# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 18, 2011 |
| v<br><br>JOEL AARON KING,<br><br>Defendant-Appellant. | No. 297667<br>Oakland Circuit Court<br>LC No. 2009-228652-FC |

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | |
| v<br><br>JOEL AARON KING,<br><br>Defendant-Appellant. | No. 303329<br>Oakland Circuit Court<br>LC No. 2009-228654-FC |

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Defendant was charged with offenses in two separate cases that were consolidated for a jury trial. In LC No. 2009-228652-FC, defendant was convicted of one count of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a), and one count of assault and battery, MCL 750.81. In LC No. 2009-228654-FC, defendant was convicted of two additional counts of first-degree CSC, MCL 750.520b(1)(a). Defendant was sentenced to 25 to 40 years' imprisonment for each CSC conviction, and to 52 days, time served, for the assault conviction. Defendant now appeals as of right his convictions and sentences in each case. We affirm.

Defendant's convictions arise from sexual activity with two of his stepdaughters. In LC No. 2009-228652-FC, defendant was charged with first-degree CSC for sexually penetrating his stepdaughter KD between June 2007 and November 2007; he was also charged with assault and battery for kissing his stepdaughter TS between March 2004 and November 2004. In LC No. 2009-228-654-FC, defendant was charged with two additional counts of first-degree CSC for sexually penetrating KD between November 2007 and November 2008. The cases were brought

separately because they were initiated by separate investigating jurisdictions. Over defendant's objection, the trial court permitted the two cases to be consolidated for trial.

## I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence at trial was insufficient to support any of his convictions. Specifically, defendant maintains that no credible evidence established penetration or the identity of the perpetrator of the sexual assaults.[1]

When reviewing the sufficiency of the evidence, we must determine whether the evidence, viewed in the light most favorable to the prosecution, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant was guilty of the charged crimes. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v John Williams, Jr*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

A person is guilty of first-degree CSC if he engages in sexual penetration with a person under the age of 13 years. MCL 750.520b(1)(a); *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). 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." The prosecution need only show penetration of the genital opening; touching of the labia majora is considered penetration. *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981). A victim's testimony alone can provide sufficient evidence to support a conviction. See *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994), aff'd 450 Mich 349 (1995), amended 450 Mich 1212 (1995). Further, every offense requires proof of identity. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *People v Thomas Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

In this case, KD testified that defendant touched her on her "private" area on the charged occasions. She stated that he touched her underneath her clothing and that he placed his hand "in between" the two sides of her genital area. Viewed in a light most favorable to the prosecution, KD's testimony was sufficient to allow the jury to find that there was penetration of the genital

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[1] In the statement of issues presented defendant challenges the sufficiency of the evidence in regard to his CSC convictions and his assault and battery conviction; however, defendant fails to address the evidence in regard to his assault and battery conviction in the analysis section of his brief. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Accordingly, we consider defendant's argument in regard to the sufficiency of the evidence to support the assault and battery conviction abandoned on appeal.

opening. We further find that there was sufficient evidence presented to identify defendant as the person responsible for the sexual assaults. Testimony indicated that when the sexual assaults occurred, no adult males were residing with the family other than defendant. Further, KD testified that she sometimes opened her eyes during the assaults and was able to identify defendant by his arm. KD stated that she was sure that defendant was the person responsible for the acts she described. Circumstantial evidence and the reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Gayheart*, 285 Mich App 202, 216; 776 NW2d 330 (2009). KD's testimony and the circumstantial evidence indicating that defendant was the only adult male living in the house at the time of the assaults was sufficient to establish defendant's identity as the perpetrator beyond a reasonable doubt.

Further, we disagree with defendant's assertion that no credible evidence was presented to the jury regarding penetration and identity. In reviewing a challenge to the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). Viewed in this light, the victim's testimony was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that defendant was guilty of the charged crimes. *Wolfe*, 440 Mich at 513-514. It is up to the finder of fact to make decisions about the credibility of witnesses and the probative value of evidence. *Id.* Consequently, we find that there was sufficient evidence presented to support defendant's convictions.

## II. CONSOLIDATION OF CHARGES FOR TRIAL

Next, defendant argues that the trial court erred in granting the prosecutor's request to consolidate both cases against defendant for trial. Specifically, defendant argues that the trial court was required to hold separate trials because the assault and battery charge and the CSC offenses were not related under the court rule governing joinder and severance, MCR 6.120.

We review a trial court's decision regarding whether to join or sever charges for an abuse of discretion. *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). A trial court's factual findings with respect to whether offenses are related for purposes of allowing joinder are reviewed for clear error. *People v Carletus Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

"[T]he Court may join offenses charged in two or more informations or indictments against a single defendant . . . when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(B). "Joinder is appropriate if the offenses are related." MCR 6.120(B)(1). Offenses are related if they are "based on the same conduct or transaction, or a series of connected acts, or a series of acts constituting parts of a single scheme or plan." MCR 6.120(B)(1)(a)-(c). If a defendant moves for separate trials, the trial court must sever offenses that are not related as defined by MCR 6.120(B)(1). MCR 6.120(C).

In support of his argument that severance was required under MCR 6.120(C), defendant relies on *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977). However, *Tobey* was decided before MCR 6.120 was adopted. Our Supreme Court observed in *Carletus Williams*, 483 Mich at 228, "the provisions of MCR 6.120 superseded *Tobey*," and the "unambiguous language of MCR 6.120 permits joinder in a greater range of circumstances than did *Tobey*." Accordingly, MCR 6.120 governs the joinder and severance of charges for trial. Defendant makes no claim in regard to the application of MCR 6.120; nevertheless, we conclude that joinder was proper pursuant to the requirements of MCR 6.120 because the charges were based on the same conduct, MCR 6.120(B)(1), and the factors identified in MCR 6.120(B)(2) favored joinder of the charges for trial.

## III. SENTENCING

Defendant argues that he is entitled to resentencing because the trial court failed to properly respond to his challenges to the accuracy of the presentence investigation report (PSIR), and because the trial court erred in scoring 10 points for offense variable (OV) 9 of the legislative sentencing guidelines.

"The trial court's response to a claim of inaccuracies in the presentence investigation report is reviewed for an abuse of discretion." *People v Waclawski*, 286 Mich App 634, 689; 780 NW2d 321 (2009). When scoring the sentencing guidelines, a court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*

The record does not support defendant's argument that the trial court failed to respond to his challenge to information in the PSIR concerning a 1991 charge of uttering and publishing. The PSIR did not list a disposition for that charge. Defendant informed the court that the charge had been dismissed, and the court was advised that court records confirmed that dismissal. The trial court's response indicates that it understood that the charge had been dismissed. Further, it was not improper for the PSIR to include information referring to the uttering and publishing charge even though it did not result in a conviction or adjudication. Defendant did not dispute that he had been charged with that offense as a juvenile, and a sentencing court properly may consider information concerning arrests or other charges not resulting in conviction. *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008).

At sentencing, defendant also objected to statements in the PSIR by the mother of both victims, who was defendant's former wife. Although the statements were hearsay, a PSIR may contain hearsay information. *People v Potrafka*, 140 Mich App 749, 752; 366 NW2d 35 (1985). Because defendant did not deny that his former wife made the statements, it was not an abuse of discretion for the trial court to refuse to delete the statements from the PSIR, and to instead add that defendant disputed his former wife's claims.

Next, defendant argues that OV 9 was erroneously scored because there was only one CSC victim. Ten points should be assigned to OV 9 when there are two to nine victims placed in danger of physical injury or death. MCL 777.39; *People v McGraw*, 484 Mich 120, 133-135; 771 NW2d 655 (2009). The prosecution concedes that the trial court erroneously scored 10

points for OV 9 because there was only one CSC victim. We agree; but find that the scoring error does not require resentencing.

While the 10-point reduction reduced defendant's sentencing guidelines range from 135 to 225 months to 126 to 210 months, defendant's actual minimum sentence was statutorily mandated. MCL 750.520b(2)(b). Because defendant was more than 17 years of age and KD was less than 13 years of age when the offenses were committed, the mandatory minimum sentence imposed by MCL 750.520b(2)(b) required that defendant's minimum sentence be no less than 25 years. The trial court imposed a 25-year minimum sentence for each CSC conviction in accordance with the statute. Under these circumstances, the trial court's error in scoring 10 points for OV 9 had no actual impact on defendant's sentence; accordingly, defendant is not entitled to resentencing.

## IV. DEFENDANT'S STANDARD 4 BRIEF

Defendant argues that he is entitled to a new trial because he was denied his right to the effective assistance of counsel. Defendant specifically argues that defense counsel's performance was so deficient that it failed to subject the prosecution's case to meaningful adversarial testing, thereby allowing this case to be evaluated under *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Alternatively, defendant argues that he was entitled to a new trial pursuant to the standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant also argues that the trial court abused its discretion when it denied his motion for an evidentiary hearing regarding his ineffective assistance of counsel claim.

Whether defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because the trial court denied defendant's motion for a new trial and an evidentiary hearing, our inquiry is limited to mistakes apparent on the record. *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Constitutional issues are reviewed de novo. *LeBlanc*, 465 Mich at 579. A trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *People v Unger (After Remand)*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008).

To determine whether a defendant was denied the effective assistance of counsel, courts generally apply the test set forth in *Strickland*, 466 US at 687, 690, 694. To warrant relief under *Strickland*, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for defense counsel's error, the result of the proceeding would have been different. *Id.*; *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). However, in *Cronic*, 466 US at 659-662, the United States Supreme Court identified three situations in which a defense attorney's performance is so deficient that the *Strickland* test is not applied and prejudice is presumed. Prejudice is presumed when a defendant is completely denied counsel, when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," and "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." *Id.* at 659-660.

Defendant argues that his case is comparable to *People v Gioglio*, ___ Mich App ___; ___ NW2d ___ (Docket No. 293629, issued April 5, 2011), slip op at 11, rev'd __ Mich __ (September 21, 2011), in which this Court recently applied the standard articulated in *Cronic*. In *Gioglio*, the defense attorney failed to make an opening statement, failed to cross-examine the victim and various other witnesses, failed to object to improper testimony, failed to effectively present a defense, and engaged in conduct that revealed her dislike of the defendant and her belief in the defendant's guilt. This Court concluded that the defendant was entitled to relief under *Cronic* because defense counsel "completely failed to submit the prosecution's case to the meaningful adversarial testing contemplated under the Sixth Amendment to the United States constitution and the Michigan constitution." *Id.*, slip op at 15. But recently our Supreme Court overruled this Court's decision in *Gioglio* because it found that the standard articulated in *Cronic* was not applicable under the circumstances present in *Gioglio*. Thus, defendant's reliance on *Gioglio* is misplaced.

Further, we find that the standard set forth in *Cronic* is not applicable to the facts of this case. In this case, defense counsel cross-examined witnesses, presented defense witnesses, made objections, pursued discovery, opposed prosecution motions, and otherwise protected defendant's rights. The record provides no basis for finding a complete failure of counsel to advocate on behalf of defendant throughout the trial. Accordingly, the trial court did not err by refusing to grant defendant a new trial based on *Cronic.*

Defendant alternatively argues that he is entitled to a new trial under the test set forth in *Strickland*. Defendant complains that defense counsel did not call an expert witness to counter the expert witnesses offered by the prosecution with respect to the child-victim witnesses; however, he does not explain what testimony an expert could have provided to assist the defense. Thus, defendant has not provided a factual basis for concluding that defense counsel's performance was deficient, or for concluding that there is a reasonable probability that the outcome of trial would have been different if an expert had been called. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

We also find that the trial court did not abuse its discretion when it denied defendant's request for an evidentiary hearing regarding his claim of ineffective assistance of counsel. Although defendant requested in his post-trial motion that the trial court appoint Katherine Okla as an expert, he did not make an offer of proof regarding her proposed testimony. Therefore, the trial court did not abuse its discretion by denying defendant's request for an evidentiary hearing. Without a preliminary showing that Okla could offer testimony that would support a claim for relief, defendant was not entitled to an evidentiary hearing.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter