

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ANTHONY EVANS,

Defendant-Appellant.

UNPUBLISHED

February 2, 1999

No. 201875

Recorder's Court

LC No. 96-502692

Before: Sawyer, P.J., and Bandstra and R. B. Burns*, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (sexual contact with a person under thirteen years of age). Defendant was sentenced to four to fifteen years' imprisonment. He appeals and we affirm.

Defendant first argues that the prosecutor wrongfully withdrew the plea agreement at the time of defendant's initial sentencing. We disagree. The parties agreed that defendant would plead guilty to a reduced charge of second-degree criminal sexual conduct,¹ and, in exchange, the prosecutor would recommend a sentence of five years' probation with the first year spent in Dickerson's work-release program. The trial court heard defendant's plea, but never accepted defendant's plea on the record. At the time of defendant's sentencing, the victim's mother asked the court to impose the maximum sentence. It became clear that she was not happy with the plea agreement. The court then refused to "go along with this agreement," and defendant proceeded to trial. There was no evidence presented by defendant that the prosecutor acted in bad faith throughout the proceeding or abused her authority to enter into the plea agreement. *Compare People v Lombardo*, 216 Mich App 500, 512; 549 NW2d 596 (1996). Rather, the court, by its own initiative, refused to sentence defendant in conjunction with the plea agreement. It is clear from the record that the prosecutor was ready and willing to follow through on the parties' previous plea agreement. Only after the court announced that it would not support the recommended sentence did the prosecutor ask that the entire plea be vacated.

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

Defendant then argues that the court erred in refusing to impose a sentence in accordance with the parties' agreement. We disagree. A trial court's decision to accept or reject a plea agreement is reviewed for an abuse of discretion. *People v Grove*, 455 Mich 439, 463; 566 NW2d 547 (1997). The court did not specifically set forth its reasons for refusing to sentence defendant in accordance with the plea agreement. The court may have concluded that the proposed agreement did not serve justice. Such a determination was within the court's right, and the court did not abuse its discretion in failing to sentence defendant in accordance with the plea agreement. The court may have looked to the nature of the crime, the fact that the victim was only nine-years-old, and that a probationary sentence was unacceptable.

Defendant next argues that he was denied effective assistance of counsel at trial where counsel failed to investigate or act under the rape-shield statute after counsel knew or should have known about prior, similar accusations by the victim. We disagree. To establish a denial of effective assistance of counsel under the state and federal constitutions, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must have prejudiced the defendant. *Id.* Effective assistance of counsel is presumed. *People v Wilson*, 180 Mich App 12, 17; 446 NW2d 571 (1989).

We are not persuaded that defense counsel was ignorant of evidence that would have substantially benefited defendant. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990); *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). It is evident from the record that defense counsel knew that the victim may have made a similar accusation in the past and attempted to question the victim's mother about that accusation. However, the trial court determined that this line of questioning was inadmissible and did not allow counsel to proceed. Simply because defense counsel was unable to make a proper offer of proof that the statement was actually made and that it was false is not necessarily an indication that he was deficient or ineffective. Rather, evidence that the victim made a prior false accusation may simply not have existed. No charges were ever filed in that instance and there is no indication that a police report was made concerning the incident. Without "concrete evidence" that a false accusation was made, such evidence must be excluded. *People v Williams*, 191 Mich App 269, 273; 477 NW2d 877 (1991). It appears defense counsel made a reasonable attempt to introduce the evidence. Thus, defendant has failed to overcome the presumption that he received effective assistance of counsel. *Wilson, supra* at 17.

Next, defendant argues that the trial court erred in not allowing defense counsel to cross-examine the victim's mother concerning a statement by the victim about an earlier, unrelated allegation of sexual misconduct. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

The rape-shield statute does not preclude evidence that a victim made a prior false accusation of rape. *Williams, supra* at 272. Any false accusation is relevant in a prosecution for criminal sexual conduct because the fact that "the victim has made prior false accusations of rape directly bears on the

victim's credibility and the credibility of the victim's accusations in the subsequent case, and preclusion of such evidence would unconstitutionally abridge the defendant's right to confrontation." *Id.* Thus, to the extent that the trial court found that the evidence was excluded by the rape-shield statute, it abused its discretion and the ruling was incorrect. *Id.* at 272-273.

However, the evidence was properly excluded for another reason. Where the trial court reaches the right result for the wrong reason, reversal is not mandated. *People v Brake*, 208 Mich App 233, 242 n 2; 527 NW2d 56 (1994). Even though the evidence was of the type that would have been properly admitted, defendant was unable to make an offer of proof and present "concrete evidence" that the victim actually made the prior statement and that the statement was actually false. *Williams, supra* at 273. No charges were ever filed against the man and there is no indication that a police report was made concerning the incident. There is simply no reason to believe that, had the victim made a statement, the statement was false. Defense counsel could not cross-examine the victim's mother concerning the victim's alleged statement about an earlier, unrelated allegation of sexual misconduct where counsel was unable to make a proper offer of proof that such a false statement was actually made. *Id.*

Finally, defendant argues that he is entitled to an order of remand where the trial court refused to hear his post-trial motion for resentencing. We disagree. A trial court's grant or denial of a defendant's motion for resentencing is reviewed for an abuse of discretion. *People v Puckett*, 178 Mich App 224, 227; 443 NW2d 470 (1989).

In order to resentence a defendant, the trial court must first make the determination that the initial sentence was invalid. *People v Willis*, 182 Mich App 706, 709; 452 NW2d 888 (1990). A sentence may be considered invalid when it is based on inaccurate information. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Here, defendant argues that he was entitled to resentencing where defendant was scored twenty-five points for penetration under Offense Variable twelve even though the jury convicted defendant of second-degree criminal sexual conduct. Defendant maintains that the sentencing guidelines specifically preclude the penetration forming the basis of the conviction from being scored under this variable.

The sentencing guidelines provide that "in CSC 1st and CSC 3rd do not score the one penetration that forms the basis of the conviction offense." Michigan Sentencing Guidelines (2d ed, 1988), p 45. Because defendant was convicted of second-degree criminal sexual conduct, this exclusion does not apply. Moreover, the guidelines provide that, "where the facts are proven or acknowledged and are not consistent with the conviction offense . . . the actual facts are to be applied when scoring the appropriate variable." Michigan Sentencing Guidelines (2d ed, 1988), p 5.

Here, the trial court properly considered the victim's testimony that defendant digitally penetrated her even though the jury returned a verdict for second-degree criminal sexual conduct instead of first-degree criminal sexual conduct. As such, the court was entitled to score offense variable twelve for penetration. *People v Armstrong*, 212 Mich App 121, 131; 536 NW2d 789 (1995). Even if the scoring of the guidelines had been erroneous, "the claim of a miscalculated variable is not in

itself a claim of legal error” where the “guidelines do not have the force of law.” *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997).

Defendant also argues his sentence was disproportionate. However, defendant has waived his proportionality argument for appeal by failing to provide this Court with a copy of the presentence investigation report. *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995). In any event, the sentence was proportionate to the offense and offender, considering that defendant, as a member of the household, took advantage of his position to dominate and exploit a child.

In his supplemental brief on appeal, defendant contends that the court made an erroneous comment at sentencing and also improperly considered his alleged lack of remorse. However, we conclude that none of these brief comments are a basis for resentencing, in light of the fact that his sentence was proportionate. Moreover, the court could properly consider a lack of remorse in sentencing defendant. *People v Terry*, 217 Mich App 660, 664; 553 NW2d 23 (1996).

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Robert B. Burns

¹ Defendant was originally charged with first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (sexual penetration with a person under thirteen years of age).