STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY JACKSON,

Defendant-Appellant.

UNPUBLISHED
January 31, 1997

No. 185356

Saginaw Circuit Court
LC No. 94-009527-FC

Before: Cavanagh, P.J., and Gage and D.A. Burress,* JJ.

PER CURIAM.

Defendant pleaded guilty of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b) (victim between thirteen and sixteen years of age), and one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (victim under thirteen years of age). Defendant subsequently pleaded guilty of being a second habitual offender, MCL 769.10; MSA 28.1082. The trial court sentenced defendant to twenty-five to fifty years' imprisonment. Defendant appeals as of right.

I

Defendant first argues that he is entitled to resentencing because Offense Variable (OV) 12 was improperly scored. Defendant contends that he was incorrectly assessed fifty points under OV 12 because there were no other penetrations arising out of the same criminal transaction. Defendant preserved this issue by raising it in a motion for resentencing in the trial court. *People v Walker*, 428 Mich 261, 266; 407 NW2d 367 (1987).

Although panels of this Court have issued a series of conflicting decisions on this question, the controversy was recently resolved by a special panel in *People v Raby*, 218 Mich App 78; 554 NW2d 25 (1996). In *Raby*, this Court held that a defendant's ongoing penetrations of a victim that occurred

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

over an extended period of time can constitute acts that occurred in a continuous time sequence and displayed a single intent or goal. *Id*. at 83. Defendant, like the defendant in *Raby*, repeatedly molested a child who lived in the same household. We therefore find that there was no error in the scoring of OV 12.

II

Defendant next argues that he is entitled to resentencing because the trial court considered at sentencing a prior conviction at which defendant was not represented by counsel. We disagree.

A defendant who collaterally challenges a prior conviction bears the initial burden of establishing that the conviction was obtained without counsel. A defendant may satisfy this initial burden by (1) presenting proof that the conviction was obtained without counsel, such as a docket entry or transcript illuminating the absence of counsel, or (2) presenting evidence that the defendant requested such records from the sentencing court and the court either (a) failed to reply to the request or (b) refused to furnish copies of the records within a reasonable time. *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994).

Defendant presents a letter from the deputy court administrator as evidence that the sentencing court refused to provide copies of the records of the prior conviction. However, the letter clearly indicates that the court did not refuse to provide the records, but rather stated that it did not have the staff to do the necessary research. The court then offered its assistance to defendant's representative. Thus, the court did not refuse to provide the necessary records, and defendant has not sustained his burden of establishing that the prior conviction was obtained without counsel.

III

Defendant next asserts that he should be allowed to withdraw his plea, or at least be resentenced, because the trial court exceeded the sentence agreement. After reviewing the record, we conclude that defendant is in error. Defendant was clearly aware when he consented to the plea agreement that he could be sentenced in the B-IV category. Although defendant reserved the right to argue at sentencing that he belonged in the B-III category, at sentencing defense counsel noted that the B-IV category appeared to be accurate. Accordingly, we find no error requiring reversal.

IV

In his next issue, defendant argues that his plea was involuntary because it was induced by a promise of leniency. Defendant has attached an affidavit in which he claims that he was told that his sentence would not exceed ten years. Although defendant does not state in the affidavit who told him this, in his appellate brief he states that it was his trial counsel.

On appeal we will not consider allegations contained in affidavits outside the record. *People v Sorna*, 88 Mich App 351, 361-362; 276 NW2d 892 (1979). Moreover, defendant stated at the time of his plea that he understood that his minimum sentence could fall between ten and twenty-five years

and that no one had promised him that his sentence would be lighter if he pleaded guilty. Thus, defendant's claims on appeal are contrary to what he stated in open court, and we reject them as a basis for reversal. Cf. *People v Gist*, 188 Mich App 610, 612; 470 NW2d 475 (1991). Accordingly, we find that this issue is without merit.

V

Defendant next contends that he was denied due process when the trial court considered at sentencing other acts of first-degree criminal sexual conduct for which he was never charged. This Court reviews a sentencing court's decision under an abuse of discretion standard. *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995).

We find no abuse of discretion. Where there is record support that other offenses have been committed by the defendant, it may constitute an aggravating factor to be considered by the trial court at sentencing. See *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995). At the preliminary examination, the victim testified that defendant had sexual intercourse with her two or three times a week. We find that the trial court did not abuse its discretion in taking these other incidents into account at sentencing.

VI

In his final issue, defendant claims that his second habitual offender conviction must be reversed because the trial court failed to follow the requisite procedures. In particular, defendant contends that because defendant stated that he could not recall the prior conviction, the court did not establish a factual basis of the plea. However, the existence of the defendant's prior conviction or convictions may be established by information contained in the presentence report. MCL 769.13(5)(c); MSA 28.1085(5)(c). Because defendant's prior conviction was listed in the presentence report, and defendant did not challenge the information in the presentence report at sentencing, we find no error requiring reversal.

Defendant also argues that if the habitual offender statute, as amended,[1] does not require a plea, then the habitual offender conviction should be stricken from the judgment of sentence. We disagree. The amendment of the statute did not alter the substance of the habitual offender provisions. As before, the habitual offender statute does not create a substantive offense; rather, it merely provides a means to enhance a defendant's sentence. *People v Anderson*, 210 Mich App 295, 297-298; 532 NW2d 918 (1995).

Defendant also contends that the prosecutor did not give defendant written notice, with a separate proof of service, of intent to seek an enhanced sentence, as required by MCL 769.13(1); MSA 28.1085(1). Because defendant did not raise this issue in the trial court, it is not preserved for appellate review and we decline to address it. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

Finally, defendant asserts that the Judgment of Sentence should be corrected to reflect a single sentence and vacated to the extent that it reflects three separate sentences. However, as the Judgment of Sentence clearly lists only defendant's twenty-five to fifty year sentence, we find no error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Daniel A. Burress

[1] See MCL 769.13; MSA 28.1085.