claim of ineffective assistance of counsel in connection with his hearsay issues, arguing that defense counsel should have objected to the alleged hearsay testimony. However, counsel is not required to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

[3] Under 2007 PA 163, effective July 1, 2008, these subsections were redesignated as subsections (e) and (q).

Cavanagh and Kelly further indicated that, "as Justice Corrigan has noted, . . . the lead opinion's characterization of the term 'inferior' is contrary to the established definition and historical use of the term." *Id*. The lead opinion had characterized an "inferior" offense as one whose elements are contained within the charged offense. *Id*. at 131. Justices Cavanagh, Kelly, and Corrigan preferred to define an "inferior" offense as including an offense designated as a lesser-degreed offense by the Legislature. See *id*. at 155-161 (Corrigan, J.).

In *Nyx*, a majority of justices failed to join the lead opinion in concluding that a defendant can never properly be convicted of CSC II if he has only been charged with CSC I. Nevertheless, in *People v Cron*, 480 Mich 999; 742 NW2d 126 (2007), the Supreme Court,[4] in considering an application for leave to appeal a judgment of the Court of Appeals, stated:

> [W]e REVERSE the judgment of the Court of Appeals to the extent it affirms the defendant's conviction for fourth-degree criminal sexual conduct, we VACATE the defendant's conviction and sentence for fourth-degree criminal sexual conduct, and we REMAND this case to the Kent Circuit Court for resentencing on the defendant's remaining conviction. In this case, the jury should not have been instructed on fourth-degree criminal sexual conduct, because that offense is not a necessarily included lesser offense of second-degree criminal sexual conduct. See *People v Nyx*, [*supra*].

It is unclear whether *Cron* represents the Supreme Court's conclusion that the lead opinion in *Nyx* should be considered binding law. However, even if we do consider the *Nyx* lead opinion as binding law, we nonetheless find no basis for reversal in this case.

First, defendant affirmatively waived an objection to the trial court's consideration of CSC II. At the conclusion of the proofs at trial, the prosecutor indicated that CSC II would be an appropriate lesser charge. The following colloquy ensued:

> MR. ZOET [defense counsel]: Your Honor, I will state that I agree that criminal sexual conduct in the second degree is probably a lesser included offense based upon the testimony that came [in] here. I forgot that one of the circumstances is, is touching over clothing for sexual contact.
>
> THE COURT: Right.
>
> MR. ZOET: I was thinking more of the requirements of the assault with intent to commit.
>
> THE COURT: Okay. Okay. I'm with you.
>
> MR. ZOET: Thank you.

[4] Justice Corrigan dissented from the order.

This exchange makes clear that defense counsel waived any objection to the CSC II charge. See *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). "Counsel may not harbor error as an appellate parachute." *Id*. at 214. Because of counsel's waiver, there is no error for us to review. *Id*. at 215.

However, defendant also contends that his attorney's waiver constituted ineffective assistance of counsel. Effective assistance of counsel is presumed, and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). To demonstrate ineffective assistance, a defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness, (2) there is a reasonable probability that this performance affected the outcome of the proceedings, and (3) the proceedings were fundamentally unfair or unreliable. *Id*. at 485-486; *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

We cannot conclude that defense counsel's actions fell below an objective standard of reasonableness. Given the evidence presented at trial, it was reasonable for counsel to hope for convictions of the 15-year offense of CSC II as opposed to the life offense of CSC I. Moreover, at trial, defendant denied any sexual penetration *and* any sexual contact with the victims; his defense constituted a rebuttal of CSC II as well as CSC I. Under the circumstances, defendant has not met his burden of establishing ineffective assistance of counsel.

Defendant also argues that his convictions should be reversed because, even though his attorney requested it, the judge failed to consider the lesser charge of assault with intent to commit CSC II. Defendant's argument is without merit. First, a review of the record indicates that defense counsel essentially abandoned his request for the assault charge when he conceded that the CSC II charge would be appropriate. Apparently, counsel initially thought that an assault charge would be appropriate because of the alleged touching that took place over clothing, but, as noted, he then stated, "I forgot that one of the circumstances [for CSC II] . . . is touching over clothing . . . ." Second, even assuming that, in general, a lesser charge of assault with intent to commit CSC II was appropriate, a lesser charge should not be given unless a rational view of the evidence supports it. *People v Mendoza*, 468 Mich 527, 545; 664 NW2d 685 (2003). Here, the evidence supported a completed sexual touching or sexual penetration, not an assault in which such a touching or penetration was not accomplished. Reversal is unwarranted.

Finally, defendant argues that the trial court erred in scoring offense variables (OVs) 3, 4, 8, 9, 10, 11, and 13 in connection with the CSC I offense. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A sentencing court's scoring of points under the sentencing guidelines is reviewed for an abuse of discretion. See *id*.

Defendant's CSC I conviction was based on a single digital penetration of his 13-year-old daughter. At sentencing, five points were assessed for OV 3, but there was no "bodily injury" that could be attributed to defendant, and therefore OV 3 should have been scored at zero. MCL 777.33(e), (f). Although there was evidence of injury to the victim's hymen, the victim acknowledged other voluntary intercourse, and, significantly, the examining physician testified that he "could not say that [the criminal] . . . sexual contact or the voluntary sexual contact that she had had caused the injury that I was seeing."

Some evidence supported the ten points scored for OV 4 because the victim may require future counseling, especially in light of the fact that this serious offense was perpetrated against her by her own father. MCL 777.34(2).

Fifteen points were assessed for OV 8; however, there was no evidence that defendant transported the victim to another place or held her captive. MCL 777.38. Accordingly, OV 8 should have been scored at zero.

OV 9 was scored at 25 points, which would be appropriate if ten or more victims had been placed in danger of physical injury or death. MCL 777.39(1)(b). Instead, there was only one CSC I victim, and the score should have been zero. MCL 777.39(1)(d); see also *People v Gullett*, 277 Mich App 214, 218; 744 NW2d 200 (2007). The prosecutor concedes this point on appeal.

Fifteen points were assessed for OV 10, indicating "predatory conduct," MCL 777.40(1)(a), which the statute defines as "preoffense conduct directed at a victim for the primary purpose of victimization," MCL 777.40(3)(a). Here, there was evidence of such conduct, because the CSC I victim testified that, when she was nine years old, defendant was walking with her and stated that he would give her five dollars if she would "go around the corner with him, let him stick it in . . . ." The 15-point score was appropriate.

With regard to OV 11, 25 points were assessed, indicating that one criminal sexual penetration occurred. MCL 777.41(1)(b). However, the statute indicates that points should not be scored for the one penetration that formed the basis of a CSC I offense, MCL 777.41(2)(c), and there was no evidence of penetration beyond that one occurrence. Although the CSC I victim testified that defendant, in addition to committing the digital penetration that formed the basis for the conviction, also rubbed his penis against her, there was insufficient evidence that the rubbing occurred directly on her genitals and thereby constituted penetration. The proper score for OV 11 was zero.

OV 13, which concerns a continuing pattern of criminal behavior, was scored at 50 points, which would be appropriate if the evidence established three or more sexual penetrations against a person or persons under the age of 13. MCL 777.43(1)(a). The evidence showed at least three CSC offenses in the last five years that concerned sexual contact, but it established only one penetration. Therefore, the correct score for OV 13 was 25, indicating a pattern of criminal activity involving three or more crimes against a person. MCL 777.43(1)(b). The prosecutor concedes this point on appeal.

Because these errors, if corrected as noted in this opinion, would reduce defendant's OV score from 145 to 60, and would result in a different recommended sentence range, resentencing is required. See *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

We affirm defendant's convictions but remand for resentencing. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Christopher M. Murray