STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 4, 2014
v	No. 311547 Wayne Circuit Court
JASON RUSSELL CARTER Defendant-Appellant.	LC No. 11-006595-FC

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant Jason Russell Carter of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration of victims younger than 13).[1] On April 16, 2012, the trial court sentenced defendant to a prison term of 25 to 30 years for each conviction, to be served concurrently. Defendant now appeals as of right, and we affirm.

The two victims were both 12 years of age at the time of defendant's October 2011 trial. The victims recalled that in the spring or summer of 2011,[2] when they were still in the fifth grade, defendant and a friend called "D" engaged both victims in digital penetration and forced them to perform oral sex. Specifically, it was alleged that defendant forced both victims to perform oral sex on him. It was these acts that led to defendant's convictions.

Defendant first argues that the trial court erred in preliminarily instructing the potential jurors that the trial would not proceed in the same manner as depicted in legal dramas on television and in the movies. Defendant concludes that the instruction preemptively bolstered the prosecution's case and minimized its burden of proof by announcing that the prosecutor need not present particular evidence, including forensic evidence. Defendant did not object to the trial court's special preliminary instruction, so this issue is unpreserved for appellate review.

[1] The prosecutor charged both defendant and a codefendant, Michael Dejeon McReynolds, with two counts of first-degree CSC for penetrating the same young victims. Codefendant McReynolds was tried separately and also convicted of two counts of first-degree CSC. His appeal is pending before this Court.

[2] The prosecutor alleged that the crimes occurred in or around May 2011.

This Court generally considers de novo claims of instructional error. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). Where a claim of instructional error is preserved, this Court reviews "for an abuse of discretion a trial court's determination that a specific instruction" applies or does not apply to the facts of record. *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011); see also *People v Young*, 472 Mich 130, 135, 141; 693 NW2d 801 (2005) (noting that a "decision whether to give a[n] . . . instruction falls within the trial court's sound discretion"). "[W]here, as here, the defendant failed to preserve his claim," an appellate court confines its review "to the plain-error framework set forth in" *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994), and *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). *Young*, 472 Mich at 135, 143. Thus, this Court reviews unpreserved claims of error only to ascertain whether any plain error affected the defendant's substantial rights. *Id*.

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000) (quotation marks and citation omitted). This Court reviews jury instructions as a whole to determine whether error requiring reversal occurred. *Bartlett*, 231 Mich App at 143. Even when somewhat imperfect, jury instructions do not qualify as erroneous provided that they fairly present to the jury the issues to be tried and sufficiently protect the defendant's rights. *People v Knapp*, 244 Mich App 361, 376; 624 NW2d 227 (2001); *Bartlett*, 231 Mich App at 143-144.

During the trial court's voir dire of the prospective jurors, it read the jury some preliminary instructions, and defendant complains on appeal about the following instruction:

> Now, how many of you watch television shows like CSI and Law & Order and Harry's Law and some of those?
>
> I have to admit to some Law & Orders myself once in a while. You can probably imagine why I ask that question. We don't want you to be sitting there under the delusion that what you're about to see in the real world of the Frank Murphy Hall of Justice bears much relationship to how you see trial reenacted on television and in the movies.
>
> Although I know those television trial shows are very popular these days, . . . they can give you a very false or misleading idea of how cases are investigated and how they're tried in a courtroom. Especially when it comes into the area of forensic science . . . , or the ability of either side to produce scientific evidence that proves or disproves the case. Most of that stuff is just fantasy that lives in the minds of television script writers.
>
> Please do not confuse what you see on TV with reality. Please don't expect here, for example, the prosecutor is going to produce a lot of exotic scientific evidence . . . , or that he is going to produce superbly articulate witnesses who look like GQ models and have been trained at the actor[']s studio because I can guarantee you that is not going to be the case here.

> And by the same token you can't expect the defense here is going to stage a melodramatic scene at the end of the trial where the real culprit burst[s] through the door of the courtroom and reveals a complicated conspiracy between General Motors and the CIA. . . . [T]hat's just for television and the movies. It's not for the real world.
>
> And . . . on television they always show the defense lawyer is . . . never just trying the case by himself as [defense counsel] is here. He's always got a team . . . of 15 or 20 lawyers that he consults at length after each day of trial and they eat Chinese food out of white cartons around a big conference table, brainstorm the case. Well [defense counsel] is going it alone here, that's the way it is in the real world, just like [the prosecutor] is.
>
> I mean even though [the prosecutor] comes from an office with . . . well over a hundred assistant prosecutors upstairs, they're all doing their own thing. They're busy with their own cases. They're not all just focused on . . . [defendant's] trial today.
>
> I say all that to simply remind you that trial evidence is frequently imperfect and can also be boring. And as far as I know, there's no videotapes of the crime charged here.
>
> So what you must do in order to perform your duty in a responsible fashion is to simply take the evidence that's presented to you and then use your own common sense and decide whether that evidence proves to you beyond a reasonable doubt that the defendant is guilty or not. Wh[at] you are not to do is to take the evidence that's presented to you and then decide whether it's presented to you the same way you think it would have been presented in your last week's Law & Order episode and measure it against that standard and decide whether i[t] proves beyond a reasonable doubt that the defendant is guilty, okay.

An accurate reading of the trial court's preliminary instruction belies defendant's contention that the instruction minimized the prosecutor's burden of proof by announcing that he need not present forensic evidence. The court merely informed the potential jurors that the prosecutor likely would not introduce during trial multiple items of scientific evidence or trained actor-like witnesses. And the above-quoted instruction, viewed as a whole, accurately advised the potential jurors that they had a responsibility to review the evidence presented by the parties, apply their common sense, and determine whether that evidence established defendant's guilt beyond a reasonable doubt. See CJI2d 3.1(3) (in deciding the facts, the jury must "think about all the evidence"), CJI2d 3.2 (describing the proof beyond a reasonable doubt standard), CJI2d 3.2(3) (describing a reasonable doubt as comprising "a doubt based on reason and common sense"), CJI2d 3.5 (defining evidence), CJI2d 3.5(9) (instructing that the jurors "should use [their] own common sense and general knowledge in weighing and judging the evidence"), and CJI2d 3.6(2) (in deciding witness credibility, the jurors "should rely on [their] own common sense and everyday experience"). Furthermore, before opening statements, the trial court gave additional preliminary instructions tracking the concepts in CJI2d 3.1, CJI2d 3.5, and CJI2d 3.6,

among others; and after closing arguments, the trial court correctly instructed the jury in accordance with CJI2d 3.1, CJI2d 3.2, CJI2d 3.5, and CJI2d 3.6, among others.

For these reasons, defendant has not demonstrated any plain error. And because the trial court's instructions when reviewed as a whole properly informed the jury regarding the prosecutor's burden of proof and other relevant matters, defense counsel was not ineffective for failing to raise a meritless objection to the instructions. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

We also reject defendant's argument that the trial court erred in admitting McGinnis's testimony regarding the cell phone records, when no suitable basis for his expertise regarding cell phone technologies had been offered. Defendant did not object at trial to the admissibility of McGinnis's testimony concerning the Metro PCS telephone records, so this issue is unpreserved for appellate review. MRE 103(a)(1).

The decision whether to admit evidence rests within the trial court's sound discretion, and "will be reversed only when there is an abuse of discretion." *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion exists when the trial court selects an outcome falling outside the range of reasonable and principled outcomes. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). If an evidentiary issue involves a preliminary question of law, such as whether a rule of evidence or statute precludes the evidence, this Court reviews de novo this legal question. *Gursky*, 486 Mich at 606. However, this Court reviews unpreserved claims of evidentiary error only to ascertain whether a plain error affected the defendant's substantial rights. *Young*, 472 Mich at 135, 143.

The trial court did not qualify McGinnis under MRE 702 as an expert in the field of cell phone records and technologies. Consequently, "the admissibility of his opinion [testimony] is governed by MRE 701 . . . ." *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). Pursuant to MRE 701, a lay witness may offer "testimony in the form of opinions or inferences," provided that the lay witness's opinion or inference testimony (1) rests on the lay witness's rational perceptions; and (2) helps establish "a clear understanding of the witness'[s] testimony or the determination of a fact in issue." See also *Daniel*, 207 Mich App at 57 (finding no abuse of discretion in the admission under MRE 701 of a police officer's lay opinion testimony regarding the occurrence of cocaine sales that the officer observed); *People v Oliver*, 170 Mich App 38, 49-51; 427 NW2d 898 (1988), mod in part on other grounds 433 Mich 862 (1989) (finding no abuse of discretion in the admission under MRE 701 of two police officers' lay opinion testimony concerning the potential appearance of bullet holes on a car they had examined).

Immediately before McGinnis testified as a rebuttal witness for the prosecutor, the parties placed on the record a stipulation about the cell phone records that were the focus of McGinnis's testimony. The stipulation encompassed that a Metro PCS record custodian had certified that the records consisted of "true copies of all the [call detail] records" pertaining to a cell phone account held by defendant's mother between April 1, 2011 and July 30, 2011. McGinnis explained that cell phone records "have become an intricate part of crime . . . investigations," and "a very large part of [his] job" involved cell phone records. McGinnis estimated that his work with the Detroit Police Department's homicide division obligated him to "spend probably 20 to

30 hours a week analyzing phone records, whether it be calls between one number and another number," or identifying "different cell towers that are used to locate where a device might be" or from where a cell phone made a given call. McGinnis's testimony concerning the number of calls between the cell phone number sometimes used by defendant and codefendant McReynolds's cell phone number, as well as the location where a few calls were placed, was derived from his personal review of the phone records that the prosecutor had supplied.

For these reasons, we detect no plain error arising from the admission of McGinnis's testimony, because (1) it rested on his own rational perceptions; (2) it had relevance toward defendant's credibility, a material fact, especially after defendant testified that he and codefendant McReynolds, although cousins, did not communicate often; and (3) the review of the cell phone records did not demand "scientific, technical or other specialized knowledge." *Oliver*, 170 Mich App at 50. Defense counsel's failure to object therefore did not constitute ineffective assistance of counsel. *Mack*, 265 Mich App at 130.

Defendant's final argument is that his 25-year mandatory minimum term of imprisonment constitutes cruel or unusual punishment prohibited by Const 1963, art 1, § 16. Defendant did not challenge in the trial court the statutory 25-year mandatory minimum sentence term as violative of 1963 Const, art 1, § 16. Therefore, this issue is unpreserved for appellate review. This Court reviews unpreserved claims of error only to ascertain whether any plain error affected the defendant's substantial rights. *Young*, 472 Mich at 135, 143.

Defendant's argument is foreclosed by our decision in *People v Benton*, 294 Mich App 191, 203, 207; 817 NW2d 599 (2011), where this Court rejected the defendant's contention that the "mandatory 25-year minimum sentences for her [CSC I] convictions," authorized in MCL 750.520b(2)(b), were "cruel and/or unusual punishments that violate the federal and state constitutions." This Court analyzed and rejected the defendant's constitutional challenge, and those grounds are the same as those proffered by defendant in the present case. Defendant has therefore not demonstrated that the 25-year minimum sentence mandated by MCL 750.520b(2)(b) violated 1963 Const, art 1, § 16, *Benton*, 294 Mich App at 203-207, and nor has he distinguished the applicability of *Benton* to this case.[3]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Riordan

[3] At oral argument before this Court, defendant's counsel indicated that a sentencing issue under *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), was not raised because defendant testified to his age at trial.