

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT JOE LOPEZ,

Defendant-Appellant.

UNPUBLISHED

June 20, 2000

No. 216302

Ingham Circuit Court

LC No. 98-073720-FH

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2); MSA 28.788(7)(2). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to forty-eight to ninety months' imprisonment. Defendant appeals as of right. We affirm, but remand for correction of the judgment of sentence.

Defendant argues that he was denied the effective assistance of counsel at trial. Because there was no evidentiary hearing, our review is limited to errors apparent on the record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockett*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was objectively unreasonable and (2) counsel's representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). A defendant must also overcome the presumption that the challenged action or inaction is trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant first claims that counsel was ineffective because he failed to investigate and assert a mistaken identity defense. Defendant contends that an investigation would have revealed that there were two other men, one of whom was a registered sex offender, in the home where the victim was assaulted. We disagree. On this record, there is no indication that defense counsel failed to investigate or was unaware of this information prior to trial. Moreover, in light of the victim's unequivocal

testimony identifying defendant as the perpetrator of the crime, defendant has failed to overcome the presumption that counsel's decision to attempt to discredit the victim and defend on grounds that defendant was incapable of committing the offense due to a back injury was strategic. *Johnson, supra* at 124. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *Avant, supra* at 508. For the same reasons, defendant has not shown that, absent the alleged error, there was a reasonable probability that the result would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant's claim that counsel was ineffective because his lack of preparation resulted in conflicting testimony from two defense witnesses is likewise without merit. At trial, testimony from defendant's cousin contradicted that of his girlfriend regarding the girlfriend's presence at a party and time of arrival at the home where the offense occurred. However, defendant has again failed to demonstrate that counsel's conduct was objectively unreasonable or prejudicial where the inconsistency was elicited during cross-examination and did not pertain to an exculpatory matter, and the witnesses testified consistently regarding the theory of defense. Further, because the victim's own testimony corroborated that of the girlfriend, we are not persuaded that the cousin's testimony irreparably damaged the girlfriend's credibility. Accordingly, we conclude that defendant has failed to meet his burden of proving that he received ineffective assistance of counsel.

Defendant also argues that his sentence is disproportionate. We disagree. The sentencing guidelines do not apply to habitual offenders like defendant, and it is inappropriate to use them when reviewing his sentence. *People v McFall*, 224 Mich App 403, 415; 596 NW2d 828 (1997). Instead, our review is limited to determining whether the trial court abused its discretion in imposing defendant's sentence. *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

In this case, defendant assaulted the twelve-year-old victim while she was sleeping and defenseless. At the time defendant committed the offense, he was on parole for a prior conviction for attempted second-degree criminal sexual conduct involving similar circumstances. The sentence imposed appropriately reflects the seriousness of the offense and defendant's apparent inability to reform his conduct to the requirements of the law. See *People v Hansford (After Remand)*, 454 Mich 320, 325; 562 NW2d 460 (1997). Further, the sentence does not exceed that which has been authorized by our Legislature for an habitual offender, second offense. MCL 769.10; MSA 28.1082; *Id.* at 326. Therefore, we find that the trial court did not abuse its sentencing discretion. However, the judgment of sentence fails to reflect defendant's status as a second habitual offender with the appropriate statutory citation. Accordingly, we remand for the limited purpose of correcting the judgment of sentence. MCR 7.216(A)(1); MCR 6.435(A).

Affirmed but remanded for the correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot