STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2005
v	No. 253684 Macomb Circuit Court
CARL JOSEPH MINTER, Defendant-Appellant.	LC No. 2003-003361-FC

Before: Gage, P.J., and Whitbeck, C.J., and Saad, J.

PER CURIAM.

Defendant Carl Joseph Minter appeals as of right his jury conviction of two counts of first-degree criminal sexual conduct[1] and one count of second-degree criminal sexual conduct[2] for engaging in sexual activity with his fiancée's younger sister, a minor. Minter also appeals his sentence of 17½ to 25 years' imprisonment. We affirm.

I. Basic Facts And Procedural History

The conduct underlying Minter's convictions took place at Minter's home between the fall of 2001 and the summer of 2003. Minter lived with his fiancée, his brother, and two friends. The complainant in this case, who was Minter's fiancée's younger sister, chose to spend about half her weekends staying at Minter's house. The complainant did not have her own bedroom there, so she slept on the couch.

The complainant testified that she initially thought of Minter as "a brother and a best friend." However, on one occasion in the fall of 2001, while the complainant was sitting on the couch with Minter and her sister, who was sleeping, Minter began rubbing her leg, then stuck his finger into her vagina for several minutes while she "sat there frozen and scared." The next day, Minter began rubbing her leg again, but after she told him "no" twice, he stopped. After these incidents, the complainant continued to spend weekends at Minter's house.

[1] MCL 750.520b(1)(b)(i) (complainant was between thirteen and sixteen years old and lived in the same household).

[2] MCL 750.520c(1)(b)(i) (complainant was between thirteen and sixteen years old and lived in the same household).

The complainant testified that one night in May or June of 2003, she asked Minter to bring her some vodka, which he did. After drinking it, she began to get very sick, tired, and drunk, and eventually vomited. After she vomited and lay on the floor, according to the complainant, Minter got on top of her and penetrated her vagina with his penis. The complainant testified that shortly after this incident, she and Minter got drunk again and he again penetrated her vagina with his penis. The complainant claimed that she and Minter would often drink or smoke marijuana together, and that she would frequently wake up after having done so to find Minter touching her breasts, vagina, or buttocks.

The final incident at issue occurred in July of 2003. The complainant testified that she was sleeping on the couch when Minter began rubbing her vagina, then attempted to put his penis in her mouth. When she turned her head away, he told her that if she did not open her mouth, he would put his penis between her legs, so she opened her mouth. She testified that Minter then pulled his penis out of her mouth and ejaculated on her face and hair.

The complainant explained that she told no one about these incidents because she was afraid no one would believe her, and she did not want to "blow [her] family apart." She also wanted to continue spending time with her sister and the other people who lived with Minter, whom she considered to be part of her family. Eventually, however, the complainant told her boyfriend what Minter had done to her, and the next day, she told her mother. The complainant's father then reported the incidents to the police.

At trial, Minter acknowledged allowing the complainant to drink at his house, but testified that he expected her to follow certain other rules, such as not leaving the house without telling Minter or her sister where she was going, and not bringing her boyfriends to the house. Minter admitted that he and the complainant would occasionally engage in physical contact including wrestling, back rubs, and foot rubs, but he denied touching her for sexual gratification, and also denied forcing her to have sex with him. All the residents of Minter's house testified that they thought of their household, including the complainant, as a family.

The jury convicted Minter of two counts of CSC I, one count of CSC II, one count of furnishing alcohol to a minor, and one count of contributing to the delinquency of a minor. This appeal concerns only the CSC convictions.

II. Sufficiency Of The Evidence

A. Standard Of Review

We review de novo challenges to the sufficiency of the evidence, taking the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[3]

[3] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

B. "Member Of The Same Household" Defined

The jury convicted Minter of CSC I on the theory that he and the complainant were members of the same household. To establish Minter's guilt on this theory, the prosecutor was required to prove

> that the defendant engaged in sexual penetration with another person and [that] any of the following circumstances exists:
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> * * *
>
> (b) That other person is at least 13 but less than 16 years of age and any of the following:
>
> (i) The actor is a member of the same household as the victim.[4]

Minter does not dispute that the complainant was between the ages of thirteen and sixteen, but he argues that there was insufficient evidence presented to establish that he was a member of the same household as the complainant.

This Court first examined what constitutes a "member of the same household" in *People v Garrison*.[5] *Garrison* involved a thirteen-year-old complainant who lived with her father during the school year, but spent summer vacation with her mother and stepfather pursuant to court-ordered visitation.[6] During this time, the defendant, who was the complainant's stepfather, had sexual intercourse with her several times.[7] The defendant was convicted of CSC I on the theory that he and the complainant were members of the same household.[8]

On appeal, the defendant argued that the complainant was not a member of his household. Noting that various dictionaries defined the word "household" as "a family group, residing under one roof,"[9] this Court concluded:

> We believe the term "household" has a fixed meaning in our society not readily susceptible of different interpretation. The length of residency or the permanency of residence has little to do with the meaning of the word as it is used in the statute. Rather, the term denotes more of what the Legislature intended as an all-inclusive word for a family unit residing under one roof for any time other

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[4] *People v Phillips*, 251 Mich App 100, 102; 649 NW2d 407 (2002), quoting MCL 750.520b(1)(b)(i).

[5] *People v Garrison*, 128 Mich App 640; 341 NW2d 170 (1983).

[6] *Id*. at 642.

[7] *Id*.

[8] *Id*.

[9] *Id*. at 646 n 2.

> than a brief or chance visit. The "same household" provision of the statute assumes a close and ongoing subordinating relationship that a child experiences with a member of his or her family or with a coercive authority figure. We conclude that, based on the facts in this case, the statutory term properly embraces the victim herein.[10]

This Court revisited the issue of what constitutes the "same household" in *People v Phillips*.[11] In *Phillips*, a jury convicted the defendant of committing CSC I and II against a fourteen-year-old girl who had been living with him and his wife for just over four months, and whom they planned to adopt.[12] To determine whether the complainant was a member of the defendant's household, the *Phillips* panel looked to the test that the *Garrison* panel had set forth, specifically, whether the defendant and the complainant were part of "a family unit residing under one roof for any time other than a brief or chance visit."[13] The *Garrison* panel concluded that, given the fact that the defendant and his wife were in the process of adopting the complainant, the four months she spent living with them could not be characterized as a "brief or chance visit" to the defendant's home. Accordingly, the *Garrison* panel held that there was sufficient evidence for a rational jury to find beyond a reasonable doubt that the defendant and the complainant were members of the same household.[14]

In this case, the trial testimony established that all the residents of Minter's house considered themselves a family unit, and considered the complainant to be a part of that family unit while she stayed with them on weekends. Further, all the witnesses agreed that the complainant regularly stayed at Minter's house, and spent at least half her weekends there over the course of a year and a half. While the duration of most of her visits was limited to two days, this Court has held that a person's membership in a household is not determined by "[t]he length of residency or the permanency of residence" in that household.[15] The testimony indicated that the complainant's relationship to the Minter household was an example of the "close and ongoing subordinating relationship that a child experiences with a member of his or her family" that the Legislature envisioned when enacting the "same household" provision.[16] It is undisputed that each instance of CSC occurred at Minter's residence while the complainant was staying there. Therefore, we conclude that the jury had sufficient evidence to find that the complainant and Minter were members of the same household when each of the crimes was committed.

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[10] *Id*. at 646-647 (internal footnote omitted).

[11] *Phillips*, *supra*.

[12] *Id*. at 103.

[13] *Id*. at 103, quoting *Garrison*, *supra* at 646.

[14] *Id*. at 105.

[15] *Garrison*, *supra* at 646.

[16] *Id*. at 646-647.

III. Jury Instructions

A. Standard Of Review

We review claims of instructional error de novo.[17] We review unpreserved allegations of instructional error for plain error that affected the defendant's substantial rights.[18] If defense counsel affirmatively approved the instructions, the issue is waived and any error is extinguished.[19]

B. "Members Of The Same Household" Instruction

With respect to the statutory requirement that a defendant and complainant be "members of the same household," the trial court instructed the jury that, to convict Minter, it must find that at the time of the alleged acts, he and the complainant were "living in the same household." After the instructions were read, defense counsel affirmatively expressed satisfaction with them. Minter argues on appeal that the trial court erred in failing to define "living in the same household" for the jury. However, because defense counsel agreed that the instructions were correct as read, any error that occurred was extinguished, and Minter may not appeal on that ground.[20] Even if the error had been forfeited rather than waived, reversal would not be warranted, because the trial court's failure to define a commonly understood phrase for the jury does not constitute error.[21]

IV. Ineffective Assistance Of Counsel

A. Standard Of Review

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.[22] This determination requires a judge first to find the facts, and then determine "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."[23] We review the trial court's factual

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[17] *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

[18] *People v Allen*, 466 Mich 86, 89; 643 NW2d 227 (2002), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[19] *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

[20] See *id*.

[21] See *Allen*, *supra* at 92 (trial court need not define "reasonable doubt" because its meaning is commonly understood).

[22] *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

[23] *Id*. at 579.

findings for clear error and review de novo its constitutional determination.[24] Because no hearing was conducted, our review is limited to mistakes apparent on the record.[25]

B. Failure To Object To Jury Instructions

Minter argues that trial counsel's assent to jury instructions that did not include a definition of "living in the same household" constituted ineffective assistance of counsel. 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 that, but for counsel's error, it is reasonably probable that the outcome would have been different.[26] Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.[27] To show an objectively unreasonable performance, the defendant must prove that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[28] In so doing, the defendant must overcome a strong presumption that the challenged conduct might be considered sound trial strategy.[29] The defendant must also show that the proceedings were "fundamentally unfair or unreliable."[30]

Minter's contention fails on several grounds. First, the failure to object to a proper instruction cannot serve as the predicate for an ineffective assistance claim, because an attorney is not required to make meritless objections.[31] Second, even if a more detailed definition had been given, it is not reasonably probable that the outcome would have been different, because, as discussed, the case law definition is broad enough to encompass the complainant's occasional stays at Minter's house.[32] Third, the defense theory of the case was that the complainant's accusations were entirely false, and that Minter never touched her inappropriately. Minter offers no argument to counter the presumption that his counsel's failure to request a definition of "living in the same household" might have reflected a strategic decision to concentrate the jury's attention solely on Minter's denial that he engaged in any inappropriate conduct with the complainant. Thus, Minter's ineffective assistance claim fails.[33]

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[24] *Id*.

[25] *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

[26] *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[27] *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

[28] *LeBlanc*, *supra* at 578, quoting *Strickland*, *supra* at 687.

[29] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[30] *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

[31] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

[32] See *Garrison*, *supra* at 646-647.

[33] See *Knapp*, *supra* at 385-386.

V. Sentencing Challenge

A. Standard Of Review

We review the trial court's determination of the existence of a sentencing factor for clear error, upholding those scoring decisions that are supported by any evidence in the record.[34] Because Minter did not object to the scoring of OV 11 or OV 13, we will only reverse if his sentence was outside the guidelines range and the trial court committed plain error affecting his substantial rights.[35]

B. Scoring Of OV 11

Minter argues that the trial court erred in scoring OV 11 at fifty points because he was only convicted of two penetrations, and the trial court was required to exclude one of these for scoring purposes. OV 11 provides that fifty points should be scored if there are two or more criminal sexual penetrations excluding the one penetration that formed the basis of the CSC I offense.[36] However, the sentencing court may consider criminal activity of which Minter was acquitted,[37] and may also consider conduct that was established by a preponderance of the evidence.[38] In this case, the complainant testified specifically about four separate acts of penetration: one digital/vaginal, two penile/vaginal, and one penile/oral. Therefore, because there is some evidence to support the trial court's decision to score for two acts of penetration and exclude one, Minter's argument is without merit.

C. Scoring Of OV 13

Minter also argues that the trial court erred in scoring twenty-five points for OV 13, which involves a "continuing pattern of criminal behavior." The relevant portion of OV 13 provides that the trial court is to score twenty-five points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person."[39] The applicable scoring instructions provide that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction," but the

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[34] *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003), citing *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

[35] *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[36] MCL 777.41(1)(a); MCL 777.41(2)(c).

[37] See *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991).

[38] *People v Perez*, 255 Mich App 703, 713; 662 NW2d 446 (2003), vacated in part on other grounds, 469 Mich 415 (2003).

[39] MCL 777.43(1)(b).

sentencing court may not score conduct already scored in OV 11 unless it relates to "membership in an organized criminal group."[40]

Minter argues that to arrive at a score of twenty-five points, the trial court must have included conduct that it had already scored under OV 11. However, this is not the case. The score was supported by taking into account the sentencing offense, which was excluded under OV 11, plus the inclusion of two non-penetration CSC offenses. Specifically, the complainant testified that she would frequently wake up after drinking or smoking marijuana to find Minter touching her breasts, vagina, or buttocks. This conduct constitutes felonious criminal activity pursuant to MCL 750.520c(1)(b)(i), which makes it a felony to engage in sexual contact with a person between the ages of thirteen and sixteen who is a member of the same household. Although the complainant did not specify how many times this occurred, it was clear from her testimony that it occurred more than once. This testimony is sufficient to support a finding that Minter committed three felonious acts against the complainant in addition to those accounted for in OV 11. Therefore, the trial court did not err in scoring OV 13 at twenty-five points.

Affirmed.

/s/ Hilda R. Gage
/s/ William C. Whitbeck
/s/ Henry William Saad

[40] MCL 777.43.