

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHERJUAN ERWIN HAMILTON,

Defendant-Appellant.

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UNPUBLISHED

February 8, 2005

No. 250297

Kalamazoo Circuit Court

LC No. 01-000926-FH

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b), and was sentenced to concurrent terms of one to two years' imprisonment. He appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

This case arises from incidents that took place at Lakeside Treatment and Learning Center in Kalamazoo in 2001, while defendant, then aged seventeen years, was a neglect ward. Defendant groped the buttocks, through their clothing, of two female workers at the center. Defendant admitted touching the complainants inappropriately, but maintained that he did not do so for purposes of sexual gratification, but in hopes of being transferred to a different facility.

Appellate counsel's sole issue is whether the prosecutor denied defendant a fair trial by asking defendant to comment on the credibility of one of the complainants. Appellate counsel admits that this issue was not preserved for review by way of an objection at trial. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

One of the complainants testified that defendant had whispered to her that he loved her. When cross-examining defendant, the prosecutor asked about defendant's relationship with that complainant, eliciting that defendant had indeed summoned the complainant to him and whispered things to her. However, defendant denied ever telling the complainant that he loved her. The prosecutor then twice elicited affirmative responses from defendant by asking if the complainant was lying when she testified to the contrary.

It is improper for a prosecutor to ask a defendant to comment on the credibility of a prosecution witness. *People v Buckey*, 424 Mich 1, 17; 348 NW2d 53 (1985). Plaintiff confesses plain error in the matter, but argues that defendant has failed to show that the error affected his substantial rights. We agree with plaintiff. Error of this sort is harmless where the defendant “dealt rather well with the questions,” and where it is not clear how the defendant was harmed by the questioning. *Id.* Appellate counsel argues that in this case defendant did not handle the questioning well, but rather “fell into the prosecutor’s trap.” However, appellate counsel does not elaborate, and our review of the transcript brings nothing to light to suggest that defendant suffered any loss of poise or composure in the matter. Although appellate counsel has identified plain error, he has not shown that defendant is actually innocent, or that the error threw the integrity of the proceedings into doubt. *Carines, supra.*

Moreover, where a prosecutor has questioned a defendant about a prosecution witness’ credibility, a timely objection “could have cured any prejudice, either by precluding such further questioning or by obtaining an appropriate cautionary instruction.” *Buckey, supra* at 18 (internal quotation marks and citation omitted). For these reasons, appellate counsel’s argument must fail. *Carines, supra.* See also *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant argues *in propria persona* that the trial court improperly departed upward from the recommended range under the sentencing guidelines in imposing defendant’s minimum sentences by relying on information that was not determined by his jury. The recommended minimum sentence under the guidelines came to zero to six months’ incarceration. The trial court thus departed upward in imposing one-year minimum sentences. The court justified the departure on the basis of “defendant’s behavior while on absconding status following his jury trial conviction, defendant’s new CSC offense, and failure to register.”

At sentencing, defense counsel stated that the defense had no challenges to any information included in the PSIR. The prosecutor reported that defendant had recently been arrested for an additional fourth-degree CSC offense. The court reported that defendant “has picked up another criminal sexual conduct charge in Genesee County which he has apparently plead [sic] guilty to attempted criminal sexual conduct in the fourth degree and is scheduled for sentencing on that on July 28<sup>th</sup>.” The court stated that defendant had failed to appear for sentencing when originally scheduled to do so. Sentencing took place on June 30, 2003, but was originally scheduled for April 22, 2002. Defendant replied that his failure to appear resulted from transportation problems. The court further stated, “you didn’t show up and you were on the lamb [sic] for a year,” and that defendant “[i]n the meantime, . . . didn’t register for the Sex Offenders Registration Act.”

On appeal, defendant does not deny that he was ultimately responsible for appearing at sentencing and for registering as a sex offender, or that he persisted for many months without attending to those responsibilities. Concerning the new CSC offense, defendant states that no proof of conviction was offered, but he does not deny the particulars as recited by the trial court.

Defendant’s main thrust is urging application of *Blakely v Washington*, 542 US \_\_\_; 124 S Ct 2531; 159 L Ed 2d 403 (2004), where the United States Supreme Court held that a sentencing court may not exceed a statutory maximum sentence on the basis of information not determined by a jury. However, the Michigan Supreme Court has observed that *Blakely* concerned an increase in a defendant’s maximum sentence in a determinate sentencing scheme,

while this state's guidelines govern the establishment of minimum sentences within an indeterminate framework. "Accordingly, the Michigan system is unaffected by the holding in *Blakely* . . ." *People v Claypool*, 470 Mich 715, 731 n 14; 684 NW2d 278 (2004). Defendant acknowledges *Claypool*, but argues that its refutation of *Blakely* "does not apply to situations in which the jury's verdict compels a legislatively mandated sentencing guidelines grid no higher than an 'intermediate sanctions' cell," but cites no authority for that attempted distinction. Defendant further tries to hold *Claypool* closely to its facts, and suggests that because this case does not involve the police engaging in sentencing manipulation, entrapment, or escalation as a basis for a downward departure, *Claypool* should not apply. However, the Supreme Court's clear statement on the inapplicability of *Blakely* to Michigan for structural reasons militates against such attempts at narrowing *Claypool*'s holding in that regard.

The rule in Michigan remains that a sentencing court may use information from several sources, including some that would not even be admissible at trial, e.g., a presentence investigator's report. See MRE 1001(b)(3); *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985).

Defendant also argues in passing that defense counsel's failure to raise the *Blakely* issue at sentencing constituted ineffective assistance of counsel. However, "[t]rial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Because defendant would have gained nothing from having this argument raised at sentencing, no claim of ineffective assistance of counsel can be predicated on counsel's inaction in this regard.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Mark J. Cavanagh  
/s/ Stephen L. Borrello