# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 3, 2012 |
| v | No. 300769<br>Kalamazoo Circuit Court |
| ADAM PAUL FINK,<br><br>Defendant-Appellant. | LC No. 2009-001990-FC |

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); and attempted CSC I, MCL 750.92; MCL 750.520b(1)(a). The trial court sentenced defendant to concurrent sentences of 25 to 40 years' imprisonment for the CSC I convictions, 10 to 15 years' imprisonment for the CSC II convictions, and 40 months to 5 years' imprisonment for the attempted CSC I conviction. Defendant appeals as of right. We affirm.

This case arises from sexual conduct occurring between defendant and an eight-year-old boy. Defendant was employed by the victim's father and, ultimately, began living with the victim's family in the summer of 2007. The victim testified at trial that the sexual conduct with defendant involved touching each other's "privates," reciprocal acts of oral sex, and defendant's attempted anal penetration of the victim. The victim also testified that defendant threatened to hurt him if he did not engage in the sexual conduct. Although defendant told the victim not to tell the victim's father about the sexual conduct, the victim eventually disclosed various instances of the sexual conduct to his parents and to a police officer during a forensic interview.

On appeal, defendant first argues that his convictions must be reversed because the first forensic interview of the victim did not comply with the Michigan Governor's Task Force Forensic Interview Protocol (the forensic interview protocol). We disagree. We review this unpreserved issue for plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Under the Child Protection Law, MCL 722.621 *et seq.*, law enforcement officials are required to cooperate with the Family Independence Agency (FIA) in conducting investigations of reported child abuse or neglect. MCL 722.628(4); MCL 722.622(o). "The [FIA] and law

enforcement officials shall conduct investigations in compliance with the protocols adopted and implemented as required by subsection (6)." MCL 722.628(4). MCL 722.628(6) provides:

> In each county, the prosecuting attorney and the [FIA] shall develop and establish procedures for involving law enforcement officials as provided in this section. In each county, the prosecuting attorney and the [FIA] shall adopt and implement standard child abuse and neglect investigation and interview protocols using as a model the protocols developed by the governor's task force on children's justice as published in FIA Publication 794 (revised 8-98) and FIA Publication 779 (8-98), or an updated version of those publications.

MCL 600.2163a governs, among other things, the use of "videorecorded statements" in prosecutions and proceedings involving the physical or sexual abuse of children. MCL 600.2163a(7) provides that "[i]n a videorecorded statement, the questioning of the witness should be full and complete" and that it "*shall be in accordance with the forensic interview protocol* implemented as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628 . . . ." (emphasis added).

Defendant's argument is based on the inclusion of the word "shall" in MCL 600.2163a(7). "The term 'shall' in a statute generally indicates a mandatory, rather than permissive, duty." *People v Kern*, 288 Mich App 513, 519; 794 NW2d 362 (2010). However, as established by this Court's case law, the failure of officials to follow a mandatory command does not necessarily grant relief to a defendant. See *People v Patton*, 285 Mich App 229, 231-235; 775 NW2d 610 (2009) (holding that the correction officials' failure to comply with the requirement, found in the Interstate Agreement on Detainers (IAD), MCL 780.601, that they "shall promptly inform" the defendant of any detainer lodged against him did not entitle the defendant to vacation of his conviction because the IAD, while it provided remedies for certain violations, did not expressly provide a remedy for the violation that occurred).

Here, the Legislature mandated that each county adopt and implement a forensic interview protocol that is modeled after the forensic interview protocol. See MCL 722.628(6). The Legislature also mandated that the questioning of an alleged child sexual abuse victim in a "videorecorded statement" "shall be in accordance with the forensic interview protocol implemented as required by section 8 of the child protection law . . . MCL 722.628[.]" See MCL 600.2163a(7). However, nowhere has the Legislature stated that the remedy for failing to question an alleged child sexual abuse victim in accordance with the forensic interview protocol is that charges for the abuse may not be brought against the alleged perpetrator or that any convictions stemming from the abuse must be vacated. Had the Legislature intended such a remedy, it would have included the remedy in the statute. We may not read such a remedy into MCL 722.628. See *People v Haynes*, 281 Mich App 27, 32; 760 NW2d 283 (2008) ("[C]ourts may not read or include provisions into a statute that the Legislature did not."). Accordingly, we

reject defendant's claim that his convictions must be vacated because the first forensic interview was not in compliance with the forensic interview protocol.[1]

Defendant next argues that his convictions are not supported by sufficient evidence. We disagree. We review de novo challenges to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.*

Defendant does not claim that the victim's testimony regarding the sexual conduct was insufficient to establish any of the elements of the crimes. Rather, he argues that, for numerous reasons, the victim's testimony should not have been believed. The reasons include that the first forensic interview tainted the victim's testimony, that the victim on two occasions when asked by his father denied that defendant had touched him, and that the victim's testimony contradicted statements he made in the forensic interviews. Defendant also contends that the testimony of the victim's family members should not be believed. However, our review of the sufficiency of the evidence is deferential. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We must draw all reasonable inferences and make all credibility choices in favor of the jury verdict. *Id.* We will not interfere with the jury's role of determining the credibility of the witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). The jury, having convicted defendant of the five CSC charges, necessarily determined that the victim was credible. We may not interfere with the jury's credibility determination. *Id.* Accordingly, the evidence, when viewed in the light most favorable to the prosecution, is sufficient to support defendant's convictions. See *Cline*, 276 Mich App at 642.

Next, defendant argues that his minimum sentences of 25 years' imprisonment for his CSC I convictions violate his constitutional protections against cruel or unusual punishment. We disagree. We review constitutional issues de novo. *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997). The punishment for a CSC I conviction is "imprisonment for life or any term of years, but not less than 25 years," if the offense is committed by a person 17 years of age or older against a person less than 13 years of age. MCL 750.520b(2)(b). This Court recently held that this mandatory minimum sentence of 25 years' imprisonment does not constitute cruel or unusual punishment. *People v Benton*, ___ Mich App ___; ___ NW2d ___ (Docket No. 296721, issued September 22, 2011), slip op at 6-8. Because we are bound to follow *Benton*, we reject defendant's argument that his minimum sentences for his CSC I convictions are unconstitutional. See MCR 7.215(C)(2), (J)(1).

Defendant next argues that the trial court erred in scoring 50 points for offense variable (OV) 11, MCL 777.41. MCL 769.34(2)(a) provides, in pertinent part: "If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of

[1] At trial, defense counsel extensively cross-examined the prosecution's witnesses regarding violations of the forensic interview protocol and called an expert witness to testify to same. Thus, defendant was able to communicate to the jury the errors for consideration when weighing the evidence.

corrections, the court shall impose sentence in accordance with that statute." The term "shall" indicates a mandatory duty. *Kern*, 288 Mich App at 519. The trial court was, therefore, required to impose a sentence in accordance with MCL 750.520b(2)(b), which mandated a minimum sentence of 25 years' imprisonment for defendant's CSC I convictions. Consequently, any error in the scoring of OV 11 did not impact defendant's sentence, and we decline to address the merits of defendant's argument that the trial court erred in scoring 50 points for OV 11.[2]

Finally, defendant argues that because he was incompetent to evaluate the plea offer tendered by the prosecutor due to a mental health disorder caused by sexual abuse he suffered as a child, his convictions must be reversed and he should be allowed to accept the offer. We disagree. We review this unpreserved issue for plain error affecting defendant's substantial rights. See *Carines*, 460 Mich at 763-764.

A defendant shall be presumed competent to stand trial. MCL 330.2020(1); see also *People v Mette*, 243 Mich App 318, 331; 621 NW2d 713 (2000). A defendant is incompetent to stand trial if his mental condition renders him incapable of understanding the nature and object of the proceedings or from assisting in his defense in a rational manner. MCL 330.2020(1). "[A] criminal defendant's mental condition at the time of trial must be such as to assure that he understands the charges against him and can knowingly assist in his defense." *People v McSwain*, 259 Mich App 654, 692; 676 NW2d 236 (2003). The same standards apply to a defendant's competency to plead. *People v Belanger*, 73 Mich App 438, 447; 252 NW2d 472 (1977). "The fact that [the] defendant decided to exercise his constitutional right to go to trial while rejecting a potentially good plea offer does not alone show a lack of competence." *People v McCrady*, 213 Mich App 474, 480; 540 NW2d 718 (1995).

The record contains no evidence to rebut the presumption that defendant was competent.[3] See *People v Blocker*, 393 Mich 501, 508; 227 NW2d 767 (1975) ("The issue of competence can only be raised by evidence of incompetence."); *McSwain*, 259 Mich App at 695 (conviction upheld where record contains no evidence that a mental condition rendered the defendant incompetent). In fact, defense counsel created a record that established that defendant understood the terms of the plea offer and that, after consulting his parents and counsel, defendant chose to reject the offer and proceed to trial. In addition, no evidence indicates that defendant suffered sexual abuse as a child. Indeed, pursuant to the presentence report, defendant denied "any physical, emotional, or sexual abuse of any kind" while growing up. See *People v Whyte*, 165 Mich App 409, 411-414; 418 NW2d 484 (1988) (discussing how presentence reports may be significant evidence of a defendant's potential incompetency to justify a psychiatric

[2] Defendant himself concedes that any error in the scoring of OV 11 has "practical value" only if the 25-year mandatory minimum sentence is declared unconstitutional.

[3] Defendant moved this Court for a remand to develop a factual record to establish his incompetency. This Court denied the motion. *People v Fink*, unpublished order of the Court of Appeals, entered May 27, 2011 (Docket No. 300769). Defendant concedes that without an additional factual record there is no record evidence establishing that he was incompetent to evaluate and accept the plea offer.

evaluation). At the sentencing hearing, defense counsel stated that he "spen[t] a great deal of time going over each of the paragraphs [of the presentence report] with [defendant] and read to him what each of the paragraphs contain[ed]." Defense counsel stated there were no additions, corrections, or deletions that needed to be made. Because there is no evidence to support defendant's claim, we reject the claim that defendant was incompetent to evaluate and accept the tendered plea offer.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering