STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ANDREW WELCH, SR.,

Defendant-Appellant.

UNPUBLISHED
August 9, 1996

No. 169037
LC No. 93-005669 FH

Before: Reilly, P.J., and Cavanagh and R.C. Anderson,* JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). Defendant subsequently pleased guilty of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. The trial court sentenced defendant to fifteen to thirty years' imprisonment. We affirm.

I

Defendant first argues that he was denied a fair trial by the introduction of both hearsay evidence of the alleged abuse and prejudicial evidence of sex acts between the complainants. Defendant did not object to the testimony, thereby waiving appellate review of the admission of the evidence in the absence of manifest injustice. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995).

After carefully reviewing the record, we find no manifest injustice. Defendant made a tactical decision not to object to the testimony of Pam Gerber, the foster mother, in order to avoid the introduction of evidence as to prior physical abuse of the complainants. The introduction of Gerber's preliminary examination testimony was cumulative to her testimony at trial, and moreover the trial court instructed the jury that this portion of the witness' statement could not be used to prove the elements of the charged crimes. Accordingly, the admission of this testimony did not result in manifest injustice.

* Circuit judge, sitting on the Court of Appeals by assignment.

Gerber's testimony regarding seeing the complainants performing oral sex on each other was admissible because it emanated from her own observations. See MRE 602.

Defendant also relies on *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), in arguing that the evidence of the sex acts between the complainants was improperly used as evidence that defendant had assaulted them. However, *Beckley* deals with the scope of expert testimony in cases involving child abuse. Gerber was not qualified as an expert in the present case. Gerber's testimony regarding the acts was admissible under MRE 401 because the evidence supported a conclusion that the complainants learned this behavior from defendant.

II

Defendant next contends that he was denied a fair trial when the prosecutor based her arguments on unsupported allegations. Defendant did not object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Defendant claims that three comments made during the prosecutor's closing argument improperly referred to physical abuse of the children. After reviewing the comments, we conclude that there was no error requiring reversal. With regard to two of the comments, the jury could have interpreted the prosecutor's references to physical attacks and contact as referring to the alleged sexual abuse. As to the remaining statement, the jury was aware that the complainants had been removed from their parents' care and placed in a foster home. The prejudicial effect of the prosecutor's statements was not so great that it could not have been cured by a curative instruction, had one been requested.

III

Defendant asserts that his conviction should be reversed because the trial court failed to instruct the jury that it must unanimously agree on the specific sexual act that was the basis of the offense for which defendant was found to be guilty. However, defendant did not object or request that the instructions at issue be given at trial. Therefore, our review is limited to the issue whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Manifest injustice occurs where the erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991).

We conclude that the trial court's instructions did not result in manifest injustice. A specific unanimity instruction is not required in all cases in which more than one act is presented as evidence of the actus reus of a single criminal offense. Where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice. *People v Cooks*, 446 Mich 503, 512-513; 521 NW2d 275 (1994). In the present case, the prosecution presented evidence of one act of first-degree criminal sexual conduct. A second instance of first-degree

criminal sexual conduct was brought out during the cross examination of one of the complainants. Because the alternative acts both involved instances of defendant putting his mouth on the complainant's penis and thus were not materially distinct, the trial court's general unanimity instruction was adequate.

IV

Finally, defendant claims that his trial counsel was ineffective in failing to object to the scoring of the sentencing guidelines. A defendant who claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel fell below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that but for counsel's error, there is a reasonable probability that the outcome of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den ___ US ___; 115 S Ct 923; 140 L Ed 2d 802 (1995).

We find that defendant has not demonstrated that his counsel was ineffective. First, we note that the sentencing guidelines do not apply to habitual offender convictions. *People v Chandler*, 211 Mich App 604, 615; 536 NW2d 799 (1995). Moreover, appellate review of scoring decisions is very limited. This Court will affirm a scoring decision if evidence exists to support the score. *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994).

Defense counsel did not err in failing to object to the scoring of Offense Variable (OV) 6. A sentencing court may consider criminal activity of which the defendant was acquitted. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). The trial court apparently did err in awarding fifteen points under OV 25 for three or more contemporaneous acts. The record reveals a maximum of two contemporaneous acts.[1] However, despite this error, defendant was not prejudiced by defense counsel's failure to object because the change in the scoring of OV 25 would still leave him in the B-III offender level.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Mark J. Cavanagh
/s/ Robert C. Anderson

[1] The first complainant testified that defendant assaulted him twice. One of these assaults formed the basis of defendant's conviction for first-degree criminal sexual conduct. The second complainant testified that defendant assaulted him one time.