STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 3, 2011
v	No. 295619 Wayne Circuit Court
JOSEPH HESTER, Defendant-Appellant.	LC No. 09-018971

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by jury of three counts of first-degree criminal sexual conduct (person under 13), MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct (person under 13), MCL 750.520c(1)(a). On each of the first-degree CSC counts, the Court sentenced defendant to 35 years to 90 years' imprisonment. On each of the second-degree CSC counts, the Court sentenced him to 10 to 15 years' imprisonment to be served concurrently, with credit for 143 days spent in custody. We affirm defendant's convictions, but remand for resentencing.

Defendant first argues that the trial court erred by failing to give a specific unanimity instruction to the jury, and that defense counsel was ineffective for failing to request such an instruction. We find no error requiring reversal.

First, defense counsel's affirmative statement that there were no objections to the jury instructions constitutes express approval of the instructions and is a waiver of review of the instructions on appeal. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Unlike the forfeiture of an issue, which arises from the failure to object, a waiver extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). However, defendant also argues that trial counsel was ineffective for expressly approving the jury instructions that failed to include the specific unanimity instruction.

Criminal defendants are guaranteed a unanimous jury verdict under the state constitution. See Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511, 521 NW2d 275 (1994). Consequently, trial courts are required to give proper instructions regarding the unanimity requirement. *Id.* at 511. "[I]t is the duty of the trial court to properly instruct the jury on this unanimity requirement." *People v Martin*, 271 Mich App 280, 338, 721 NW2d 815 (2006).

"Under most circumstances, a general instruction on the unanimity requirement will be adequate." *Id.* "However, the trial court must give a specific unanimity instruction where the state offers evidence of alternative acts allegedly committed by the defendant and 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." *Id.* (internal quotations and citation omitted). Our review of the record indicates that a specific unanimity instruction should have been given in this case, but that trial counsel waived this issue.

"Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 460 NW2d 246 (2002). Findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.* This Court decides ineffective assistance of counsel claims based on the existing record. See *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997); *People v Ginther*, 390 Mich 436, 443; 197 NW2d 281 (1973). This Court must reverse if trial counsel rendered objectively deficient performance and there is a reasonable probability that the outcome of the trial would have been different but for trial counsel's error. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Because defendant did not raise a claim of ineffective assistance of counsel in the trial court, our review is limited to errors apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish a claim for ineffective assistance of counsel, a defendant must "show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citation omitted).

Defendant argues that but for counsel's failure to request the specific unanimity instruction, he would likely have been convicted only of counts two and four. We disagree. Even if defense counsel had requested the specific unanimity instruction, and it had been given, the result of the proceedings would not likely have been different. Kianne testified unequivocally that defendant penetrated her vagina with his penis, and that he performed cunnilingus on her. Kianne's testimony was consistent and credible. Kajhana likewise testified that defendant put his tongue on her private. Neither girl ever waivered in her allegations against defendant. The jury would undoubtedly have been able to agree upon one specific incident as the basis for each count against defendant. Therefore, regardless of defense counsel's error the outcome of the proceedings would have remained the same, and there was no error requiring reversal.

Next, defendant argues that the trial court erred in calculating his sentence. We agree.

The proper interpretation and application of the statutory sentencing guidelines are legal questions that an appellate court reviews de novo. *People* v *Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006); *People* v *Houston*, 473 Mich 399, 403; 702 NW2d 530 (2005). Constitutional questions are reviewed de novo, with any associated findings of fact reviewed for clear error.

People v *Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006). This Court decides ineffective assistance of counsel claims based on the existing record. See *People v Williams*, 223 Mich App 409, 414, 566 NW2d 649 (1997); *People v Ginther*, 390 Mich 436, 443, 197 NW2d 281 (1973).

Defendant argues that Prior Record Variable (PRV) 2 was incorrectly scored for four prior convictions. PRV 2 assesses points for prior low severity felony convictions. An offender who has three prior low severity felonies will receive a score of 20 points. An offender who has four or more prior low severity felonies is assessed 30 points. MCL 777.52.

MCL 777.52(2) defines a "prior low severity felony conviction" as a prior conviction falling within any of the categories of felonies listed in the statute "if the conviction was entered before the sentencing offense was committed."

Defendant argues that he was convicted of a misdemeanor and that the trial court incorrectly counted the crime as a felony based on an error in the Presentence Investigation Report (PSIR). On page 3 of the PSIR, it states that defendant has a prior conviction from 1988 for "Computers - Fraudulent Access - $20,000 or More." However, based on the docket entries defendant has produced from the trial court for that case, it appears that he was convicted in 1988 under a previous version of the same statute for only a misdemeanor.

According to the docket entries for defendant's case from 1988, he pleaded guilty to one count of violating MCL 752.794, involving less than $100. That statute provided as follows in 1988, when the offense occurred:

> A person shall not, for the purpose of devising or executing a scheme or artifice with intent to defraud or for the purpose of obtaining money, property, or a service by means of a false or fraudulent pretense, representation, or promise with intent to, gain access to or cause access to be made to a computer, computer system, or computer network.

MCL 752.797 set the penalties for a violation of MCL 752.794, as follows, in 1988:

> A person who violates this act, if the violation involves $100.00 or less, is guilty of a misdemeanor. If the violation involves more than $100.00, the person is guilty of a felony, punishable by imprisonment for not more than 10 years, or a fine of not more than $5,000.00, or both.

In 1996, MCL 752.797 was amended to redefine when a violation of MCL 752.794 is a misdemeanor or a felony. MCL 752.797(1)(d)(*i*) now provides that the offense of computer fraud is a felony, punishable for not more than 10 years in prison or a fine of not more than three times the aggregate amount, or both, if the violation involves an aggregate amount of $20,000 or more. Accordingly, based solely on the statutes involved, defendant has shown that computer fraud involving an amount of $20,000 or more was not a felony in 1988 and, therefore, his PSIR is inaccurate.

Because there was no such felony as fraudulent access to computers involving $20,000 or more in damages in 1988 as a matter of law, defendant has established that it was error for the

trial court to count this offense as a felony conviction based on the information contained in the PSIR and defendant is entitled to resentencing on this error.

Similarly, defendant argues that a conviction for felon in possession of a firearm was incorrectly counted under PRV 2. That offense occurred on August 17, 2008, and defendant entered a plea to it and was sentenced on October 28, 2008, according to information in the PSIR. Defendant now argues that that offense occurred after his sentencing offenses and, therefore, his conviction for felon in possession of a firearm should not have been scored under PRV 2 because it was not a prior conviction.

Defendant is mistaken in his belief that this prior conviction was used to calculate his score under PRV 2. The prosecution originally gave notice that defendant was subject to Habitual Offender-Fourth Offense enhancement upon conviction here. One of the three cited previous felony convictions was the felon in possession of firearm. However, during the first day of trial, at the prosecutor's request, the court directed the information to be amended to indicate habitual offender third offense. At sentencing, the court initially thought defendant was subject to the habitual offender fourth offense enhancement, but was corrected by the prosecutor and defense and instead applied the habitual offender - third offense enhancement. The Court applied a sentencing guidelines score level of F-IV based on the PSIR. Applying habitual offender-third enhancement, the Court determined a guidelines range of 171-427 months minimum sentence. Therefore, the trial court did not err in this respect.

Defendant also cited error in the scoring of PRV 6. According to the PSIR, on October 28, 2008, defendant was sentenced to two years probation in Wayne Circuit Court for being a felon in possession of a firearm. That offense occurred on August 17, 2008. Also according to the PSIR, this offense occurred on May 18, 2009, and, therefore, according to the PSIR, defendant was on probation at the time of this offense. The PSIR is incorrect and PRV 6 was improperly scored. The evidence actually showed that the current crimes took place between September 2006, and August 17, 2008. Accordingly, defendant should not have been scored under PRV 6 as if he were on probation when the instant offenses were committed and we remand to the trial court for resentencing.

Finally, defendant argues that trial counsel was ineffective for declining to exercise peremptory challenges to dismiss jurors who had been victims of sexual abuse. We disagree.

Under the two-pronged test for establishing ineffective assistance of counsel, defendant must show that counsel's performance was deficient according to prevailing professional norms and that the deficiency was so prejudicial that defendant was deprived of a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). On this latter point, defendant must demonstrate a reasonable probability that but for counsel's unprofessional error or errors, the trial outcome would have been different. *Id.* at 302-303. Defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. *Id.* at 302.

While questioning members of the jury penal it was asked if there was "anyone in the jury box who has any close friends or relatives, or themselves been a victim of any type of sexual assault?" Several jurors raised their hands. Despite this personal relationship with sexual abuse, all of these jurors stated that they could decide the case fairly. In addition, Juror Brown stated

that she was a child care worker that she "would have a problem hearing a child testify" when asked by the prosecutor how she felt about a child's testimony. Juror Holmes stated that it would bother her to hear testimony about a child who had endured sexual abuse. Defense counsel asked both Brown and Holmes if they could still render an impartial verdict. Both answered "yes." Defense counsel declined to exercise any peremptory challenges.

"[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy." *People v Johnson*, 245 Mich App 243, 259, 639 NW2d 1 (2001). The decision whether to challenge a juror for cause or to exercise a peremptory challenge is a matter of trial strategy that seldom rises to a level of ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). Although the jurors indicated that they had been victims of sexual abuse as children, they all stated that they could decide the case fairly. The other two jurors with concerns about seeing children testify also agreed that they could render a fair verdict. In light of this, defense counsel apparently concluded that the removal of these jurors would have been futile. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42, 555 NW2d 715 (1996). The fact that the strategy chosen did not work does not constitute ineffective assistance of counsel. *Id.* Defense counsel was not ineffective.

Affirmed, but remanded for recalculation of the guidelines and resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro