

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADAM A. LITWIN,

Defendant-Appellant.

UNPUBLISHED

November 23, 1999

No. 205579

Wayne Circuit Court

LC No. 97-002192

Before: Gribbs, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of being an accomplice to first-degree criminal sexual conduct, MCL 750.520b(1)(d); MSA 28.788(2)(1)(d). The court sentenced defendant to fifteen to thirty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's first argument on appeal is that his fifteen- to thirty-year sentence was disproportionate under the circumstances. We disagree. This Court reviews the imposition of a particular sentence for an abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality. *Id.* at 636.

A sentence that falls within the applicable judicial sentencing guidelines range is "presumptively not excessively severe or unfairly disparate." *People v Broden*, 428 Mich 343, 354; 408 NW2d 789 (1987). However, a sentence within the guidelines may be an abuse of discretion under "unusual circumstances." *Milbourn, supra* at 661. The ultimate test of a sentence is whether it is "proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Id.* Defendant has presented no evidence of "unusual circumstances" sufficient to overcome the presumption that his sentence was proportional.

Defendant contends that his age and his continued academic success are factors that call for a sentence below the applicable guidelines. "[W]hile a sentencing court may, in some circumstances, consider a defendant's age, it need not do so." *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995), citing *People v McKernan*, 185 Mich App 780, 782; 462

NW2d 843 (1990). Given defendant's prior record and the significant disciplinary problems related to his previous stays in the state's correctional facilities, we conclude that defendant's age of seventeen is not such an "unusual circumstance" that it renders his sentence disproportionate. Furthermore, defendant's argument regarding his educational success is analogous to the argument that a defendant's employment should be considered an "unusual circumstance." We specifically rejected that contention in *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Both the "educational success" argument and the "gainful employment" argument focus on the demonstration of responsible behavior over an extended period of time by a defendant, which arguably could be cited by a court when justifying a reduced sentence. However, while a court may consider such factors, they are not factors that will make a sentence that is within the guidelines nevertheless disproportionate. *Id.*

The sentencing court acknowledged receiving and considering letters from defendant's relatives, teachers, and counselors before imposing the sentence. However, as the court pointed out, defendant was convicted of a particularly horrible crime. The court's sentence of fifteen years is at the low end of the recommended guidelines. This sentence is proportionate to the "seriousness of the matter" and thus was not an abuse of the sentencing court's discretion. *Milbourn*, *supra* at 661.

Defendant's next contention is that he was denied effective assistance of counsel because his attorneys failed to call certain witnesses at trial. Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, our review is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

To establish that the defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, we must find that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant alleges that he was denied his constitutional right to effective assistance of counsel because neither his preliminary examination attorney nor his trial attorney deposed or called certain witnesses at trial, particularly members of the staff of the juvenile facility who were on duty at the time of the offense. However, defendant has offered no proof as to what the testimony of these witnesses would have been, or how their testimony would have been beneficial to defendant. There is no record evidence to support defendant's assertion that the testimony of these witnesses would have contradicted the testimony of the victim.

In *People v Avant*, 235 Mich App 499; 597 NW2d 864 (1999), the defendant argued that he was denied effective assistance of counsel because his attorney had failed to call a particular witness at trial. *Id.* at 508. We noted that "counsel's failure to call a particular witness is presumed to be trial strategy." *Id.* We then stated:

Moreover, although defendant speculates that [the potential witness] would have provided testimony favorable to him, the record is silent regarding what [the potential witness] in fact would have testified. Accordingly, defendant has not shown that a

reasonable probability exists that, if counsel had called [the potential witness] as a witness, the outcome of the proceedings would have been different. [*Id.*]

The record in this case, as in *Avant*, contains no evidence that would suggest that the decision not to call these potential witnesses was anything other than a sound trial tactic. Thus, because there is no evidence of error by defendant's attorneys apparent in the record, defendant's claim of ineffective assistance of counsel must fail.

Affirmed.

/s/ Roman S. Gibbs

/s/ William B. Murphy

/s/ Richard Allen Griffin