STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY CLARK WESTPHAL,

Defendant-Appellant.

UNPUBLISHED
June 9, 2000

No. 208193
Kalkaska Circuit Court
LC No. 96-001636-FC

Before: Kelly, P.J., and Doctoroff and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). The court sentenced defendant to twenty to thirty years' imprisonment for each of the CSC I convictions, and ten to fifteen years' imprisonment for the CSC II conviction, all three sentences to be served concurrently. Defendant appeals his convictions and sentences as of right. We affirm.

Defendant first argues that the district court erred when it denied his request for a preliminary examination after he withdrew his guilty plea and the circuit court remanded his case for a preliminary examination. We review the denial of a defendant's motion for a preliminary examination for an abuse of discretion. *People v Skowronek*, 57 Mich App 110, 115; 226 NW2d 74 (1974). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). "The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it. The preliminary examination thus serves the public policy of ceasing judicial proceedings where there is a lack of evidence." *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993). It also helps to satisfy the constitutional requirement that the defendant be informed of the nature of the accusation against him. *Id.* The right to a preliminary examination is procedural; it is not constitutionally based, but rather is provided for by statute. *People v Hall*, 435 Mich 599, 603; 460 NW2d 520 (1990). See MCL 766.1; MSA 28.919 and MCR 6.110(A).

In denying defendant's motion for a preliminary examination, the district court stated that it did not believe that it had jurisdiction to conduct a preliminary examination when such examination had been properly waived. Defendant contends that he waived his right to a preliminary examination only because he was pleading guilty, and that once he withdrew that plea, everything that transpired pursuant to the guilty plea is a nullity. See *People v George*, 69 Mich App 403, 407; 245 NW2d 65 (1976). However, the record does not indicate that defendant's waiver was part of the plea bargain, defendant subsequently was arraigned on the same charges he faced at the time he entered into his plea bargain, and he does not contest the validity of the waiver. Therefore, we conclude that the district court did not abuse its discretion in refusing defendant's request for a preliminary examination. See *Skowronek, supra* at 115.

In any event, because defendant received a fair trial and was not otherwise prejudiced by the district court's failure to give him a preliminary examination, any error by the lower courts in denying defendant a preliminary examination after he withdrew his guilty plea does not require reversal of his convictions. Our Supreme Court concluded in *Hall, supra* at 611, that evidentiary errors in preliminary examination proceedings do not require automatic reversal on appeal from a subsequent trial. Rather, if the trial was fair and the defendant was not otherwise prejudiced by the error, error at the preliminary examination stage is harmless. *Id.* at 600-601. See also *People v Torres*, 452 Mich 43, 60; 549 NW2d 540 (1996). As discussed below, defendant received a fair trial. Moreover, he has not demonstrated that he was prejudiced because he did not have a preliminary examination. He was fully aware of the nature of the charges against him, and in view of the scientific evidence concerning paternity of the complainant's child and the complainant's testimony, there was sufficient evidence presented at trial to convict defendant. See *Hunt, supra*; *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996).

Defendant argues next that he was denied his right to a fair trial because of prosecutorial misconduct. Because defendant did not object at trial to the alleged misconduct, appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). The test is whether defendant was denied a fair trial. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995).

Defendant contends that the prosecution engaged in misconduct by failing to provide notice, pursuant to MRE 404(b), that it intended to introduce other acts evidence, by eliciting testimony concerning repeated sexual encounters between the complainant and defendant outside the time period identified in the felony information as the period during which the charged acts allegedly occurred, and by making reference during closing arguments to the testimony regarding those sexual acts. The prosecution is required to provide notice prior to trial when it intends to introduce other acts evidence. MRE 404(b)(2); *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). Under MRE 404(b), other acts evidence is admissible if it is offered for a proper purpose, it is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). However, it is not admissible if offered solely to show the criminal propensity of an individual and that he acted in conformity with that propensity. *Id.*

at 65. Essentially, other acts evidence is admissible whenever it is relevant on a noncharacter theory. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996).

Here, evidence of prior and subsequent uncharged sexual acts between defendant and the complainant was admissible because they were members of the same household and without such evidence, the victim's testimony would seem incredible. *People v DerMartzex*, 390 Mich 410, 415; 213 NW2d 97 (1973); *People v Layher*, 238 Mich App 573, 585; 607 NW2d 91; *People v Dreyer*, 177 Mich App 735, 737; 442 NW2d 764 (1989). The complainant in this case was fourteen years old at the time the charged acts were alleged to have been committed and is the daughter of defendant's girlfriend, with whom he was living at that time. At trial, defendant acknowledged paternity of the complainant's child, but claimed that the act of sexual intercourse that resulted in the conception of the complainant's son was an isolated incident initiated by the complainant. He also presented considerable testimony by others that he and the complainant enjoyed a healthy, non-sexual relationship as evidence by the complainant accompanying him when he went shopping or fishing. The complainant, on the other hand, testified that defendant engaged in an ongoing sexual relationship with her, that when she told him she was pregnant, he told her not to tell anyone and continued to have sex with her, and that she did not feel safe enough to reveal his actions until she was no longer living in the household with him.

Evidence of defendant's ongoing sexual relationship with the complainant was admissible to put the charged acts in context, as "[c]ommon experience indicates that sexual intercourse and attempts thereat are most frequently the culmination of prior acts of sexual intimacy." *DerMartzex, supra* at 415. Moreover, the testimony was admissible to explain why the complainant did not reveal her pregnancy and the fact that defendant was the father of her child sooner, why she denied having a sexual relationship with defendant when asked by her mother if she was, and to counter defendant's suggestion that she fabricated the charges after her mother and defendant asked her to move out of her mother's home because she was jealous of defendant's relationship with her mother and wanted to obtain his love for herself. See *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998). Finally, although the evidence was prejudicial to defendant, we do not believe its probative value was substantially outweighed by the danger of unfair prejudice. See *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909 (1995). Because the other acts evidence was admissible, manifest injustice did not result from the prosecution's failure to provide notice or from its introduction of the evidence.

Defendant also argues that the prosecutor engaged in misconduct by making references during closing arguments to defendant committing violence against the complainant's mother and forcing the complainant to have sex with him, when those statements were not supported by the evidence. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992); *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, the prosecutor is allowed to argue the evidence and reasonable inferences that can be deduced therefrom. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Furthermore, he need not state the inferences in the blandest possible terms. *Ullah, supra* at 678.

Defendant suggests that because the complainant did not testify that she was physically overcome or physically forced to participate in sexual activity with defendant, that the prosecutor could not state that defendant forced the activity upon the complainant. However, given the complainant's testimony that she felt she was forced into participating in sexual activity with defendant, although the coercion could be characterized as psychological rather than physical, the prosecutor's comments were reasonable inferences from the testimony. With regard to defendant's contention that the prosecutor's references to violence by the defendant and the complainant's fear of defendant were not supported by the evidence, the complainant clearly testified that "there had been many times where he would hit my mother, where he would push my mother. They'd get into fights. They'd hurt each other. They'd throw things at each other." Furthermore, defendant himself testified to kicking out the tail lights of the complainant's mother's vehicle. Given the testimony at trial, the prosecutor's comments were not inappropriate and do not constitute misconduct.

Defendant argues next that he was denied his right to the effective assistance of counsel. Defendant did not move for an evidentiary hearing or new trial based on ineffective assistance of counsel in the trial court. Therefore, this Court's review is limited to errors apparent on the record. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In order for this Court to reverse due to the ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 314. The defendant must also overcome a strong presumption that his counsel's actions constituted sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

In light of the analysis of the preceding issues, defendant's contentions that he received ineffective assistance of counsel because defense counsel did not ensure that he received a preliminary examination, because counsel failed to object to the prosecution's failure to comply with MRE 404(b), and because counsel failed to object to the prosecution's closing argument, are without merit.

Defendant also argues that he received ineffective assistance because counsel did not properly attack the credibility of the complainant. Specifically, defendant contends that counsel failed to properly argue the admissibility of evidence that the complainant was a member of a gang, that one of the initiation rites of the gang for girls attempting to become members was that they must first engage in a sexual act with an older man, and that the complainant was allowed into the gang after she reported that she had sex with defendant. At trial, defense counsel argued that the testimony concerning the complainant's gang involvement was relevant to show that the complainant was not forced to have sexual intercourse with defendant, but rather initiated it and, in fact, raped defendant. The trial court ruled that because consent was not an issue, the evidence was irrelevant and therefore inadmissible. Defendant contends on appeal that the testimony regarding the complainant's gang involvement was relevant to "attack the veracity" of the complainant, i.e., to impeach her testimony that she did not

participate in sexual acts with defendant willingly, and that defense counsel was ineffective for not offering the evidence for that purpose.

The record shows that defense counsel did establish on cross-examination that the complainant made a false statement in her statement to the police, that she made inconsistent statements regarding, among other things, whether she wanted to have sex with defendant, that she told no one of the sexual activity with defendant until after the child was born and, in fact, repeatedly denied any such involvement, and that she lied throughout her pregnancy concerning the identity of the father of her child. Given the extent of defense counsel's cross-examination to impeach the complainant's credibility, defendant has not shown that, but for counsel's failure to offer the gang testimony for the purpose of impeachment, the result of the trial would have been any different. *Pickens, supra*. Moreover, defendant has not overcome the presumption that counsel's decisions with regard to his cross-examination of the complainant were a matter of trial strategy. See *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987).

Defendant also argues that he received ineffective assistance of counsel because counsel failed to seek admission of a Family Independent Agency (FIA) report to impeach the credibility of the complainant. Defendant does not indicate in what respect the report would or could have been used to draw into question the credibility of the complainant. In any event, for the reasons outlined above, we find this argument to be without merit.

Finally, defendant argues that he received ineffective assistance of counsel because counsel failed to object to the prosecution's reference to the blood test that established with a high degree of certainty that defendant was the father of the complainant's child, because those test results were obtained in connection with a civil matter that was later dismissed. Defendant further argues that counsel failed to introduce "that other blood tests were taken and the results did not match." However, defendant offers nothing to support his assertion that the blood tests were obtained in connection with a civil matter, he offers no authority to support his argument that blood tests obtained pursuant to a civil matter are inadmissible in a criminal proceeding, nor does he offer any proof that any other drug tests were taken. Accordingly, we find that defendant waived this issue. A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999).

Defendant argues next that the trial court erred in refusing to instruct the jury that they must find defendant not guilty of first-degree criminal sexual conduct if they concluded that an act of sexual penetration occurred, but that the act was perpetrated by the complainant and not defendant. This Court reviews de novo claims of instructional error. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). Instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). Jury instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *Daniel, supra* at 53.

A charge of statutory rape or criminal sexual conduct is proved by evidence of penetration of a female under the statutory age without regard to whether she consented. See *People v Worrell*, 417 Mich 617, 621; 340 NW2d 612 (1983). Defendant points to no law, and we know of none, that suggests an exception to this rule where there is evidence that the victim initiated, or "perpetrated," the sexual activity. Thus, the court did not err in refusing to give the requested instruction.

Defendant argues next that remand for resentencing is required because improper scoring of the sentencing guidelines resulted in a disproportionate sentence. This Court reviews a defendant's sentence to determine whether the sentencing court abused it discretion by violating the principle of proportionality. *People v St. John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). The principle of proportionality requires that a sentence be proportionate to the seriousness of the crime and the defendant's prior record. *Id.* A sentence that falls within the applicable judicial sentencing guidelines is presumed proportionate. *People v Lyons*, 222 Mich App 319, 324; 564 NW2d 114 (1997). If a sentence is proportionate, an error in the calculation of the guidelines variables is no basis for relief. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998).

In support of his assertion that his sentence was disproportionate, defendant points out that he has never been convicted of a felony or serious misdemeanor either as an adult or a juvenile, that the complainant was not of "tender years," and the only reason that the charges in this case were elevated from third-degree to first-degree sexual conduct is that defendant and the complainant were members of the same household. The court noted at sentencing, however, that it considered all the information in the presentencing report, the facts brought out at trial, and the statements made at sentencing before concluding that it would sentence defendant consistent with the Department of Corrections recommendation of twenty to thirty years' imprisonment, the minimum of which sentence falls within the sentencing guidelines of 120 to 300 months. The sentencing court noted the need to protect other young girls from defendant, to deter others from engaging in conduct similar to defendant's, and to punish defendant for his actions. In light of the scientific evidence against defendant and the victim's testimony regarding defendant's behavior toward her and its effect on her life, we find that defendant's sentence is not disproportionate, notwithstanding the fact that he had no prior record. Because defendant's sentence is not disproportionate, there is no basis for relief on appeal. *Raby, supra.*

Defendant also argues that because his sentence following the jury verdict was harsher than that which the court imposed as a result of his plea, he was impermissibly punished for exercising his constitutional right to a trial by jury. A sentencing court may not take into account a defendant's refusal to plead guilty in determining sentence. *People v Travis*, 85 Mich App 297, 303; 271 NW2d 208 (1978). However, there is no indication in the record that the trial court considered defendant's withdrawn guilty plea in rendering sentence, and absent something in the record suggesting that the higher sentence was imposed as a penalty for the accused's assertion of his right to trial by jury, this Court does not generally presume retaliation. See *People v Sickles*, 162 Mich App 344, 365; 412 NW2d 734 (1987). Moreover, the harsher sentence could be explained by the testimony at trial, which was not before the sentencing judge when defendant entered his guilty plea.

Defendant's final argument on appeal is that he was denied a fair trial as a result of the

cumulative effect of the errors he alleges. Given the analysis of the preceding issues, this claim is without merit. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Jeffrey G. Collins

I concur in result only.

/s/ Michael J. Kelly