STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES CHARLES WILCOX,

Defendant-Appellant.

UNPUBLISHED
November 26, 2013

No. 310550
Branch Circuit Court
LC No. 10-109467-FC

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (person under 13 years of age). The trial court sentenced him to concurrent prison terms of 15 to 40 years. We affirm the convictions but remand this case for a rescoring of offense variable (OV) 10 of the sentencing guidelines.

The complainant, DE, nine years old at the time of the March 21, 2012, trial, testified as follows: Defendant, his cousin, raped him. DE used to stay at defendant's house at times, when DE's father was out of work. Defendant touched him "in a bad way" three or four times[1] when DE was seven years old. During the final incident, defendant made DE "suck his wiener." Defendant then told DE to bend over, defendant pulled down DE's pants and "put his wiener in [DE]," and it hurt; defendant then wiped "white stuff" onto a shirt. During the second incident, defendant "put his wiener in [DE] again" and also "made [DE] suck it again . . . ." During the first incident, defendant again "put his wiener in [DE]" and "told [DE] to suck it." DE stated that he didn't tell anyone at first because defendant had threatened to hurt him with a pocketknife. Defendant showed DE videos online of people having sex.

On cross-examination, DE testified that defendant asked him three times to "put a wiener in [DE's] mouth" and that he did it three times. Defense counsel brought out that at the preliminary examination, DE had testified that oral sex occurred on only two occasions.

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[1] DE later stated that there were three incidents, not four.

On redirect, DE stated that during his last encounter with defendant, anal sex did not actually take place because DE's mother came into the room before the penetration happened. The prosecutor attempted to clarify whether DE meant that on this "last encounter," no sex at all occurred and the three incidents DE had testified about were on three *other* days. DE stated, "you're just confusing me" but answered "[y]es" when asked, "on three different times this happened between you and [defendant]?"

At the preliminary examination on October 12, 2010, when he was seven years old, DE testified that defendant penetrated him with his penis and it "happened three times." DE stated that, during the last incident, defendant penetrated him anally with his penis and made DE suck his penis. He testified that the first incident was similar, except that during that incident defendant did not "make [DE] put his penis in [DE's] mouth." He stated that in all three incidents except the first, defendant "made [DE] put his penis in [his] mouth." DE then indicated that on one occasion, defendant was about to engage in anal penetration with him when DE's mother walked in, and DE flung himself to the floor.

The prosecution had originally charged defendant with two counts of CSC I, alleging one act of anal/penile penetration and one act of "Oral" penetration. At the conclusion of the preliminary examination, the prosecution moved to add three additional counts, stating that "the child has testified that he's had at least three instances of anal/penile penetration by the Defendant" and "he has testified that there have been at least two instances of oral penetration." The trial court allowed an amendment of the information to allege three counts of penile/anal penetration and two counts of penile/oral penetration.

On November 3, 2011, defendant moved for a bill of particulars under MCR 6.112(E) and MCL 767.44. MCR 6.112(E) states that "[t]he court, on motion, may order the prosecutor to provide the defendant a bill of particulars describing the essential facts of the alleged offense." MCL 767.44 states, in part:

> The following forms may be used in the cases in which they are applicable but any other forms authorized by this or any other law of this state may also be used:
>
> * * *
>
> Rape--A.B. raped or ravished C.D.
>
> * * *
>
> Provided, That the prosecuting attorney, if seasonably requested by the respondent, shall furnish a bill of particulars setting up specifically the nature of the offense charged.

Defendant argued that he needed "to be informed of the exact factual basis that the prosecution intends to present for each element of each of the five charges."

The prosecution responded that, according to caselaw, when a preliminary examination adequately informs a defendant of the charges against him, there is no need for a bill of particulars. The trial court denied defendant's motion, stating, in part:

> The Court has over approximately 89 pages or so of preliminary examination testimony. The prosecutor, during that preliminary exam, did a sufficient enough evidentiary finding in reference to the timeframe that the defendants [sic] are most concerned about. We have to understand that we have a victim who was at or about seven years old at the time or six years old. . . .
>
> The Court believes that the prosecution has met their burden in describing these accounts. The Court believes that in reference to the prosecution's response, the Court does adopt the law of the rationale and the facts based on the People's answer and incorporates that . . . .

During closing arguments at trial, the prosecutor emphasized that DE was seven years old when the incidents with defendant occurred, and stated, "I don't dispute that [DE] had trouble remembering time. . . . He was on that stand for five hours. . . . The anal penetration happened three times . . . and . . . the oral penetration happened on at least two occasions." Defense counsel stated that DE "changed his story consistently regarding what happened . . . ." During her rebuttal argument, the prosecutor stated that DE "got penetrated three times . . . and . . . he had the oral at least twice." She stated that "he's been consistent [about that] in every statement . . . ." The prosecutor stated that it was likely that the encounter involving the mother walking in on DE and defendant (when DE flung himself to the floor) was *not* one of the three "incidents" during which sexual abuse occurred.

The jury returned a verdict of guilty on Count I (anal), II (anal), IV (oral), and V (oral) and a verdict of not guilty on Count III (anal).

On appeal, defendant argues that the trial court erred in denying the motion for a bill of particulars. Defendant contends that "it is impossible to decipher which allegations resulted in convictions, which resulted in acquittal, or which have not yet been tried." We review this issue for an abuse of discretion. *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986).

We disagree that the trial court erred in denying the motion for a bill of particulars. As clearly set forth in *People v Harbour*, 76 Mich App 552, 557; 257 NW2d 165 (1977), "Where a preliminary examination adequately informs a defendant of the charge against him, the need for a bill of particulars is obviated." The preliminary examination in this case adequately informed defendant of the basis for the charges against him. Defendant claims that "there is a chance that [defendant] has been convicted of a crime for which he was never charged." However, the trial court properly instructed the jury on the elements of the charged crimes and sufficient evidence supported the verdicts, even if some of the evidence from the young witness contained contradictions. It was up to the jury to assess credibility. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). No error requiring reversal occurred.

Defendant argues that the trial court erred in disallowing evidence that DE had acquired "sexual knowledge" from prior assaults. We review for an abuse of discretion a trial court

decision to admit or exclude evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

In the middle of DE's testimony, defense counsel attempted to ask questions about DE's having had sexual experiences before the incidents with defendant. Counsel argued that this was relevant to DE's "prior sexual knowledge" and possible fabrication of testimony against defendant. The trial court denied defense counsel's request, stating that the questioning was prohibited by the rape-shield statute. See MCL 750.520j. The trial court also addressed this issue by way of an order denying a motion for discovery of Child Protective Services records that defendant claims could have shown evidence of prior sexual knowledge. In that order, the trial court stated that "[t]he 2008 CPS records are not relevant and are beyond the scope of the case at hand and any probative value would be heavily outweighed by the prejudicial effect . . . ." The court also relied on the rape-shield statute, MCL 750.520j, which states, in part:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

In *People v Morse*, 231 Mich App 424; 586 NW2d 555 (1998), this Court discussed the issue of whether prior sexual incidents may be introduced to show the prior sexual knowledge of a child victim. The Court stated:

> . . . Michigan law dictates that an in-camera hearing is appropriate to determine whether: (1) defendant's proffered evidence is relevant, (2) defendant can show that another person was convicted of criminal sexual conduct involving the complainants, and (3) the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding. [*Id*. at 437.]

Defendant has not even alleged that another person may have been convicted of criminal sexual conduct involving DE and does not even discuss this issue on appeal. As such, we affirm the trial court's rulings on the basis of *Morse.* See also *People v Parks*, 483 Mich 1040, 1051-1052; 766 NW2d 650 (2009) (YOUNG, J., *concurring*) (discussing *Morse*).[2] Moreover, evidence was adduced at trial indicating that DE had been observed "humping the floor" when he was four years old and that he had been heard to use "sex words." Another witness stated that DE had

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[2] We acknowledge that Justice Young's opinion in *Parks* does not constitute binding authority but cite it to help illuminate the binding holding of *Morse*.

exhibited "sexually inappropriate behavior." In addition, DE's mother testified that when DE was five, he underwent therapy in which he learned about "good touch and bad touch." The jury had a sufficient basis to evaluate the proposition that the defense is now advocating (i.e., that DE might have gained his sexual knowledge from someone other than defendant). We find no basis for reversal.

Defendant next contends that the trial court erred by engaging in judicial fact-finding and by failing to use the "beyond a reasonable doubt" standard when scoring the sentencing guidelines variables. This presents a question of law. We review questions of law de novo. *People v Van Tubbergen*, 249 Mich App 354, 360; 642 NW2d 368 (2002). The Michigan Supreme Court rejected this argument in *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), and therefore defendant's argument is without merit. Defendant cites the case of *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), which was pending on appeal at the time defendant filed his appellate brief. In *Alleyne*, 133 S Ct at 2160-2161, the United States Supreme Court held that a fact that increases a *mandatory* minimum sentence must be subject to trial by jury and established beyond a reasonable doubt because such a fact essentially constitutes an element of the offense. Here, a *mandatory* minimum is not at issue. As stated in *Alleyne*, *id*. at 2161 n 6:

> Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range *and* does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment "within limits fixed by law." While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing. [Citations omitted; emphasis in original.]

The Court went on to state:

> In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. [*Id*. at 2163.]

Here, the court was using fact-finding in selecting a punishment within limits fixed by law. The court was free to depart from the guidelines range if substantial and compelling reasons for doing so existed. MCL 769.34(3). A mandatory minimum was not at issue and *Alleyne* does not affect our decision today.

Defendant next argues that the trial court erred in scoring OV 10 at 15 points. MCL 777.40(1) states that "[o]ffense variable 10 is exploitation of a vulnerable victim." It allows for a score of 15 points if "[p]redatory conduct was involved[.]" MCL 777.40(1)(a). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a).

At sentencing, defense counsel argued for a score of zero for OV 10. The prosecutor argued for a score of 15, stating that DE had been forced to watch pornographic videos and look at a pornographic magazine and smoke marijuana. Defense counsel argued that defendant did not provide the magazine to DE but that DE had found it on his own, that the marijuana was provided by someone other than defendant, and that defendant's father had refuted the evidence of the pornographic videos. The trial court stated:

> The Court understands that each party has a different view as to the sufficiency of evidence or where it may have begun or arise [sic]; however, in reference to the proofs, the prosecution has stated there has to be some evidence in reference to the scoring. And based upon the prosecutor's argument whether it is either in total or in part accurate, in and of itself is sufficient evidence to do the scoring, because there is some evidence of that, in relation, more specifically as to the varying conduct stated by the prosecution as well as indicated in the report . . .; therefore, the objection will be denied as to OV 10.

Defendant received a guidelines range of 135 to 225 months. A reduction of even one point in his OV score would drop him to a range of 126 to 210 months. See MCL 777.62. As such, if OV 10 *was* improperly scored, resentencing is required. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

Recently, in *People v Hardy*, 494 Mich 430; 835 NW2d 340 (2013), the Michigan Supreme Court clarified the standard to be employed in making sentencing findings. A sentencing court's factual determinations must be supported by a preponderance of the evidence. *Id*. at 438. The trial court's statements in regard to OV 10 in this case simply did not evidence that the court was applying a preponderance-of-the-evidence standard. Instead, the court repeatedly referred to "some" evidence. We are not a fact-finding body; we thus remand this matter for a rescoring of OV 10.[3] If this rescoring lowers the guidelines range, defendant must be resentenced. *Francisco*, 474 Mich at 89-91.

Affirmed, but remanded for a rescoring of OV 10. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan

[3] We note that the trial court is free to impose the same 15-point score on remand, if it is warranted; we are simply remanding for an evaluation under the proper standard.