STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 21, 2000
v	No. 214051 Washtenaw Circuit Court
ISIAH SIMPSON, JR., Defendant-Appellant.	LC No. 97-008763-FC

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and sentenced to three concurrent terms of forty to sixty years' imprisonment. He appeals as of right. We affirm.

I

Defendant claims that his statements to the police on May 9, 1997 and December 4, 1997, wherein he admitted digital penetration of the victim, should have been suppressed. Defendant's claim is without merit.

Defendant has forfeited consideration of any claim regarding admission of his statements made on December 4, 1997. Defendant does not appropriately argue the merits of this claim. He may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claim. *Wilson v Taylor,* 457 Mich 232, 243; 577 NW2d 100 (1998); *People v Leonard,* 224 Mich App 569, 588; 569 NW2d 663 (1997).

With regard to the statements made during a police interview on May 9, 1997, defendant argues that the interview was, in effect, a custodial interrogation requiring *Miranda* warnings, which he did not receive, and that his statements were also involuntary. We disagree. *Miranda* warnings are not required unless the accused is subject to a custodial interrogation, in which questioning is initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v Arizona,* 384 US 436, 444; 86 S Ct 1602; 16 L

Ed 2d 694 (1966); *People v Hill,* 429 Mich 382, 384; 415 NW2d 193 (1987). With respect to custody, which is the critical issue here, the key question is whether the defendant reasonably believed that he was not free to leave. *People v Marsack,* 231 Mich App 364, 374; 586 NW2d 234 (1998). In looking at the totality of the circumstances in this case, we agree with the trial court's determination that defendant was not in custody on May 9, 1997. *Hill, supra; Marsack, supra.* In addition, giving deference to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, our examination of the evidence supports the trial court's determination that defendant's statements were voluntarily made. See *People v Sexton,* 458 Mich 43, 68; 580 NW2d 404 (1998); *People v Cipriano,* 431 Mich 315, 334; 429 NW2d 781 (1998). Accordingly, defendant's statements to the police were properly admitted at trial.

II

Defendant contends that there was no independent proof of the corpus delicti of digital/anal penetration of the victim by defendant and that his extrajudicial confession was therefore improperly admitted into evidence with respect to that count. Defendant does not argue that the corpus delicti was not established for the remaining counts of first-degree criminal sexual conduct, i.e., that defendant committed criminal sexual assault, specifically in the form of penetration, against the victim.

In *People v McMahan,* 451 Mich 543, 548; 548 NW2d 199 (1996), our Supreme Court reaffirmed the "rule that proof of the corpus delicti is required before the prosecution is allowed to introduce the inculpatory statements of an accused." The prosecutor need not present independent proof of each element of the particular crime charged as a condition of admissibility of a defendant's confession. *People v Williams,* 422 Mich 381, 391; 373 NW2d 567 (1985). The rule is satisfied in any criminal case if there is direct or circumstantial evidence independent of the confession establishing the occurrence of a specific injury or loss and that some person's criminality was the cause of the injury. *People v Konrad,* 449 Mich 263, 269-270;536 NW2d 517 (1995); *People v Cotton,* 191 Mich App 377; 478 NW2d 681 (1991).

In the instant case, defendant was convicted of first-degree criminal sexual conduct pursuant to MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), under which "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . that other person is under 13 years of age." The corpus delicti of criminal sexual conduct is the criminal sexual assault, and that which elevates it to a certain degree [here, first-degree criminal sexual conduct involving penetration of the victim] is provable by the confession of the accused. 1 Gillespie, Michigan Criminal Law and Procedure (2d ed), § 20.50, pp 85-86; *Williams, supra* at 391-392; *Cotton, supra* at 388-389. See also 65 Am Jur 2d, Rape, § 89, p 816. Independent proof of the corpus delicti of criminal sexual conduct was presented in this case before defendant's confession was admitted into evidence. Therefore, no error occurred in the admission of defendant's confession as proof of the aggravating circumstances that constituted the crime of first-degree criminal sexual conduct by digital penetration of the victim's anus. *Williams, supra; Cotton, supra.*

Also without merit is defendant's claim that his counsel rendered ineffective assistance for failing to object to the admission of defendant's confession based on a violation of the corpus delicti rule.

Because there was no error in admitting defendant's confession, defense counsel was not ineffective for failing to challenge the admission of the confession. Defense counsel is not required to make a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 24 (1998).

III

Defendant's remaining claim of ineffective assistance of counsel is likewise without merit. Because defendant failed to move for an evidentiary hearing below, our review is limited to mistakes apparent on the record. *Darden, supra* at 604. Defendant argues that defense counsel was ineffective for failing to object to the court's jury instruction with regard to Count III, which defendant states was aiding and abetting digital/*anal* penetration of the victim. However, defendant has misread the record. Count III was based on aiding and abetting the digital/*vaginal* penetration of the victim. Evidence was presented that defendant participated in the digital/vaginal penetration of the victim, both as a principal and as an aider and abettor in performing acts or giving encouragement that assisted others in the commission of this crime. See *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999). No error occurred in the court's instruction to the jury on this count, and defendant's right to a unanimous jury verdict was not violated as to this offense. See *People v Smielewski*, 235 Mich App 196; 596 NW2d 636 (1999). Defendant has not shown that he was deprived of the effective assistance of counsel in this regard. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

IV

Defendant avers that his sentences of forty to sixty years' imprisonment, which exceeded the sentencing guidelines recommendation by fifteen years, are disproportionate to the crimes committed and constitute cruel and unusual punishment. We disagree.

The facts in this case generated guidelines scores well in excess of the highest applicable grid. Given the egregious facts, the guidelines did not reflect the seriousness of this matter. We believe the sentences are proportionate to the seriousness of the matter. See *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994). The court did not err in imposing lengthy sentences which have the effect of avoiding defendant's eligibility for parole until he is no longer a viable risk as a sexual predator. *People v Lemons*, 454 Mich 234, 258; 562 NW2d 447 (1997); *Merriweather, supra* at 809-811. Because defendant's sentences are proportionate, they are neither cruel nor unusual. *People v Bullock*, 440 Mich 15, 40-41; 485 NW2d 866 (1992); *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). Also, contrary to what defendant argues, it was proper for the court to consider evidence of defendant's sexual assaults against another victim where competent evidence was presented at trial on this issue. *People v Gahan*, 456 Mich 264, 275 n 15; 571 NW2d 503 (1997); *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey