

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

ROBERT WAYNE PERRY,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

December 15, 2009

No. 286065

Wayne Circuit Court

LC No. 07-025009-FC

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age). Defendant was sentenced to 27 to 60 months' imprisonment for his conviction. The prosecution cross-appeals by right the trial court's downward departure of defendant's sentence. We affirm defendant's conviction, but vacate his sentence and remand to the trial court for resentencing consistent with this opinion.

Defendant first argues that he was denied effective assistance of counsel because his trial counsel failed to present a substantial defense by failing to properly file notice of his alibi defense, failing to call additional alibi witnesses, and failing to submit documentary evidence supporting his alibi. We disagree. Because there was no hearing pursuant to *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

"To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defense counsel acknowledged at trial that she did not properly file notice of defendant's alibi defense, which would have allowed him to establish that he did not live with the victim in July 2004, a time when the victim claimed defendant did in fact live with her, and during a time period when the victim said the incident took place. Defendant contends that this failure denied him the effective assistance of counsel. However, despite defense counsel's omission, the prosecution did not object to defense counsel calling and questioning several alibi witnesses

(including the victim's mother), all of whom testified that from mid-March 2004 until late November 2004, defendant was living in Saginaw, Michigan, without the victim.

Defendant claims that defense counsel's omission allowed the prosecution to call a rebuttal witness, the victim's stepmother, who was not sequestered during the trial. The record reflects that the victim's stepmother only testified that she married the victim's father in 2002 and that the victim moved in with them in June 2004. This rebuttal testimony merely confirmed defendant's alibi that the victim was not living with him in the summer of 2004. Because defendant was permitted to fully present his defense, he has failed to show how he was prejudiced by his counsel's failure to timely file notice of an alibi defense.

Defendant also contends that his counsel should have called additional witnesses to support his alibi. Specifically, defendant points to probation officers who supervised him during the summer of 2004. Defense counsel's decisions regarding what evidence to present or whether to call and question witnesses are matters of trial strategy that will only constitute ineffective assistance of counsel if they deny a defendant a substantial defense. *In re Ayres*, 239 Mich App 8, 21-22; 608 NW2d 132 (1999). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* at 22.

Four witnesses testified that defendant was living in Saginaw from mid-March 2004 to November 2004. In addition, the prosecution's rebuttal witness confirmed that the victim was not living with defendant during the summer of 2004. It is clear that defendant's alibi defense was fully presented and that additional testimony from probation officers would not have bolstered the defense. In fact, testimony from probation officers could have actually prejudiced defendant because the jury would have learned that defendant had other legal troubles.

Defendant further argues that his counsel should have submitted documentary evidence that showed he was living in Saginaw during the summer of 2004. Specifically, defendant points to probation supervision papers, an arrest incident report, and to an order from the Wayne Circuit Court awarding full custody of the victim to her father on June 11, 2004. Once again, documentation concerning arrests and probation, just like testimony from probation officers, could have served to prejudice defendant in the eyes of the jury. It appears to have been sound trial strategy on the part of defense counsel not to introduce evidence of defendant's other legal troubles. Finally, the custody order, which showed that the victim was living with her father as of June 11, 2004, was merely cumulative to the testimony of witnesses at the trial. Defendant has failed to show a reasonable probability that the outcome would have been different had this evidence been introduced. Based on the testimony of both prosecution and defense witnesses, there was a great deal of evidence presented to the jury that the victim did not live with the defendant during the time in question. The jury, however, was free to conclude that the victim was confused about the date of the offense, as was suggested by the prosecutor in her closing argument.

Next, defendant argues that there was insufficient evidence to support his conviction. In support of his claim, defendant argues that the only testimony supporting the conviction was that of the victim, and emphasizes that multiple witnesses testified that defendant did not live in Canton, Michigan with the victim during the time period the victim testified the incident occurred. We disagree.

A challenge to the sufficiency of evidence is reviewed by this Court de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court must “view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.” *Id.*, quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). When reviewing a sufficiency of evidence claim, all conflicts in the evidence must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). It is solely the trier of fact’s role to weigh the evidence and judge the credibility of witnesses. *Wolfe*, *supra* at 514.

Defendant was charged with first-degree criminal sexual conduct for engaging in cunnilingus with the female victim, who was under the age of thirteen. A person commits first-degree criminal sexual conduct when “he or she engages in sexual penetration with another person and . . . that other person is under 13 years of age.” MCL 750.520b(1)(a). The Legislature has defined 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.” MCL 750.520a(r).

The victim testified that in 2004, when she was 12 years old, defendant pulled down her pants after having her lie down on her mother’s bed. Defendant then began to lick her vagina and to move his mouth around her vagina. This Court concluded, in *People v Harris*, 158 Mich App 463, 469-470; 404 NW2d 779 (1987), that “it is evident that cunnilingus requires the placing of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself, or the mons pubes.” *Id.* at 470. The victim’s testimony, then, was sufficient to satisfy that elements of first-degree criminal sexual conduct because it described sexual penetration of person under the age of 13. Furthermore, our Legislature and our courts have long recognized that the testimony of a victim alone, and without corroboration, can constitute sufficient evidence to establish a defendant’s guilt. MCL 750.520h; *People v Lemmon*, 456 Mich 625, 643 n 22; 576 NW2d 129 (1988). Furthermore, “time is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim”, and “an alibi defense does not make time of the essence.” *People v Dobek*, 274 Mich App 58, 82-83; 732 NW2d 546 (2007).

Defendant also attacks the victim’s credibility, but it was up to the jury to assess her credibility, *Wolfe*, *supra* at 514, and her testimony did not need to be corroborated, MCL 750.520h. When we view the totality of the evidence in a light most favorable to the prosecution, we find that sufficient evidence was presented to the jury to support defendant’s conviction.

On cross-appeal, the prosecution argues that defendant’s sentence should be vacated and that this case should be remanded for resentencing. The prosecution claims that the trial court did not provide substantial and compelling reasons for its downward departure from the sentencing guidelines, and that it did not explain the reasons for the extent of its departure. We agree with the prosecution’s argument that the sentence should be vacated and that we should remand for resentencing.

The existence of a particular factor supporting a trial court's decision to depart from the sentencing guidelines is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). We review the determination of whether the factor is objective and verifiable de novo. *Id.* at 264. Furthermore, we review the extent of the trial court's departure from the sentencing guidelines range, and whether the reason for the departure is substantial and compelling, for an abuse of discretion. *People v Havens*, 268 Mich App 15, 18; 706 NW2d 210 (2005).

Defendant's Prior Record Variable (PRV) score was ten points, placing him at level C. His Offense Variable (OV) score totaled ten points, placing him at level I. Based upon these levels, defendant's minimum sentence guidelines range was 47 to 70 months. The trial court downwardly departed from the sentencing guidelines, and sentenced defendant to a minimum sentence of 27 to 60 months' imprisonment. The basis for the trial court's departure was defendant's respect for the law, his potential for rehabilitation (based upon his family support and employment), and the length of time from the date of the offense until the trial.

Under our legislative sentencing guidelines, a trial court may only depart from the guidelines if it has a substantial and compelling reason to do so, and it states the reason on the record. MCL 769.34(2) and (3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The trial court is not permitted to use a factor already considered in the offense or prior record variables unless the trial court finds that the characteristic has been given inadequate or disproportionate weight based on facts of record. MCL 769.34(3)(b); *Abramski, supra* at 74. Furthermore, the trial court's reasons for departing from the guidelines range must be objective and verifiable. *Id.* "They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008).

First, the trial court's reliance on defendant's employment history is an objective and verifiable factor. According to the presentence investigation report (PSIR), and his counsel's statements, defendant had been self-employed in construction for five years prior to his sentencing. However, defendant, who was 37 years old at the time of sentencing, did not account for any other period of employment. We conclude that the modest duration of defendant's work history does not keenly or irresistibly grab one's attention, and is more akin to *People v Claypool*, 470 Mich 715, 727; 684 NW2d 278 (2004), which held that employment as a cabdriver for less than two years did not constitute a substantial and compelling reason for departing from the sentencing guidelines.

Second, the trial court cited defendant's family support as a basis for its downward departure. Strong family support has previously been regarded by this Court as one factor that could constitute a substantial and compelling reason supporting a downward departure. See *People v Harvey*, 203 Mich App 445, 448-449; 513 NW2d 185 (1994). However, we conclude that the family support in this case was not a substantial and compelling reason to support a downward departure. The letters and statements from defendant's family members included in the lower court record and in the PSIR demonstrate that the basis for defendant's family support is their belief in his innocence. We conclude that family support based upon defendant's perceived lack of culpability is not a substantial and compelling reason supporting a downward departure.

Third, the trial court cited defendant's respect for the law. This is not an objective factor because it assumes that the trial court can discern how defendant feels about the law, which is a subjective determination. The trial court, in support of its reasoning, noted that defendant voluntarily surrendered when it was determined that defendant was required to be in custody following his conviction and pending sentencing. Following an order of a trial court does not rise to the level of considerable worth that keenly or irresistibly grabs one's attention constituting a substantial and compelling reason for a departure from the guidelines.

Lastly, the trial court cited the length of time between the commission of the offense and defendant's conviction, noting that defendant had apparently led a normal and an uneventful life during that time span. In this case, the offense was committed sometime in 2004, and defendant was not convicted until April 7, 2008. Much of the delay was due to the fact that the crime was not reported to the police until August 2007. We conclude that although this factor is objective and verifiable, a mere gap in time alone does not keenly or irresistibly grab one's attention and is therefore not a substantial and compelling reason to depart.

Based upon the above analysis, we conclude that the trial court abused its discretion with its downward departure from the sentencing guidelines, absent substantial and compelling reasons and without articulating its reasons for the length of the departure.

Defendant argues that his sentence should be affirmed because, regardless of whether the trial court had substantial and compelling reasons to depart, any error was harmless. Defendant bases his argument on the alleged improper scoring of PRV 5, which had the effect of raising his minimum sentencing guidelines range from 27 to 45 months to 47 to 70 months. Defendant argues that his sentence should be affirmed because the trial court's downward departure to 27 months falls within the proper minimum sentencing guidelines range (27 to 45 months). Because defendant raises this scoring issue for the first time on appeal, we review for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

MCL 777.55 states:

(1) Prior record variable 5 is prior misdemeanor convictions or prior misdemeanor juvenile adjudications. Score prior record variable 5 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(c) The offender has 3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications 10 points

(d) The offender has 2 prior misdemeanor convictions or prior misdemeanor juvenile adjudications 5 points

(e) The offender has 1 prior misdemeanor conviction or prior misdemeanor juvenile adjudication 2 points

(f) The offender has no prior misdemeanor convictions or prior misdemeanor juvenile adjudications 0 points

(2) All of the following apply to scoring record variable 5:

(a) Except as provided in subdivision (b) count a prior misdemeanor conviction or prior misdemeanor juvenile adjudication only if it is an offense against a person or property, a controlled substance offense, or a weapon offense. Do not count a prior conviction used to enhance the sentencing offense to a felony.

(b) Count all prior misdemeanor convictions and prior misdemeanor juvenile adjudications for operating or attempting to operate a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while under the influence of or impaired by alcohol, a controlled substance, or a combination of alcohol and a controlled substance. Do not count a prior conviction used to enhance the sentencing offense to a felony.

The trial court relied on the prosecution's version of defendant's prior criminal record in scoring ten points for PRV 5 because it found that defendant had three or four prior misdemeanor convictions. The prosecution referenced defendant's misdemeanor convictions for: (1) reckless driving in 1988; (2) disorderly person in 2000; (3) operating [with license suspended] in 2000; and (4) operating a motor vehicle while intoxicated (OWI), in March 2004.

Defendant correctly contends that PRV 5 was improperly scored. Defendant's misdemeanor conviction that dates back to 1988 may not be considered pursuant to MCL 777.50(1), which provides:

In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

Defendant's second misdemeanor conviction occurred in 2000. Therefore, according to MCL 777.50(1), defendant's conviction from 1988 could not be counted under PRV 5 because at least ten years had elapsed between the 1988 misdemeanor and the 2000 misdemeanor. Furthermore, MCL 777.55(2)(a) mandates that only an "offense against a person or property, a controlled substance offense, or a weapon offense" can be counted. Accordingly, defendant's operation of a motor vehicle while his license was suspended cannot be counted because it is not an offense against a person or property, a controlled substance offense, or a weapon offense. In addition, there is nothing to suggest that defendant's conviction for disorderly person – illegal occupation was an offense against a person or property, a controlled substances offense, or a weapons offense. Therefore, it also appears not to be an offense that can be counted. Defendant's OWI offense, on the other hand, is a countable offense under MCL 777.55(2)(b). Without including three of defendant's misdemeanor convictions, defendant has one misdemeanor conviction that may be scored, reducing PRV 5 to two points. MCL 777.55(1)(e). This reduction places defendant into PRV level B, rather than PRV level C. The change in PRV levels alters his sentencing guidelines from 47 to 70 months to 27 to 45 months.

Because the error in the scoring of defendant's sentencing guidelines range, if corrected, would result in a different recommended sentence range, resentencing is required. *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

We affirm defendant's conviction, but vacate his sentence and remand to the trial court for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Karen M. Fort Hood

/s/ Cynthia D. Stephens