

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD BRYANT,

Defendant-Appellant.

UNPUBLISHED

January 9, 2001

No. 214091

Wayne Circuit Court

LC No. 95-010235

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c) (during felony), kidnapping, MCL 750.349; MSA 28.581, and aggravated stalking, MCL 750.411i; MSA 28.643(9). Defendant was sentenced as a third-habitual offender, MCL 769.11; MSA 28.1083, to concurrent sentences of seven and one-half to fifteen years' imprisonment for both the criminal sexual conduct and the kidnapping convictions, and one to five years' imprisonment for the aggravated stalking conviction. The prosecutor appealed defendant's sentences, and this Court entered an order vacating defendant's sentences and remanding the case to the trial court for resentencing, finding that defendant's sentences were disproportionately lenient. *People v Bryant*, unpublished order of the Court of Appeals, entered June 12, 1997 (Docket No. 195664).¹ Defendant filed a delayed application for leave to appeal this Court's remand order to the Michigan Supreme Court, which denied leave. *People v Bryant*, 457 Mich 883; 586 NW2d 924 (1998). On remand, defendant was resentenced as a third habitual offender to twenty-two to forty-five years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant argues that his twenty-two to forty-five year sentence was disproportionate. We disagree. Appellate review of sentencing determinations is limited to whether the trial court abused its discretion in imposing sentence. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). An abuse of discretion occurs when a sentence violates the principles of

¹ Defendant also appealed as of right from his convictions, but this Court affirmed defendant's convictions in an unpublished, per curiam opinion. *People v Bryant*, unpublished opinion per curiam of the Court of Appeals, issued November 3, 1998 (Docket No. 200683).

proportionality, that is, when a sentence is disproportionate to the seriousness of the offense and the particular offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence that is within the sentencing guidelines range is presumptively proportionate; however, the sentencing guidelines are not applicable to the sentencing of habitual offenders. *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999).

The record shows that defendant's enhanced sentence was proportionate to the offenses committed. The trial court found defendant's prior victimization of the complainant to be a significant factor when determining defendant's sentence, noting that in view of defendant's criminal history involving the complainant, "[t]his woman was clearly in danger from the conduct of this defendant." The trial court further found that defendant's "previous convictions did not deter the defendant from having contact with her [the complainant]," and that his prior offenses evinced his inability to conform his conduct to the laws of society. *People v Reynolds*, 240 Mich App 250, 252-253; ___ NW2d ___ (2000). Therefore, the trial court properly considered defendant's prior record along with the circumstances of this case in imposing defendant's sentence. *Milbourn*, *supra* at 635-636; *People v Johnson (On Remand)*, 223 Mich App 170, 173; 566 NW2d 28 (1997).

Additionally, defendant was sentenced within the statutory maximum limits. Both first-degree criminal sexual conduct and kidnapping are punishable by imprisonment for life or any term of years. MCL 750.520b(2); MSA 28.788(2)(2); MCL 750.349; MSA 28.581. Moreover, MCL 769.11; MSA 28.1083 allows a sentencing court to sentence a third habitual offender to imprisonment for a maximum term that is not more than twice the maximum prescribed for the underlying offense. Defendant's maximum sentence of forty-five years falls within this statutory limit and, therefore, the trial court did not abuse its discretion in sentencing defendant. *Reynolds*, *supra* at 252.²

Defendant next argues that the trial court's finding that he pursued the victim was an "extensively and materially false" foundation upon which his sentence was based. We disagree. The evidence established that in August 1994, charges were filed against defendant for domestic violence against the victim. Defendant was arrested and a personal protection order was issued against him. Shortly thereafter, charges were filed against defendant for felonious assault, aggravated stalking and criminal sexual conduct against the victim, and breaking and entering of her residence. Following a jury trial, defendant was found guilty of the lesser offense of domestic violence and acquitted of the other charges. In May 1995, defendant was once again arrested for assaulting the victim and he pleaded guilty to assault with a dangerous weapon before the same judge who presided over his bench trial in this case. In each of these cases against defendant, the trial court ordered him to have no further contact with the victim. Nevertheless, on August 27, 1995, defendant committed the acts which gave rise to this case.

² We further note that defendant's challenges to the scoring of certain sentencing variables is not, in and of itself, a claim of legal error. *People v Mitchell*, 454 Mich 145, 175-177; 450 NW2d 600 (1997). Because the sentencing guidelines do not apply to habitual offenders, claims of error in the scoring of sentencing variables do not support defendant's argument that he is entitled to resentencing. *People v Dixon*, 217 Mich App 400, 411; 552 NW2d 663 (1996).

The sentencing court found it significant that the victim was the complainant in three of defendant's prior convictions. Therefore, contrary to defendant's argument, the record clearly showed that defendant had pursued the victim for a lengthy period of time and the trial court's finding was not an "extensively and materially false" foundation upon which defendant's sentence was based.

Defendant's final argument on appeal is that he was denied his due process rights because he was sentenced by a judge who did not preside over his bench trial. We disagree. The construction of court rules is a question of law which we review de novo. *People v Levandoski*, 237 Mich App 612, 617; 603 NW2d 831 (1999).

MCR 2.003(A) provides that a judge may sua sponte raise the issue of disqualification. *People v Weathington*, 183 Mich App 360, 362; 454 NW2d 215 (1990). MCR 2.003(B) provides that a judge is disqualified when he or she cannot impartially hear a case, including instances in which the judge is personally biased or prejudiced for or against a party or attorney. Even if the original judge is not biased toward a defendant, however, this Court has held that reassignment for resentencing is appropriate "to preserve the interests of justice and fairness where it would be unreasonable to expect the trial judge to be able to put out of his mind his previously expressed views and findings without substantial difficulty." *Weathington, supra* at 362, quoting *People v Williams*, 168 Mich App 150, 153; 424 NW2d 1 (1988).

Defendant contends that the judge who presided over defendant's bench trial did not assert that he was biased in his sua sponte motion to disqualify himself and, therefore, did not fulfill the requisites of MCR 2.003(B)(1). However, even absent a trial court's assertion of bias toward a defendant, reassignment to a different judge for the purpose of resentencing is appropriate to preserve the interests of justice and fairness. *Weathington, supra*. We find no error in defendant's resentencing by a different judge.

We also reject defendant's contention that the successor judge's unfamiliarity with the record prevented him from being able to perform his duties at resentencing. Unlike MCR 6.440(B)(2), MCR 2.003 does not require a judge to certify that he or she has become familiar with the record of a trial when the preceding judge has become unavailable. In any event, the record reveals that the successor judge was familiar with the case and was able to rule on defendant's objections to the scoring of certain sentencing variables. The record also clearly demonstrates that, despite not having presided over defendant's bench trial, the successor judge was able to adequately assert his reasoning for determining the particular sentence imposed. In addition, there is no evidence that the sentence imposed was the product of any unjustified or impermissible considerations. *Weathington, supra* at 365. Accordingly, we find no error.

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder