STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 30, 2011
v	Nos. 296745; 296746 Saginaw Circuit Court
DEAN EDWARD WEISENBACH, Defendant-Appellant.	LC Nos. 06-028121-FC; 08-031803-FC

Before: WHITBECK, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

In these consolidated cases, defendant appeals as of right his 19 criminal sexual conduct (CSC) convictions following a jury trial. Defendant was convicted of and sentenced for eight counts of first-degree CSC, MCL 750.520b(1)(a) (under 13); nine counts of second-degree CSC, MCL 750.520c(1)(a) (under 13); and two counts of third-degree CSC, MCL 750.520d(1)(a) (between 13 and 16), after engaging in sexual acts with his daughter and foster daughter.[1] We affirm defendant's convictions but vacate his sentences in part and remand for resentencing consistent with this opinion.

I. JURY INSTRUCTIONS

Defendant first asserts that all of his second-degree CSC convictions with respect to his foster daughter and one of his second-degree CSC convictions with respect to his daughter should be vacated as a result of instructional error. Specifically, defendant contends that the trial court erroneously instructed the jury that it could consider second-degree CSC as a lesser included offense of first-degree CSC. This unpreserved allegation of instructional error is

[1] In Docket No. 296745, defendant was sentenced to 225 to 360 months' imprisonment for four counts of first-degree CSC, and 10 to 15 years' imprisonment for four counts of second-degree CSC, in the case involving his foster daughter. In Docket No. 296746, defendant was sentenced to 225 to 360 months' imprisonment for four counts of first-degree CSC, 10 to 15 years' imprisonment for five counts of second-degree CSC, and 10 to 15 years' imprisonment for two counts of third-degree CSC, in the case involving his daughter.

subject to the plain-error rule. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

Defendant is guilty of first-degree CSC if he engaged in sexual penetration with another person and that other person was under 13 years of age. MCL 750.520b(1)(a). MCL 750.520a(r) defines "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." Defendant is guilty of second-degree CSC if he engaged in sexual contact with another person and the other person was less than 13 years old. MCL 750.520c(1)(a). "Sexual contact" in relevant part "includes the intentional touching of the victim's . . . intimate parts or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts," and such intentional touching was done for sexual arousal or gratification, for a sexual purpose, or in a sexual manner for (1) revenge, (2) to inflict humiliation, or (3) out of anger. MCL 750.520a(q).

In this case, the trial court instructed the jury that it could find defendant guilty of second-degree CSC as a lesser crime rather than first-degree CSC with respect to the numerous first-degree CSC counts involving the victims. A trier of fact may find "a defendant guilty of a lesser offense if the lesser offense is necessarily included in the greater offense." *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010). Nonetheless, second-degree CSC is a cognate lesser offense of first-degree CSC because it requires proof of an intent not required by first-degree CSC – that defendant intended to seek sexual arousal or gratification. *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997). "Cognate offenses share several elements and are of the same class or category as the greater offense, but contain elements not found in the greater offense." *Wilder*, 485 Mich at 41. "[A] cognate offense is *not* an inferior offense under MCL 768.32(1)[;]" thus, "the trier of fact may not find a defendant not guilty of a charged offense but guilty of a cognate offense because the defendant would not have had notice of all the elements of the offense that he or she was required to defend against." *Id.*

The trial court provided a jury instruction that was contrary to the current state of the law when it instructed the jury that it could find defendant guilty of the lesser offense of second-degree CSC rather than the charged first-degree CSC offenses. *Wilder*, 485 Mich at 41; *Lemons*, 454 Mich at 253-254. Still, reversal is not warranted in this case. Notably, defendant requested that the trial court instruct the jury on second-degree CSC as a "lesser included" offense of first-degree CSC for both cases. A defendant may not expressly agree to the jury instructions and then argue to the contrary on appeal. See *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

Additionally, defendant misstated the record on appeal with respect to his foster daughter: "The Defendant was charged in the case involving [his foster daughter] only with eight counts of first-degree criminal sexual conduct." In fact, defendant was charged with four counts of first-degree CSC for engaging in digital penetrations with his foster daughter when she was less than 13 years of age and four counts of second-degree CSC for engaging in sexual contact with her when she was less than 13 years of age. The trial court provided separate jury instructions for the foster daughter on the charged offenses, and the jury found defendant guilty on all counts in that case. With respect to his daughter, the verdict form reflects that the jury

made the following findings regarding the eight counts of first-degree CSC against defendant: guilty of four counts of first-degree CSC, guilty of two counts of second-degree CSC, and guilty of two counts of third-degree CSC. We note that the concern over convicting a defendant of a cognate lesser offense lies in the risk that the defendant would not have notice of all the elements of the offense that he was required to defend against. *Wilder*, 485 Mich at 41. Such is not the case here, where defendant was charged with separate second-degree CSC counts as to both victims and actually sought a jury instruction of second-degree CSC as a lesser offense. Reversal is not warranted under the plain-error rule. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Next, defendant alleges that the trial court erroneously submitted all eight first-degree CSC counts with respect to his daughter to the jury when there was only evidence to support five such counts. This unpreserved allegation of instructional error is abandoned where defendant failed to adequately address the merits. See *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004) ("The failure to brief the merits of an allegation constitutes an abandonment of the issue"). In his brief on appeal, defendant does not explain how, if at all, the error affected the verdict. Moreover, this case does not involve logically irreconcilable verdicts; there is no record evidence of unresolved jury confusion, and there was sufficient evidence to support defendant's convictions. We conclude that reversal is not warranted under the plain-error rule because there was no indication that the error affected defendant's substantial rights or "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Carines*, 460 Mich at 763 (internal quotation marks omitted).

II. TESTIMONY OF THE EXPERT WITNESS

Defendant next complains that the prosecutor's expert witness improperly vouched for the credibility of the victims. A trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). Defendant's failure to object below limits our review to the plain-error rule. *Carines*, 460 Mich at 763-764. Generally, it is improper for "a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury[,]" and "[a]n expert may not vouch for the veracity of a victim." *Dobek*, 274 Mich App at 71. In child sexual abuse cases, "expert testimony concerning syndrome evidence is sometimes necessary to explain behavioral signs that may confuse a jury so that it believes that the victim's behavior is inconsistent with that of an ordinary victim of child sexual abuse." *People v Peterson*, 450 Mich 349, 362; 537 NW2d 857 (1995). In such cases "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *Id.* at 352.

We conclude that the expert's testimony did not violate any principles espoused above. On appeal, defendant attempts to stretch the expert's testimony to that of an implicit comment on the credibility of the prosecutor's witnesses. The expert did not testify that the victims' behavior was consistent with that of a sexually abused child. *Id.* at 374. From the prosecutor's standpoint, as argued during closing argument, the utility of the expert's testimony was to explain that the actions of the victims were consistent with the actions of victims of child sexual abuse. "The prosecution may, in commenting on the evidence adduced at trial, argue the

reasonable inferences drawn from the expert's testimony and compare the expert testimony to the facts of the case." *Id.* at 373. We conclude that there was no error related to the expert's testimony, and an abuse of discretion did not occur.

III. EXCLUSION OF EVIDENCE

Subsequently, defendant argues that the trial court improperly denied defendant's motions for discovery of the foster daughter's medical and psychological records. A trial court's decisions regarding discovery and in camera inspections are subject to an abuse of discretion standard. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003); *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MCR 6.201(C)(1) provides in relevant part that "there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege[.]" Still, "[i]f a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records." MCR 6.201(C)(2). "Even inadmissible evidence is discoverable if it will aid the defendant in trial preparation." *Laws*, 218 Mich App at 452. A defendant has "a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or innocence." *Id.* We have thoroughly reviewed the lower court file, which contains the sought after records, including the foster daughter's medical records, unspecified handwritten notes, the foster daughter's psychological evaluation, letters of support for the second wife of defendant, an August 25, 2006 court report regarding the second wife's custody of the foster daughter, and a July 25, 2006 CPS initial service plan for the second wife. On appeal, defendant chiefly contends that he "was denied a fair trial by the trial court's denial of access to the medical records from [a physician]." We conclude that the trial court did not abuse its discretion by denying defendant's discovery request for the foster daughter's medical records. The basis for defendant's request appears to be a purported hearsay statement by defendant's second wife. Defendant failed, however, to demonstrate a good-faith belief, grounded in articulable fact, that there was a reasonable probability that the foster daughter's medical records likely contained material information necessary to the defense. MCR 6.201(C)(2). Moreover, after reviewing the foster daughter's medical records, we agree with the trial court that nothing in the foster daughter's medical records "would assist the defense in this case." The trial court's ruling was a reasonable and principled outcome and did not amount to an abuse of discretion.

IV. SENTENCING

A. SCORING UNDER THE GUIDELINES

Defendant next challenges the trial court's OV 11 scoring of 50 points. We review issues concerning the proper scoring of sentencing guidelines variables for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). OV 11 should be scored 50 points if "[t]wo or more criminal sexual penetrations occurred." MCL 777.41(1)(a). Under

MCL 777.41(2)(c), "[p]oints should not be scored, however, for the one penetration underlying a CSC-1 conviction." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). As noted above, sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). For 50 points to be scored for OV 11, there must have been two or more additional sexual penetrations that arose out of the sentencing offense. *People v Johnson*, 474 Mich 96, 101-102; 712 NW2d 703 (2006).

Sentencing information reports (SIR) were prepared for each case. With respect to the case involving the foster daughter, defendant received a total prior record variable (PRV) score of 22 points, PRV level C, and a total offense variable (OV) score of 205 points, OV level VI, for the class A felony, first-degree CSC. With respect to case involving his daughter, defendant received a total PRV score of 22 points, PRV level C, and a total OV score of 190 points, OV level VI, for the class A felony, first-degree CSC. At the sentencing hearing, the trial court never set forth defendant's PRV scores, but it ruled that defendant's OV total was 125 points. Clearly, it ruled favorably on some of defendant's objections to the scoring of the OVs. The record suggests that defendant's PRV total was unchanged by the trial court, where the trial court indicated that defendant's minimum sentencing range was 135 to 225 months. Such a range corresponds to PRV level C (10 to 24 points) and OV level VI (100 or more points). See MCL 777.62. The trial court, therefore, reduced defendant's OV total from 205 to 125 in the case involving his foster daughter, and from 190 to 125 in the case involving his daughter. The trial court did not reference the fact that there were two separate criminal cases for which defendant received sentences. The trial court did not amend either SIR to reflect changes in the scoring of the OVs. We find that the trial court erred by failing to provide corrected and completed SIRs in each case. MCR 6.425(D).

The record further does not support the trial court's scoring of OV 11 at 50 points because there is no evidence that two additional penetrations arose out of the same underlying sentencing offense in either case. On this record, there is a reasonable inference that at least one additional digital penetration occurred with the foster daughter during a given criminal transaction in that case. Thus, 25 points should be assessed for OV 11 where "[o]ne sexual penetration occurred," MCL 777.41(1)(b), and the non-offense penetration arose out of the sentencing offense, MCL 777.41(2)(a). Such a conclusion reduces defendant's total OV score from 125 points to 100 points in that case; however, defendant's OV level remains the same at VI, and his recommended minimum sentence range remains unchanged at 135 to 225 months. MCL 777.62. Defendant received a minimum sentence of 225 months for his first-degree CSC convictions in the foster daughter's case (Docket No. 296745). Even though there was a scoring error, resentencing is not required because "[w]here a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

In Docket No. 296746, however, there is no record evidence that any additional sexual penetrations arose out of the sentencing offense in the case involving defendant's daughter. Thus, OV 11 should have been scored zero points instead of 50 points. In this case, the scoring error reduces defendant's total OV score from 125 points to 75 points, which changes his OV level from VI to IV and his recommended minimum sentence range under the legislative

guidelines from 135 to 225 months to 108 to 180 months. MCL 777.62. Defendant received a minimum sentence of 225 months for his first-degree CSC convictions in that case. Because the scoring error altered the appropriate guidelines range, resentencing is required. *Francisco*, 474 Mich at 89 n 8.

B. DEPARTURE FROM THE GUIDELINES

Finally, defendant complains that the trial court imposed minimum sentences on his second- and third-degree CSC convictions that amounted to upward departures and that the trial court failed to provide substantial and compelling reasons for doing so. We agree.

Because defendant received concurrent sentences, the trial court was not required to provide in the presentence investigation report (PSIR) the recommended minimum sentence range under the legislative guidelines for each conviction for which a sentence was authorized. MCL 771.14(2)(e)(i). It was only required to prepare the recommended minimum sentence range for the crime having the highest crime class. MCL 771.14(2)(e)(ii). First-degree CSC is a class A felony; third-degree CSC is a class B felony and second-degree CSC is a class C felony. MCL 777.16y. Thus, for sentencing on defendant's multiple convictions, PSIRs and SIRs were properly prepared for defendant's first-degree CSC convictions, the highest crime class felony conviction. *Id.*

In making his argument that there was an upward departure from the guidelines, defendant assumes that his guidelines' scoring for his second- and third-degree CSC convictions would have been the same as the corrected scoring for his first-degree CSC convictions: a PRV score of 22 and an OV score of 100. For his third-degree CSC convictions, defendant's sentences should have been determined by using the sentencing grid in MCL 777.63. Presuming the same guidelines scoring as for his first-degree CSC convictions, defendant would have a PRV level C (10 to 24 points) and an OV level VI (more than 75 points) for each case. PRV level C and OV level VI for a class B felony result in a minimum sentencing range of 57 to 95 months. MCL 777.63. For his second-degree CSC convictions, defendant's sentences should have been determined by using the sentencing grid in MCL 777.64. Defendant would have a PRV level C (10 to 24 points) and an OV level VI (more than 75 points) for each case. PRV level C and OV level VI for a class C felony provide for a minimum sentencing range of 43 to 86 months. MCL 777.64.[2]

The trial court sentenced defendant to minimum sentences of ten years (or 120 months) for all of his second- and third-degree CSC convictions. The minimum sentence of 120 months for these convictions constituted an upward departure from the recommended minimum sentence range under the legislative guidelines. The trial court did not explain why it imposed such minimum sentences for those convictions. A trial court must impose a sentence within the

[2] The OV 11 scoring error has no bearing on the sentences for defendant's second- and third-degree CSC convictions because OV level VI requires at least 75 points for class B and C offenses, as opposed to 100 points for class A offenses.

calculated guidelines range, MCL 769.34(2), unless substantial and compelling reasons exist to depart from the statutory minimum range, and the trial court states on the record the reasons for departure, MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). The trial court must articulate substantial and compelling reasons for the upward departure on the record; "it is not enough that there *exists* some potentially substantial and compelling reason to depart from the guidelines range." *Babcock*, 469 Mich at 258. Because the trial court failed to articulate any reasons, let alone substantial and compelling reasons, we remand for resentencing or rearticulation. *People v Lucey*, 287 Mich App 267, 274; 787 NW2d 133 (2010).

We affirm but vacate defendant's first-degree CSC sentences in Docket No. 296746 and defendant's second- and third-degree CSC sentences in Docket Nos. 296745 and 296746. We remand for further resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly