

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 14, 2013

V
DERRICK BERNARD WESTBROOK,
Defendant-Appellant.

No. 308410
Wayne Circuit Court
LC No. 11-009139-01-FC

Before: TALBOT, P.J., and DONOFRIO and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC 1), MCL 750.520b(1)(b)(ii) (sexual penetration with a person at least 13 but less than 16 years of age to whom the actor is related by blood or affinity), and second-degree criminal sexual conduct (CSC 2), MCL 750.520c(1)(b)(ii) (sexual contact with a person at least 13 but less than 16 years of age to whom the actor is related by blood or affinity). The trial court sentenced defendant to 7 to 15 years' imprisonment for each offense, the sentences to be served consecutively. Defendant appeals as of right. Because the evidence was sufficient to support defendant's convictions and he was not denied the effective assistance of counsel, we affirm his convictions, but because defendant's sentence for his CSC 2 conviction constituted a departure from the appropriate sentencing guidelines range that was not supported by a substantial and compelling reason, we vacate that sentence and remand for resentencing on the CSC 2 conviction only.

Defendant's convictions stem from the sexual assault of his daughter, "AG," who was 13 years old at the time of the incident. AG testified that defendant came into her bedroom, laid down on the bed with her, and rubbed her breasts. He then pulled down her shorts and underwear and rubbed her buttocks before inserting his penis into her vagina. After defendant ejaculated, AG got out of bed and went into the bathroom. When she returned, defendant was lying asleep on the bed. He awoke five or ten minutes later and started moving his hand up and down on his penis. He asked AG to do the same thing for him, which she did, before he moved her hand away and resumed moving his own hand up and down on his penis.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to support his convictions. We review de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App

192, 195; 793 NW2d 120 (2010). When analyzing a claim of insufficient evidence, “[w]e examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt.” *Id.* at 196. Witness credibility and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in favor of the prosecution. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

In order to establish CSC 1 pursuant to MCL 750.520b(1)(b)(ii), the prosecution must prove that: (1) the defendant engaged in sexual penetration with another person, (2) the other person was at least 13 but less than 16 years of age, and (3) the defendant is related to the victim by blood or affinity to the fourth degree. “‘Sexual penetration’ means 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). To establish CSC 2 pursuant to MCL 750.520c(1)(b)(ii), the prosecution must show that: (1) the defendant engaged in sexual contact with another person, (2) the other person was at least 13 but less than 16 years of age, and (3) the defendant is related to the victim by blood or affinity to the fourth degree. “‘Sexual contact’ includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification” MCL 750.520a(q).

In this case, AG’s age and relation to defendant were not disputed. The only contested issue was whether defendant engaged in sexual penetration and sexual contact with AG. Defendant claimed that he did not engage in such conduct with AG and that AG’s brother had slept between defendant and AG, making it impossible for the conduct to have occurred. Witness credibility, however, is a question to be resolved by the jury, and this Court must resolve all evidentiary conflicts in favor of the prosecution. *Harrison*, 283 Mich App at 378. Moreover, AG’s testimony alone was sufficient for a reasonable trier of fact to conclude that the essential elements of CSC 1 and CSC 2 were proven beyond a reasonable doubt. A victim’s testimony need not be corroborated, and can be sufficient, by itself, to support a criminal sexual conduct conviction. MCL 750.520h; *People v Brantley*, 296 Mich App 546, 551; 823 NW2d 290 (2012). Therefore, the prosecution presented sufficient evidence to support defendant’s convictions.

II. SENTENCING

Defendant next argues that he is entitled to resentencing on his CSC 2 conviction because the trial court failed to prepare a separate Sentencing Information Report (SIR) for that conviction. Although defendant did not preserve this issue for our review by raising it in the trial court, a sentence outside the appropriate guidelines range may be challenged on appeal even if not raised below, and is subject to review for plain error that affected the defendant’s substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Here, the parties agree that defendant’s CSC 2 sentence exceeds the appropriate sentencing guidelines range.

The prosecution concedes that defendant is entitled to resentencing on his CSC 2 conviction. Although the trial court prepared an SIR for defendant’s CSC 1 conviction, it failed

to do so for his CSC 2 conviction. When a trial court orders that sentences be served consecutively, an SIR should be completed for every crime with a sentence that is to be served consecutively. *People v Hill*, 221 Mich App 391, 396-397; 561 NW2d 862 (1997). In this case, the trial court sentenced defendant to consecutive terms of 7 to 15 years' imprisonment for both of defendant's convictions based on the guidelines range applicable to defendant's CSC 1 conviction. It is undisputed, however, that defendant's sentencing guidelines range for his CSC 2 conviction would have been 12 to 24 months. Thus, the trial court departed from the appropriate sentencing guidelines range despite indicating that it did not "see any reason to go beyond the guidelines." "Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). Not realizing that defendant's CSC 2 sentence constituted a departure, the trial court failed to articulate such a reason. Accordingly, defendant is entitled to resentencing on his CSC 2 conviction.

III. DEFENDANT'S STANDARD 4 BRIEF

In a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant argues that he was denied the effective assistance of counsel at trial. Our review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *Id.* (quotation marks and citation omitted). "To establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under 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." *Id.* at 187.

Defendant asserts that he was denied the effective assistance of counsel for two reasons: (1) counsel did not have the preliminary examination transcripts available for use while cross-examining AG at trial, and (2) counsel failed to call a witness who would have testified regarding the inconsistencies in AG's testimony. Regarding defendant's first claim, it is unclear from the record whether defense counsel had the transcripts available while he cross-examined AG. Nonetheless, counsel was able to impeach AG with her prior testimony and AG admitted that she had previously testified differently. Thus, defendant has failed to show that he was prejudiced by defense counsel's alleged unpreparedness. With respect to defendant's second claim, counsel's decision not to call the proposed witness is presumed to be sound trial strategy. See *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009) ("[T]he failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court will not substitute its judgment for that of counsel in matters of trial strategy.") In any event, the jury was able to assess AG's testimony and evaluate the inconsistencies in her testimony for itself. Accordingly, defendant has failed to show that there existed a reasonable probability of a different result but for counsel's alleged error. *Lockett*, 295 Mich App at 187.

We affirm defendant's convictions, vacate the sentence imposed for defendant's CSC 2 conviction, and remand for resentencing on that conviction only. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto