STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 29, 2013
v	No. 308315 Saginaw Circuit Court
DAVID BENJAMIN WINCHELL, Defendant-Appellant.	LC No. 10-034417-FH

Before: SERVITTO, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2), and second-degree criminal sexual conduct (2 counts), MCL 750.520c(1)(a) (sexual contact with person under 13 years of age). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent sentences of 76 months to 15 years' imprisonment for the assault conviction and 19 to 40 years' imprisonment for the criminal sexual conduct convictions.

I. PROSECUTORIAL MISCONDUCT

Defendant first argues that the prosecutor committed misconduct prejudicial to defendant during his closing argument. We conclude that there was one instance of misconduct, but that defendant was not prejudiced due to the trial court's jury instructions.

To preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant only objected to one of the alleged instances of misconduct. We generally review de novo preserved allegations of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Unpreserved errors are reviewed for plain error affecting the defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "Reversal is warranted only when plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008), quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "The test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in

context." *Id*. at 64.

A. MISSTATEMENT OF LAW

> During closing argument the prosecution stated, without objection:
>
> The testimony of the victim alone need not – is all that is necessary, need not be corroborated.
>
> If you don't follow that instructions – instruction of the Court, and you get in the jury room, whether you say it or not, and you do the opposite of that instruction, *if you just try to say, well, I just don't believe the victim, what you're doing is disregarding the instruction and an oath you took at the beginning* [emphasis added.]

The prosecution misstated the law by implying that the jury would be disregarding its jury instructions if it disbelieved the victims. "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). "However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *Id*. In this case, the trial court properly instructed the jury that the victim's testimony did not need to be corroborated ("To prove these charges, it is not necessary that there be evidence other than the testimony of [victim one] for Count I and its alternative, and [victim two] for the remaining counts, if that testimony proves . . . guilt beyond a reasonable doubt"), and further instructed that the jury was free to believe "all, none or part of any person's testimony." The trial court also instructed that "[i]f a lawyer says something different about the law, follow what I say." Accordingly, the misstatement was corrected and defendant's substantial rights were unaffected. Reversal is not required.

B. MISCHARACTERIZATION OF EXPERT TESTIMONY

Dr. Catherine Okla was defendant's expert witness and addressed matters, such as susceptibility to suggestion and "red flags" in the procedure used by the forensic interviewer, aimed at calling into question the veracity of the victim's statements. During closing argument, the prosecution stated without objection:

> One of those significant instructions, as I said, is that the children can be sufficient to prove the case beyond a reasonable doubt. And that came up in glowing relief in this case that some of the witnesses seem to have a bias, and *I'm obviously singling out Dr. Okla in the defense case who used words that suggested that she has a very strong bias. If they're strong, concrete -- I'm not going to remember all her words – solid, irrefutable, tangible, substantiation of the charge of sexual abuse, okay, then, that's okay.*
>
> *I agree with her completely. I wish there was that in every single case, if I have to prosecute it. But from the point of view of the child, I hope that's never the case. I hope a child's innocent bodies don't have to be the place where we find evidence.* I hope you feel that way, too. And sometimes people who have chosen

> to sexually molest children are smart enough to not do it in front of witnesses or at least witnesses they fear will report them, not leave a trail, not insert a fully erect penis inside the vagina of a child [emphasis added.]

Defendant asserts that these comments mischaracterized Dr. Okla's testimony by implying that Dr. Okla said a child's uncorroborated testimony should be insufficient to prove abuse. Dr. Okla's testimony – fairly understood and reviewed in context – indicates that she felt physical evidence of abuse located on or in the child's body would be more compelling evidence and that videotapes of the abuse would be a form of "solid substantial evidence." When asked if the child's statement was "good evidence" she said that she would "not agree with that statement. It's one – it's one piece of evidence. It depends on what else you have. That by itself in isolation, it might be true it might be not true." This testimony could be construed to reflect that she thought more than the child's statement was necessary in order to find proof of sexual abuse; however, she proceeded to specifically testify that it was not her opinion that

> [U]nless there is physical evidence, then everyone should be found not guilty. What I'm saying is, when you don't have that, that makes it easy. In most cases we don't have that. So if you don't have that, and all you have is one person's word against another's, that when it's really critical to find out how did that first statement come about, who heard it, what did they say, how did they ask, what were some of the potential background influences, so that the person who does have to decide can look at all of those things and weigh the non-hard evidence. I'm not saying that's the only way to conclude that abuse happened.

In other words, she testified that whether a child's statement uncorroborated by physical evidence is sufficient depends on the circumstances surrounding the statement. Defendant is, therefore, correct that Dr. Okla never indicated an uncorroborated statement was insufficient to convict a defendant. However, although defendant asserts the prosecution's statements implied Dr. Okla testified there must be physical evidence of abuse, when viewed in context, the prosecution merely stated that Dr. Okla seemed biased based on her language. Furthermore, the prosecutor's statement, "I agree with her completely" appears to be a reference to Dr. Okla's testimony that corroborating physical evidence of the abuse is solid substantial evidence and is more compelling. The prosecutor then stated that he wished he always had solid evidence, but that he hoped that there did not always have to be physical evidence because sometimes people do not leave a physical trail of injuries and witnesses. In context, the prosecutor does not appear to be arguing that Dr. Okla testified that there must be more than the child's uncorroborated statement. Instead, he appears to be emphasizing that the child's statement alone is sufficient and that there are good reasons for the child's statement alone to be sufficient. Accordingly, we conclude that there was no prosecutorial misconduct associated with this statement.[1]

[1] Even were we to conclude that this is an instance of prosecutorial misconduct, we would nevertheless affirm because the trial court properly instructed the jury that it must determine the facts, that it must decide the case based on the properly admitted evidence, and that the lawyer's statements and arguments are not evidence. A curative instruction is usually sufficient to cure

Defendant objected to the second alleged mischaracterization of Dr. Okla's testimony. During closing, the prosecution argued that "Dr. Okla would like – no, she likes to say a lot but if she – she had her way, she would, it seems like, explain away almost any sexual abuse claim that happens to arise during a divorce as, well, the divorce caused it." At trial, Dr. Okla testified that "[w]e do know that allegations of abuse frequently arise only at the time of a divorce or separation." She also testified that she was "familiar with research that shows there are higher rates of false allegations in domestic disputes and divorces." She also indicated that she knew defendant's wife was planning on divorcing defendant and, although she specified that she was not saying that the girls were "put up to saying something about abuse in order to effectuate [defendant's] leaving the household," she implied that it was a possibility in certain circumstances. Thus, the prosecution's argument was a fair inference. Further, we note that the prosecution did not say that Dr. Okla *would* explain away almost any sexual claim arising in a divorce as a product of the divorce; he said that *it seems like* she would. Accordingly, we conclude that there was no misconduct.[2]

Moreover, even if there were misconduct, when defendant objected to the comments, the trial court immediately instructed the jury that "this is argument. You'll determine what the facts of the case are from the testimony." Further, the trial court instructed the jury that the attorney's statements and arguments were not evidence and that the jury was to determine the outcome based only on the properly admitted evidence. The jury was also instructed of its duty to determine the facts based on the evidence, including the witnesses' testimony. Again, juries are presumed to follow their instructions, *Unger*, 278 Mich App at 235. Accordingly, we do not find error requiring reversal.

II. "COMPROMISE VERDICT"

Defendant argues that six counts of second-degree criminal sexual conduct were not supported by sufficient evidence and should not have been submitted to the jury. Although the

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the prejudicial effect of an inappropriate prosecutorial comment. *People v Cain*, 299 Mich App 27, 36; 829 NW2d 37 (2012). Thus, if defense counsel failed to object, review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005), aff'd 475 Mich 101 (2006). In this case, not only would an appropriate curative instruction have cured any error, the jury was actually instructed in a manner that would have cured any error associated with the prosecution's comments. The jury is presumed to follow its instructions. *Unger*, 278 Mich App at 235.

[2] We also note that the prosecution's comments could fairly be understood as a response to defendant's theory of the case. In opening statement, the defense attorney stated, "It is our position in this case that these children are victims, but they're not victims of any sexual assault by the defendant, but they're victims of manipulation by Doris Winchell, because they were having problems in their marriage." The defense attorney also introduced testimony regarding what the children knew about the divorce and she produced a witness to contest Winchell's assertions that she initially sought a divorce.

jury acquitted him of four of these counts, he contends that the sheer number submitted violated his due process rights due to the possibility of a "compromise verdict." We disagree.

Defendant preserved this issue by moving for directed verdict on the second-degree criminal sexual charges. *People v Lugo*, 214 Mich App 699, 710-711; 542 NW2d 921 (1995). Challenges to the sufficiency of the evidence are reviewed de novo. *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010).

"A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if . . . [t]hat other person is under 13 years of age." MCL 750.520c(1)(a). "Sexual contact" is defined as "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification [or] done for a sexual purpose . . . ." MCL 750.520a(q). "'Intimate parts' includes the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(e).

The second-degree criminal sexual conduct charges all pertained to the older of the two victims. She testified that defendant touched her "butt" and chest sometimes when she was in bed and sometimes when she was not in bed. She explained that defendant once made her sit on his lap while they were in the living room and he would "touch [her] . . . on the edge of [her] underwear." She added that his fingers would be on bare skin because he placed his hands inside her jeans. She testified that he would squeeze the top of her butt and specifically stated that it happened "[m]ore than one time." She also testified that he touched her chest area more than once while in the bedroom and that it would occur two times or more per month. Regarding her chest, the victim testified that defendant touched her nipples and that her chest would hurt because he rubbed the skin "really hard." She also testified that he would touch "around" her front part, demonstrating that he "rubb[ed] from about the right front hipbone area down toward the crotch of her jeans." She testified that this contact happened more than once and that it was on her skin because defendant reached inside her pajamas to touch her. Finally, she testified that she touched defendant's "private part" once and then pulled her hand away. Her testimony does not need to be corroborated. MCL 750.520h.

We note that only six charges were submitted to the jury. However, there was sufficient evidence to submit *seven* charges based on defendant touching the victim's buttocks, once in the living room and once in the bedroom (2 counts); touching her chest, including her nipples, on more than one occasion (2 counts); touching her "front area" on more than one occasion (2 counts); and making her touch his "private parts" on one occasion (1 count).[3] Since there was sufficient evidence to support all of the charges, there was no danger of a compromise verdict.

[3] Although the victim did not testify to the specific number of times that defendant touched her, a jury could reasonably believe that "more than once" means more than one time and at least two times.

Furthermore, even if it were improper to submit all six counts to the jury, it is highly probable that the error did not affect the verdict. First, the jurors were given the standard instruction not to compromise their views. Second, the jurors were polled after rendering their verdict and each affirmed two verdicts of second-degree criminal sexual conduct and one verdict of assault with intent to commit second-degree criminal sexual conduct. Further, in *People v Graves*, 458 Mich 476, 487-488; 581 NW2d 229 (1998), this Court held:

> If, however, sufficiently persuasive indicia of jury compromise are present, reversal may be warranted in certain circumstances . . . where the jury is presented an erroneous instruction, and: 1) logically irreconcilable verdicts are returned, or 2) there is clear record evidence of unresolved jury confusion, or 3) as the prosecution concedes in the alternative, where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense.

Defendant concedes that there is "admittedly no evidence . . . of logically inconsistent verdicts or unresolved jury confusion." Instead, he argues that the "sheer number of unsupported counts of second-degree criminal sexual conduct was bound to cause substantial confusion and posed a serious risk of jury compromise." However, there is nothing on this record indicating that the jury was confused. There is also nothing to suggest that the number of charges posed a risk of a compromise verdict.

III. SENTENCING GUIDELINES

Defendant argues that offense variables (OV's) 9 and 19 were improperly scored. This issue was preserved by a motion to remand. "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, 432; ___ NW2d ___ (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*.

A. OV 9

OV 9 addresses the number of victims. MCL 777.39(1). The trial court must assess ten points if "2 to 9 victims . . . were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c). Each person placed in danger of physical injury or loss of life is counted as a victim. MCL 777.39(2)(a). And, to be considered a victim for purposes of OV 9, a person does not have to suffer actual harm; close proximity to a physically threatening situation may suffice. *People v Gratsch*, 299 Mich App 604, 624; 831 NW2d 462 (2013). However, when scoring OV 9, the trial court may not consider the defendant's conduct after the completion of the sentencing offense. *People v McGraw*, 484 Mich 120, 133-134; 771 NW2d 655 (2009).

Defendant acknowledges testimony that both girls were abused, but asserts that only one of them was a victim during each of the defendant's convicted crimes (the older of the two). However, defendant's assault conviction arose from his conduct concerning the younger of the two victims and the girls' testimony established that both victims were sleeping in the same bed

when defendant entered their room, picked up the younger girl, put her in a separate bed *in the same room*, removed her clothes and touched her. The younger girl testified that she kicked her sister awake. The older girl testified that she claimed she had to go to the bathroom when defendant asked her what she was doing. She said that she actually went to the bathroom to catch her breath because she saw what was happening to her younger sister and that it had happened to both girls before. She testified that on previous occasions, defendant would pull either her or her sister out of bed and into a different bed after dark when everyone was asleep. She testified that sometimes she hid in the bathroom because she was afraid that she was going to be next. Accordingly, based on the testimony both girls were "victims" within the meaning of OV 9 and there was no error in the scoring.

B. OV 19

OV 19 addresses interference with the administration of justice. MCL 777.49. The trial court must assess ten points if "the offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). In this case, the presentence investigation report indicated that "OV 19 was scored at 10 points as [defendant] had told both girls not to tell." In *People v Endres*, 269 Mich App 414, 420-421; 711 NW2d 398 (2006), this Court held that a defendant's threats to kill his victim jeopardized the administration of justice and thus supported the scoring of OV 19. This Court concluded in *Endres* that "the record supports the conclusion that those threats resulted in the interference with the administration of justice, either by preventing the victim from coming forward sooner or affecting his testimony against defendant." *Id*. at 422. Thus, if there was evidence that defendant threatened or ordered the girls to not tell anyone about the abuse, then there would be sufficient evidence to support the trial court's scoring of OV 19. However, the only reference in the record is the above statement that the variable was scored for this reason. Neither victim testified that defendant told them not to tell. The older girl testified that she did not tell because she was afraid of defendant, but that alone does not appear to be sufficient to score OV 19 because it is not based on what defendant, did, but rather on how the victim felt. Accordingly, we hold that OV 19 was erroneously scored.

If a scoring error results in a higher sentencing guidelines range, this Court must remand for resentencing even if the sentence falls within the corrected guidelines range. *People v Francisco*, 474 Mich 82, 88-91; 711 NW2d 44 (2006). Although OV 19 was misscored, remand for resentencing is not required because defendant's minimum sentence range is unaffected by the error in scoring OV 19.[4] "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *Id*. at 89, n 8. And "[a]n erroneous score that would not,

[4] Defendant was given a total OV score of 65 and a total PRV score of 175, placing him in OV level V of the sentencing grid for his offenses. His minimum sentencing guidelines range was 22 to 76 months for the assault with intent to commit second-degree criminal sexual conduct conviction and it was 58 to 228 months for his second-degree criminal sexual conduct convictions. When the ten erroneously scored points for OV 19 are subtracted, defendant's new OV total is 55 points. An offender is in OV level V if he or she has between 50 and 74 points. Thus, the reduction in points does not affect defendant's minimum sentencing guidelines range.

when corrected, result in a different recommended minimum sentence range does not require resentencing." *People v Jackson*, 291 Mich App 644, 649; 805 NW2d 463 (2011).

Affirmed.

/s/ Deborah A. Servitto
/s/ William C. Whitbeck
/s/ Donald S. Owens