

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee,

v

TRAVIS FARR GONZALES,

Defendant- Appellant.

UNPUBLISHED

January 17, 1997

No. 186903

Saginaw Circuit Court

LC No. 93-8627 FC

Before: Markman, P.J., and O’Connell and D. J. Kelly,* JJ.

PER CURIAM.

Defendant appeals by right his convictions of armed robbery, MCL 750.529; MSA 28.797, second-degree criminal sexual conduct (CSC), MCL 750.520c; MSA 28.788(3), and habitual offender - fourth felony, MCL 769.12; MSA 28.1084, pursuant to a pleas of guilty but mentally ill. These convictions arise out of the robbery of a gas station, during which defendant held a female clerk at knife point and fondled her breasts. The trial court sentenced defendant to twenty to forty years’ imprisonment on the armed robbery count and a concurrent term of ten to twenty years’ imprisonment for the second-degree CSC count. We affirm.

Defendant first claims that he was denied the effective assistance of counsel by his counsel’s failure to seek a “*Cobbs* plea.” See *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). Defendant contends that the premises on which he entered into the plea bargain changed because his sentencing guidelines’ range was increased during his sentencing on the basis of an analysis of the incident underlying the convictions. In order to justify reversal of an otherwise valid conviction on the basis of ineffective assistance of counsel, “a defendant must show that a counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Here, in response to this claim, the trial judge indicated that he generally disfavored “*Cobbs* pleas.” A trial judge “may” but is not obligated to provide a preliminary sentence evaluation. *Cobbs* at 283. The

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

plea record indicates that defendant's plea was not conditioned in any way on the sentencing guidelines. The prosecutor's only sentence recommendation was that the minimum sentence not exceed twenty years. The sentence imposed did not exceed this recommended minimum sentence. Under these circumstances, defense counsel's decision not to pursue a "*Cobbs* plea" did not constitute ineffective assistance of counsel as defined by *Pickens*.

Defendant next claims that his sentence was disproportionate. This Court reviews sentences for an abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). The principle of proportionality requires that sentences "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* A minimum sentence within the guidelines' range is presumptively proportionate; a defendant must present "mitigating factors relating to his criminal history or the circumstances of [the offense at issue] to overcome this presumption." *People v Vettese*, 195 Mich App 235, 246-247; 489 NW2d 514 (1992). Here, the sentence imposed for the armed robbery conviction was within the guidelines' range. After recounting the circumstances of the robbery at issue, the trial court concluded that he considered defendant "an extremely dangerous threat to society." We find no abuse of discretion in the sentence imposed for the armed robbery conviction.¹ Nor do we find any abuse of discretion in the sentence imposed upon defendant as a habitual offender for the second-degree CSC conviction. See *People v Yeoman*, 218 Mich App 406, 419, 422; 554 NW2d 577 (1996).

Finally, defendant contends that the trial court erred in listing a conviction for the habitual offender count on the judgment of sentence. The habitual offender statutes provide a means to enhance the sentence of a defendant who repeatedly engages in criminal acts. *People v Smith*, 423 Mich 427, 439, 445; 378 NW2d 384 (1985) (Williams, C.J.). Here, the judgment of sentence demonstrates that defendant's status as an habitual offender was not treated as a separate substantive offense but was properly used as a means to enhance his sentence regarding the second-degree CSC conviction.² Accordingly, we find no error with respect to the listing of the habitual offender conviction on the judgment of sentence.

For these reasons, we affirm defendant's judgment of sentence.

/s/ Stephen J. Markman

/s/ Peter D. O'Connell

/s/ Daniel J. Kelly

¹ We note that defendant should have been sentenced as an habitual offender with respect to both the armed robbery and second-degree CSC convictions. Being sentenced as an habitual offender affects a defendant's ability to be paroled prior to the calendar minimum sentence without the sentencing judge's approval. *Lamb v Bureau of Pardons & Paroles*, 106 Mich App 175, 186-187; 307 NW2d 754 (1981). However, the trial court only sentenced defendant as an habitual offender regarding the

second-degree CSC conviction. This error benefits defendant and is not properly before us because neither party raised it.

² See n 1.