

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 26, 2013

v

RALPH LEE MEREDITH, JR.,
Defendant-Appellant.

No. 311814
Wayne Circuit Court
LC No. 12-002344-FH

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of criminal sexual conduct, third degree, MCL 750.520d(1)(b), and his sentence, as a fourth-offense habitual offender, MCL 769.12, of 10 to 20 years' imprisonment. We affirm defendant's conviction, vacate his sentence, and remand for resentencing.

Defendant was in a dating relationship with the complainant and resided in her home. After several disagreements about money, the complainant asked defendant to move out of the home but he did not. On the morning of August 31 or September 1, 2011, the complainant and defendant were in the bedroom and the complainant again asked defendant to leave the home. Defendant asked her to engage in sexual intercourse "since this was the last time," but the complainant vehemently denied his request. Despite the complainant's protests, defendant tore off her underwear, "pulled [her] legs over to the side," put her legs on his shoulders, and put his penis into her vagina. Defendant then changed positions and put both of her legs on the other side. Defendant then swung her legs onto the bed and got on top of her and ejaculated. The complainant reported the assault to the police the next day. At trial, defense counsel argued that the complainant lied about the rape because she wanted him to leave the house and did not want to wait for a legal eviction, and counsel implied that defendant was not athletic or agile enough to do what the complainant described. The jury found defendant guilty.

Defendant first argues that the trial court erred in answering a juror's question. Because this issue is not preserved, this Court will review it for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). A trial court's decision to allow juror questions is reviewed for an abuse of discretion. *People v Heard*, 388 Mich 182, 188; 200 NW2d 73 (1972). We find that, although an error occurred, the error did not amount to plain error affecting substantial rights and there is no basis for reversal.

MCR 2.513(I) gives a trial court discretion to allow juror questions:

Juror Questions. The court may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.

Further, the Michigan Supreme Court long ago recognized the ability of trial courts to allow jurors to ask questions. *Heard*, 388 Mich at 187-188.

Here, the trial court instructed the jury that they were able to ask questions and should submit them in writing to the bailiff. Although the record is not clear, it appears that a juror submitted a question after the prosecution rested. The record contains the juror note, which states the following, “How old was Mr. Meredith at the time of the alleged assault? Juror #9.” On the bottom of this note, in different handwriting and ink, is written, “Mid 50s, per agreement attorney, RMS 6/19/12.” Therefore, it appears that the attorneys agreed off the record to allow the trial court to answer the question. MCR 2.513(I) specifically provides that questions deemed appropriate should be asked by the court of witnesses. Here, no witness was on the stand, and the trial court responded to the juror’s question, “The only testimony that was introduced was that he was in his mid ‘50’s at that time - or estimated to be in his mid ‘50’s at that time.” In fact, there was no testimony regarding defendant’s age.

“A judge who comments on the evidence must take great pains to assure that his comments accurately represent the subject.” *People v Jones*, 130 Mich App 676, 678; 344 NW2d 46 (1993). Here, the trial court could have answered that the parties stipulated that defendant was in his mid-50s at the time of the alleged assault or recalled Officer Nicholle Quinn and asked her the question. The trial court erred by failing to follow the procedure of MCR 2.513(I) and by stating that testimony was introduced regarding defendant’s age. However, a party cannot stipulate to an action and then argue on appeal that the action was erroneous. *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

Further, even if defendant did not stipulate to the trial court’s response to the juror question, the error did not amount to plain error affecting substantial rights. Defense counsel argued that defendant was in his mid-50s. It appears from the record, then, that defense counsel *wanted* the jury to know defendant’s age. Defendant contends that the “age” issue pertained to the ability of defendant to perpetrate the assault and implies that the trial court’s answer about his age may have negatively affected the jury’s decision-making. However, counsel implied in her arguments that the alleged assault was too vigorous for defendant to perpetrate. In making this argument about the vigorous assault, counsel specifically asked the jurors to “look at [defendant]” As the prosecution argues on appeal, the jury had the opportunity to view defendant for two days of trial and approximate his age and agility level. We find that defendant was not prejudiced by any alleged error; thus, his substantial rights were not affected. *Carines*, 460 Mich at 763.

Next, defendant argues that the trial court erred in scoring offense variable (OV) 11. We disagree. “Under the sentencing guidelines, the circuit court’s factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence.” *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). “Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Id.*

MCL 777.41(1) provides that OV 11 concerns criminal sexual penetration and should be scored at 50 points if two or more penetrations occurred and 25 points if one penetration occurred. In MCL 777.41(2), the sentencing court is instructed to not count the one penetration that forms the basis of the offense.

At trial, the complainant described the sexual assault, including two changes in position. Although it was not clear from her trial testimony that the changes in position also included new penetrations, the preliminary-examination testimony did support a finding of three penetrations.¹ In scoring the guidelines, a sentencing court may consider testimony taken at a preliminary examination. *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008). The trial court did not clearly err in its factual determination that the prosecution established, by a preponderance of the evidence, three penetrations.

Defendant also argues that, because the three penetrations were part of a single sexual act and were penetrations of the same body part, they should not be considered separate penetrations for the scoring of OV 11. The application of the facts to the law is a question of statutory interpretation, which an appellate court reviews de novo. *Hardy*, 494 Mich at 438. “A court may not construe a statute unless it is ambiguous; if the statute is unambiguous, the court will apply it as written.” *Badeen v PAR, Inc*, 300 Mich App 430, 438; 834 NW2d 85 (2013) (citations and internal quotation marks omitted). We find no ambiguity in MCL 777.41, and the statute therefore must be applied as written. The trial court did not err in finding that three penetrations occurred. Pursuant to MCL 777.41(2), one of the penetrations must not be counted for scoring purposes but the other two are to be counted, leading to a score of 50 points for OV 11. We find that the scoring of OV 11 was proper.

Defendant next argues that his Fifth Amendment rights were violated where the trial court sentenced him more harshly because he refused to admit guilt. Defendant’s minimum sentence was within the appropriate guidelines range. “If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence.” MCL 769.34(10). However, MCL 769.34(10) does not “preclude relief for sentencing errors of constitutional magnitude.” *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006).

¹ The complainant answered “Yes” when asked, “Does that mean he place [sic] his penis in your vagina for the third time?”

Defendant's Fifth Amendment right against self-incrimination includes the right to remain silent and suffer no penalty for that silence and extends to the sentencing phase of the trial. *Id.* at 314. However, a sentencing error will only be found if the court based a defendant's sentence upon his refusal to admit guilt, as indicated by, for example, actually asking the defendant to admit guilt or offering an abbreviated sentence in exchange for such an admission. See *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003).

The trial court did not ask defendant to admit anything and did not imply that defendant could get a lower sentence if he admitted guilt. Defendant exercised his right to allocution and denied taking "anything sexually from this woman." In sentencing defendant, the trial court noted, "There's absolutely no remorse shown by the Defendant in this case." The trial court did not ask defendant to admit guilt and did not imply that defendant might receive a lower sentence if he did, and there was no sentencing error concerning this issue. *Id.*

Finally, defendant argues that the trial court erred in considering a prior, unrelated acquittal in sentencing him. We agree. Based on defense counsel's statement during sentencing that defendant was acquitted of a charge in 2004, and counsel's stating her belief that the court would not hold that acquittal against defendant, we find that this issue is preserved. Preserved, constitutional errors are reviewed to determine if the party benefiting from the error (here, the prosecution) has established that the error was harmless beyond a reasonable doubt. *People v Likine*, 492 Mich 367, 408; 823 NW2d 50 (2012).

It has been established that trial courts do not violate a defendant's constitutional rights when considering an acquittal as an adverse factor in sentencing where the facts behind the acquittal have been established by a preponderance of the evidence. *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007). Here, the facts behind the acquittal were not established by a preponderance of the evidence and defendant was not afforded an adequate opportunity to challenge the evidence. *Id.*

The prosecution argues that the trial court only mentioned the acquittal in passing, but it appears that the trial court did consider the acquittal in fashioning its sentence. In response to defense counsel's argument at sentencing that defendant had not had much recent criminal activity, the trial court gave a long statement, which included, "While there are no convictions since [1988] there was an arrest and an acquittal of CSC in the fourth degree in 2004. . . . [B]ased on the finding of the Jury and the history that I see, I don't see sentencing at the low end of the guidelines as appropriate." The trial court did not state that it was not considering the acquittal in determining defendant's sentence and instead listed the acquittal as part of defendant's criminal history. Further, the trial court stated that, based on the jury's finding and defendant's criminal history, it was not sentencing defendant at the low end of the guidelines. We find that the trial court improperly considered this acquittal and the nature of the charged offense in sentencing defendant. Further, the prosecution has not established that this error was harmless beyond a reasonable doubt because, although defendant was sentenced within the guidelines, the trial court specifically stated that it was not sentencing defendant at the low end of the guidelines based on the jury's finding and defendant's criminal history.

We affirm defendant's conviction but vacate his sentence and remand this matter for resentencing. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad