

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAT T. PATTERSON,

Defendant-Appellant.

UNPUBLISHED

February 1, 2000

No. 211084

Clinton Circuit Court

LC No. 97-006402-FC

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, (CSC I), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to the mandatory two-years' imprisonment for the felony-firearm conviction, to be followed by eight to twenty years' imprisonment for the CSC I conviction with credit for thirty-two days served. Defendant appeals as of right. We affirm.

Defendant first argues he was denied effective assistance of counsel due to defense counsel's conflict of interest. Because defendant did not move for a *Ginther*¹ hearing or a new trial on the basis of ineffective assistance of counsel, our review is limited to mistakes that are apparent on the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). For a defendant to successfully establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the result of the proceeding was fundamentally unfair or unreliable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996). In an ineffective assistance of counsel claim premised on conflict of interest, prejudice will be presumed only if the defendant shows that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his attorney's performance. *People v Smith*, 456 Mich 543, 556-557; 581 NW2d 654 (1998), citing *Strickland v Washington*, 466 US 668, 692; 104 S Ct

2052; 80 L Ed 2d 674 (1984), and *Cuyler v Sullivan*, 446 US 335, 348-350; 100 S Ct 1708; 64 L Ed 2d 333 (1980).

Effective assistance of counsel is presumed. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Moreover, there is a strong presumption that counsel's decisions constituted sound trial strategy. *Stanaway*, *supra* at 687. Decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *Rockey*, *supra* at 76. The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense that would have affected the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

The Michigan Rules of Professional Conduct prohibit an attorney from acting as an advocate at a trial in which the attorney is likely to be a necessary witness, subject to a few exceptions. MRPC 3.7(a).² Moreover, the rules provide that an attorney shall not represent a client if the representation is materially limited by the attorney's own interests, unless the attorney reasonably believes the representation will not be adversely affected and the client consents after consultation. MRPC 1.7(b).³

The record in this case indicates that defense counsel was present at a meeting between defendant and the complainant, that defense counsel represented to the court that the complainant made a number of untruthful statements, and that counsel discussed with his client the potential that he might need to be a witness on behalf of defendant in order to impeach the credibility of the complainant regarding these alleged lies. An in-chambers conference was held regarding this concern and, following this discussion, the parties stipulated to the fact that the complainant lied regarding whether she wore a microphone at the meeting with defendant and defense counsel. The complainant also acknowledged her lack of truthfulness on this point during her testimony. Neither counsel nor defendant raised any further request that counsel be allowed to testify at trial or asked for any additional relief; nor did either counsel or defendant object to the resolution of this issue through the use of the stipulation. Accordingly, under the specific language of MRPC 1.7, whether the complainant lied about wearing a microphone was an "uncontested issue" and no actual conflict existed between trial counsel's need to represent defendant and the need for him to be a witness. Therefore, trial counsel was not a "necessary" witness under MRPC 1.7.

We further note that defendant did not seek a post-conviction evidentiary hearing in the trial court. While defendant did seek a remand from this Court to make a record concerning this claim, defendant failed to present affidavits from his trial counsel or himself in support of the motion to remand setting forth the substance of what he would demonstrate at an evidentiary hearing. MCR 7.211(C)(1)(a)(ii).⁴ At trial, defendant was apparently satisfied with the decision to utilize a stipulation rather than his counsel's testimony to demonstrate the complainant's untruthfulness. The decision to use a stipulation in lieu of witness testimony is a matter of trial strategy and we do not second-guess trial counsel on such matters. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). Defendant has failed to overcome the strong presumption that counsel's decision constituted sound trial strategy. *Stanaway*, *supra* at 687. We therefore decline to accept defendant's invitation to remand this case for

an evidentiary hearing where defendant has failed to provide this Court with any basis from which it could conclude that such a remand is appropriate.

Defendant also argues that his sentence was disproportionate. We disagree. This Court reviews sentencing decisions for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). Criminal sentences must be proportionate to the seriousness of the offense and must take into account the circumstances of both the offense and the offender. *Milbourn*, *supra* at 636. A sentencing court that fails to adhere to the principle of proportionality abuses its discretion. *Id.*; *McCrady*, *supra* at 483. A sentence that is within the guidelines is presumptively valid and proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v McElhaney*, 215 Mich App 269, 285-286; 545 NW2d 18 (1996); *People v Jones*, 201 Mich App 449, 457; 506 NW2d 542 (1993). However, a sentence that is within the guidelines may constitute an abuse of discretion where unusual circumstances exist. *Milbourn*, *supra* at 661; *Broden*, *supra* at 354. The term “unusual circumstances” has been construed to mean “uncommon” or “rare.” *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). A defendant’s employment or lack of prior criminal record do not constitute unusual circumstances. *Daniel*, *supra* at 54.

Defendant was sentenced to eight to twenty years for CSC I. The guidelines’ recommended minimum sentence range was 96 to 240 months. Thus, the minimum sentence of eight years (96 months) is within the guidelines. Because the sentence imposed was within the guidelines, it is presumptively valid and it is defendant’s burden to come forward with unusual circumstances to establish that the sentence is disproportionate notwithstanding the fact that it meets the guidelines. *Broden*, *supra* at 354-355; *Jones*, *supra* at 457. Defendant’s proffered circumstances of no prior criminal record, military service, gainful employment, elderly age, and remorsefulness are not uncommon or rare circumstances. Furthermore, the sentencing court did note defendant’s mitigating personal characteristics, but properly considered as well the severity and nature of the crime, including defendant’s use of a weapon to force his complainant to engage in sexual acts. Thus, to the extent that there were mitigating or unusual circumstances, the sentencing court considered them and balanced them against the negative circumstances. Finally, the trial court appears to have applied defendant’s mitigating factors because the minimum sentence imposed is at the bottom of the guidelines’ suggested minimum sentence range. There was ample justification for the sentence imposed and the sentencing court did not abuse its discretion.

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Donald S. Owens

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² MPRC 3.7 provides in relevant part:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

³ MPRC 1.7(b) provides in relevant part:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. . . .

⁴ MCR 7.211(C)(1)(a)(ii) specifically requires that a motion to remand "must be supported by affidavit or other proof regarding the facts to be established at a hearing." This Court may properly deny a motion to remand that does not satisfy this prerequisite. We do not believe that a *request* to remand, presented as alternative proposed relief in a party's appellate brief, is subject to a lesser preliminary showing.