

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 16, 2013

v

WILLIE CARL HUNTER,
Defendant-Appellant.

No. 308519
Macomb Circuit Court
LC No. 2011-000710-FC

Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(ii). He was sentenced as a fourth habitual offender, MCL 769.12, to serve 15 to 30 years in prison. Defendant appeals by right. We affirm.

Defendant argues on appeal that the trial court erred in admitting the complainant's statements to a sexual assault nurse examiner under MRE 803(4). We disagree.

Statements made by victims during sexual assault examinations are admissible if made for the purpose of treatment and are reasonably necessary for diagnosis and treatment. *People v Mahone*, 294 Mich App 208, 214-215; 816 NW2d 436 (2011). In this case, the nurse testified that the questions she asked the victim were necessary to assist in the medical examination and treatment of the victim. The examination occurred immediately after the assault and resulted in medical treatment for the potential physical consequences of sexual assault. Accordingly, the trial court did not abuse its discretion when it concluded that the nurse's statements were admissible under MRE 803(4).

Defendant also argues that the victim's statements to the nurse were testimonial, and that therefore their admission violated his rights under the confrontation clause of the Sixth Amendment to the United States Constitution. We disagree. "Statements are testimonial if the 'primary purpose' of the statements or the questioning that elicits them 'is to establish or prove past events potentially relevant to later criminal prosecution.'" *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009), quoting *Davis v Washington*, 547 US 813, 822; 126 S CT 2266, 165 L Ed 2d 224 (2006). In *Garland*, this Court explained:

[I]n order to determine whether a sexual abuse victim's statements to a [nurse following a sexual assault] are testimonial, the reviewing court must consider the totality of the circumstances of the victim's statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the [nurse's] questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency. [*Garland*, 286 Mich App at 10 (citations and quotations omitted).]

In this case, as in *Garland*, the record demonstrates that the circumstances surrounding the victim's statements to the nurse objectively indicate that the statements were not made with the primary purpose of assisting the government in defendant's prosecution. As in *Garland*, even though the nurse collected evidence that was later used by the prosecution at trial, assisting the government was not the primary purpose of the nurse's examination. Rather, the nurse testified that the purpose of her questions and examination was to ascertain the physical effects, if any, defendants' assault caused to the victim. Indeed, the nurse could not have treated the victim without first learning what occurred, and the nurse was not involved in the investigation of the crime. See *id.* Accordingly, defendant's confrontation rights were not violated when the trial court admitted the victim's statements to the nurse, and the trial court did not abuse its discretion by admitting them.

In a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant presents additional issues. First, he contends that, because the jury found insufficient evidence to convict him of nine additional counts of criminal sexual conduct, there must have been insufficient evidence to convict him of any charge. We disagree.

A sufficiency of the evidence challenge is reviewed to determine whether any reasonable trier of fact could find each element of the crime established beyond a reasonable doubt, if the evidence is viewed in the light most favorable to the prosecution. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). Defendant fails to recognize that he was accused of multiple episodes of criminal sexual conduct. The verdict reflected the jury's finding of sufficient evidence of only one incident of sexual contact, which had a corroborating witness. It is the jury's role to judge credibility and weigh the evidence. *People v Lemmon*, 456 Mich 625; 637; 576 NW2d 129 (1998). Although the victim's testimony regarding past incidents and the type of contact was affected by limitations on her ability to communicate, the testimony and additional evidence was sufficient to establish at least one incident of second-degree criminal sexual conduct beyond a reasonable doubt.

Next, defendant argues that the prosecution improperly charged him with five counts of first-degree and five counts of second-degree criminal sexual conduct after he refused a plea offer. Defendant claims the prosecution inappropriately divided one offense into multiple components. We disagree.

Defendant did not preserve this issue below; therefore our review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[W]e consider issues of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004) (citations omitted). Defendant cites this Court's holding in *People v Wells*, 102 Mich App 122, 131-132; 302 NW2d 196 (1980), that, although a prosecutor can charge multiple offenses from the same transaction where the evidence supports it, dividing a clearly single offense into an unreasonable amount of components could be an abuse of prosecutorial discretion. Defendant also cites specifically the Supreme Court's holding in *People v Johnson*, 406 Mich 320; 279 NW2d 534 (1979), that "a single sexual penetration" cannot result in multiple convictions under different applicable subsections of MCL 750.520b. We find defendant's argument unpersuasive. The prosecution did not allege that defendant committed one act of criminal sexual conduct; rather, the prosecution accused defendant of multiple acts of criminal sexual conduct arising from multiple incidents, as the trial court explained to the jury. The prosecution charged defendant with five counts of penetration and five counts of sexual contact, some before and some after the child turned 13. The prosecution claimed that the additional charges resulted from the police investigation. The investigation included a Care House interview, which the prosecution did not attempt to have admitted as evidence. The prosecution asked the child repeatedly during her testimony whether other acts of criminal sexual conduct occurred before January 16, 2011. The child testified that there were other acts, although her testimony had many conflicting and confusing statements. Although the jury found the testimony insufficient to prove other incidents beyond a reasonable doubt, there was enough in her testimony to suggest the prosecution had reason to allege multiple occurrences. Accordingly, defendant has not established plain error.

Defendant also challenges his sentence, including his sentencing under the habitual fourth offender statute, MCL 769.12. He argues persuasively that the presentence investigative report does not support the assertion in the habitual fourth offender notice that he was *convicted* of a felony in April 2002. However, defendant did not raise this issue in the trial court as provided in MCL 769.13(4). If defendant had raised the issue, the prosecution could have amended the notice to substitute another conviction that was established by the presentence investigative report because this would not have increased the potential sentence by changing the habitual offender level. See *People v Hornsby*, 251 Mich App 462, 472-473; 650 NW2d 700 (2002). Therefore, there is no error requiring resentencing.

Next, defendant argues that the trial court exceeded the statutory guidelines without proper justification. However, the guidelines range was 58 to 228 months. The minimum sentence the trial court imposed was 180 months. The sentencing guidelines set a range only for the minimum sentence. *People v McCuller (On Remand)*, 479 Mich 672, 684; 739 NW2d 563 (2007). Therefore, the court did not exceed the guidelines.

Finally, defendant argues that his prior variables were incorrectly scored because he was discharged from his last offense in 2001 rather than 2002. The prior variables may only be scored with offenses for which the defendant was discharged within 10 years before committing the charged offense. MCL 777.50(1). Defendant raised this issue in the trial court; however, he provided no evidence contradicting the presentence investigative report. The trial court was

entitled to rely on the report, absent evidence to the contrary. See *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause