

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

MARIA ELENA SANTOYO a/k/a MARIAN
ELENA SANTOYO,

Defendant-Appellant.

UNPUBLISHED

June 24, 1997

No. 185971

Ottawa Circuit Court

LC No. 94-018313 FC

94-018314 FC

Before: Gage, P.J., and Reilly and Hoekstra, JJ.

MEMORANDUM.

Defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), and sentenced to ten to twenty-five years' imprisonment and four to fifteen years' imprisonment, respectively. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred when it failed to instruct the jury concerning the lesser included offense of second degree criminal sexual conduct. Defendant did not request the instruction. She also failed to object when the instruction was not given. Under these circumstances, reversal is unwarranted absent manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). We find no manifest injustice on this record. A trial counsel's decision not to request a lesser included offense instruction and to proceed with an all or nothing defense is a legitimate trial strategy. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). Defendant has failed to present any record evidence that would rebut the presumption of effective assistance. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant also argues that her ten-year minimum sentence violates the principle of proportionality. Defendant has failed to overcome the presumption that a sentence within the guidelines is proportionate to the offense and offender. *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994).

Affirmed.

/s/ Hilda R. Gage
/s/ Maureen Pulte Reilly
/s/ Joel P. Hoekstra