STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2001
v	No. 223007 Wayne Circuit Court
DONALD MERRITT, Defendant-Appellant.	LC No. 99-000122

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of two counts of armed robbery, MCL 750.529, one count of assault with intent to rob while armed, MCL 750.89, one count of carjacking, MCL 750.529a, three counts[1] of first-degree criminal sexual conduct, MCL 750.520b(1)(c) (penetration during commission of other felony) and (e) (penetration while actor is armed with a weapon), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of thirty to sixty years' imprisonment for each of the armed robbery, assault with intent to rob while armed, carjacking, and criminal sexual conduct convictions, to be served consecutively to the mandatory two-year term for the felony-firearm conviction. We affirm.

On appeal, defendant first argues that the trial court abused its discretion in denying his request for an adjournment and for substitute counsel. We disagree. "A trial court's decision regarding substitution of appointed counsel will not be disturbed absent an abuse of discretion." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). In *Traylor*, a panel of this Court addressed the substitution of counsel:

> "An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate

[1] According to the judgment of sentence, three additional convictions of first-degree criminal sexual conduct were vacated by the trial court.

> difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." [*Id.*, quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991) (citations omitted).]

In this case, the trial court did not abuse its discretion in denying defendant's request for substitute counsel because defendant failed to show good cause. On appeal, defendant maintains that he sought substitute counsel because his appointed counsel refused to challenge the trustworthiness of defendant's confession to the police. However, our review of the record reveals that appointed counsel filed a pretrial motion to suppress the statement on August 4, 1999. The trial court denied this motion following an evidentiary hearing. Similarly, to the extent that defendant also argues that appointed counsel failed to challenge the victims' identifications of defendant, a review of the record reveals that appointed counsel pointed out the weaknesses in the victims' identification of defendant during cross-examination of the witnesses. Thus, defendant suffered no prejudice. *Traylor, supra* at 463.

Moreover, defendant raises these concerns for the first time on appeal. At the motion for adjournment held on August 30, 1999, the day before trial, defendant did not articulate good cause for obtaining substitute counsel. Rather, defendant's desired substitute counsel merely indicated that defendant's family had gathered money to pay for another attorney and were prepared to retain him if the court allowed the substitution. On the first day of trial, defendant again raised this issue. When the trial court asked him what he would like to say, he stated only, "I am not comfortable with [appointed counsel] being my attorney . . . [a]nd I don't want to go to trial with him."[2] On this record, we are not persuaded that the trial court abused its discretion in denying defendant's request for substitute counsel.

Defendant next argues that he was denied effective assistance of counsel. We disagree. Defendant filed a claim of appeal on October 25, 1999. This Court remanded for a *Ginther*[3] hearing in an order entered November 8, 2000. Following the January 11, 2001, *Ginther* hearing, defendant moved for a new trial. The trial court denied this motion in an opinion and order entered February 28, 2001. Specifically, the trial court found that defendant had failed to establish that trial counsel's performance was deficient in any manner.

A claim of ineffective assistance of counsel raises a constitutional issue. This Court reviews de novo constitutional issues. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). To establish ineffective assistance of counsel, defendant must show (1) that trial counsel's performance fell below an objective standard of reasonableness, and (2) that he was prejudiced to the extent that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To satisfy the prejudice requirement, defendant must demonstrate "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

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[2] To the extent that defendant claims in his brief on appeal that the trial court was required to inquire whether defendant's allegations of a breakdown in the attorney-client relationship were true, *People v Bass*, 88 Mich App 793, 802; 279 NW2d 551 (1979), we are not persuaded that defendant's comment that he was not "comfortable" with his attorney, standing alone, imposed such a duty on the trial court.

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

would have been different.'" *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

Defendant must also overcome the well-established presumption that his counsel's action was the product of sound trial strategy. *Toma, supra* at 302. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (2000). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant initially argues that defense counsel was ineffective in failing to request that the trial court instruct the jury in conformance with CJI2d 4.1.[4] We disagree. As an initial matter, we note that defense counsel's decisions regarding jury instructions are presumed to be matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). As the trial court noted in its findings following the *Ginther* hearing, during trial defendant did not seriously dispute that he made the challenged statement. Rather, defendant primarily asserted that he was not competent to waive his *Miranda*[5] rights. As the trial court aptly observed:

> Trial counsel was not ineffective because he failed to request the confessions instruction because no question was raised concerning the voluntariness of the statement, there was no dispute that defendant made the statement, and there was

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[4] CJI2d 4.1 provides:

> (1) The prosecution has introduced evidence of a statement that it claims the defendant made. You cannot consider such an out-of-court statement as evidence against the defendant unless you do the following:
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> (2) First, you must find that the defendant actually made the statement as it was given to you. If you find that the defendant did not make the statement at all, you should not consider it. If you find that [he / she] made part of the statement, you may consider that part as evidence.
>
> (3) Second, if you find that the defendant did make the statement you must decide whether the whole statement, or part of it, is true. When you think about whether the statement is true, you should consider how and when the statement was made, as well as all the other evidence in the case.
>
> (4) You may give the statement whatever importance you think it deserves. You may decide that it was very important, or not very important at all. In deciding this, you should once again think about how and when the statement was made, and about all the other evidence in the case.

[5] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> no evidence concerning the circumstances surrounding the taking of the statement.[6]

On this record, defendant has failed to rebut the well-settled presumption that counsel's conduct was the product of sound trial strategy under the circumstances. *Toma, supra*.[7]

Moreover, we reject defendant's contention that defense counsel was deficient in failing to cross-examine Sergeant James Sanford regarding the inconsistencies between defendant's statement to the police and the events as described by the victims. Indeed, our independent review of the record reveals that defense counsel vigorously cross-examined Sergeant Sanford at length regarding the statement and the circumstances under which it was obtained. Defense counsel also presented the testimony of Marilyn Gerwolls, Ph.D., who testified regarding defendant's inability to render a knowing and intelligent waiver of his *Miranda* rights.[8] Further, at the *Ginther* hearing, defense counsel indicated that he decided to focus on the fact that defendant could not have competently waived his *Miranda* rights because of his low intelligence rather than attack the factual content of the statement. It is well-settled that counsel's decisions regarding how to cross-examine witnesses is a matter of trial strategy. *Ayres, supra* at 23. We will not second-guess such a strategic decision with the benefit of hindsight on appeal.

Additionally, defendant has not made a persuasive showing that trial counsel's performance was deficient because he did not hire an investigator to testify about the lighting at the scene of the crime. During the *Ginther* hearing, trial counsel testified that he did not believe that it would have been useful to hire an investigator because the crime took place at different locations over a long span of time. Additionally, trial counsel cross-examined the witnesses about the lighting conditions and their ability to make reliable observations and discussed this in closing argument. Thus, we are not persuaded that trial counsel's performance in this regard was deficient.

Further, we reject defendant's claim that trial counsel was deficient because he did not take efforts to establish that witness Anthony Cheatom resembled the individual depicted in the police composite sketch. At the *Ginther* hearing, defense counsel testified that he did not attempt to connect Cheatom with the crime because there was no evidence to suggest that he was

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[6] The trial court went on to observe that trial counsel "performed admirably in the face of overwhelming evidence against the defendant, including the eyewitness identifications and the defendant's admissions."

[7] In his brief on appeal, defendant notes that during the *Ginther* hearing, trial counsel stated that his failure to request this instruction was not the product of trial strategy. Trial counsel's statement is not dispositive in our inquiry however, because "[t]he reasonableness of counsel's performance is to be evaluated from counsel's perspective *at the time of the alleged error* and in light of all the circumstances. . . ." *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995) (Boyle J.) (emphasis supplied), quoting *Kimmelman v Morrison*, 477 US 365, 381; 106 S Ct 2574; 91 L Ed 2d 305 (1986).

[8] Specifically, Gerwolls testified that although defendant would have trouble comprehending his *Miranda* rights if he attempted to read them himself, if the *Miranda* rights were read aloud to defendant, he would be able to comprehend and knowingly and intelligently waive those rights.

involved and because the composite looked like defendant. Again, defendant has not established that counsel's performance was in any manner deficient.

Lastly, we disagree with defendant that trial counsel was remiss in failing to call to testify at trial the lawyer who was present at the lineup where defendant was identified as the perpetrator of these crimes. Defendant argues that the lawyer would have testified that one of the victims also initially identified two other individuals as the perpetrators of these crimes. According to defense counsel's testimony at the *Ginther* hearing, he did not present the challenged testimony because he concluded it would be cumulative. Counsel's performance in this regard was not objectively unreasonable, given that the victim expressly conceded during her trial testimony that she identified another person in the lineup before identifying defendant.

Defendant next argues that he was denied a fair trial because the trial court failed to instruct the jury pursuant to CJI2d 4.1. We disagree. In his brief on appeal, defendant concedes that trial counsel did not request this instruction. Because this issue was not properly preserved for our review, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Smith*, 243 Mich App 657, 690; 625 NW2d 46 (2000). Jury instructions are reviewed in their entirety to determine whether reversal is warranted. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). "The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them." *Id.*, quoting *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1997). Even if somewhat imperfect, there is no error if the instructions fairly presented the relevant issues and sufficiently protected defendant's rights. *Id.* After reviewing the jury instructions as a whole, we are satisfied that they fairly presented the relevant issues and sufficiently protected defendant's rights. Thus, the trial court did not commit plain error affecting defendant's substantial rights. *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 761 (2000).

Defendant next argues that the trial court erred in admitting defendant's confession because he did not knowingly and intelligently waive his *Miranda* rights. "Although engaging in a de novo review of the entire record," *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996) (Boyle, J.) we also afford great deference to the trial court, and will not disturb its factual findings following an evidentiary hearing unless they are clearly erroneous. *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000).

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997), citing *Miranda*, *supra*. The state bears the burden of proving by a preponderance of the evidence that there was a valid waiver of the suspect's *Miranda* rights. *Cheatham*, *supra* at 29-30.

> To establish a valid waiver, the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him. [*Id.* at 29.]

Whether a suspect has voluntarily waived his *Miranda* rights depends on the factual circumstances underlying each case. *Id.* at 27.

> The totality of the circumstances approach "permits – indeed, it mandates – inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the [suspect's] age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." [*Id.*, quoting *Fare v Michael C*, 442 US 707, 725; 99 S Ct 2560; 61 L Ed 2d 197 (1979).]

A defendant's mental ability is only one factor to be considered in the totality of circumstances inquiry. *Cheatham, supra* at 43. Further, the fact that a defendant is "behind others in his age group in his expressive language skills and development of both abstract verbal reasoning" does not necessarily render a defendant incapable of knowingly waiving his *Miranda* rights. See *People v Abraham*, 234 Mich App 640, 648-649; 599 NW2d 736 (1999).

Following an evidentiary hearing, the trial court concluded that defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights. We are not persuaded that the trial court's determination was clearly erroneous. Specifically, after hearing the testimony of both defendant and Sergeant Sanford, the trial court found that defendant was adequately advised of his *Miranda* rights and knowingly and intelligently waived those rights based on (1) defendant's written responses contained in the statement, (2) Dr. Gerwolls' testimony that defendant would be able to understand and knowingly waive his rights if they were explained to him aloud, and (3) Sergeant Sanford's testimony that he verbally explained the *Miranda* rights to defendant. Considering the totality of the circumstances, and giving deference to the trial court's credibility determinations, *Cheatham, supra* at 30, we are satisfied that the trial court did not clearly err in concluding that defendant knowingly and intelligently waived his *Miranda* rights.

Finally, defendant argues that his concurrent sentences of thirty to sixty years' imprisonment violate the principle of proportionality. We disagree. This Court reviews sentencing issues for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). A trial court's imposition of sentence amounts to an abuse of discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The principle of proportionality requires that a sentence "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* The Michigan Supreme Court's sentencing guidelines apply to offenses committed before January 1, 1999. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000).

"To facilitate appellate review, the sentencing court must articulate on the record the criteria considered and the reasons for the sentence imposed." *People v Pena*, 224 Mich App 650, 661; 569 NW2d 871 (1997), modified 457 Mich 885 (1998). When sentencing on multiple offenses for which concurrent sentences will be imposed, only guidelines calculations on the highest offense need be prepared. See *People v Hill*, 221 Mich App 391, 396; 561 NW2d 862 (1997). The statutory maximum sentence for first-degree criminal sexual conduct, MCL 750.520b, is a term of life imprisonment. However, the sentencing information report (SIR) reflects a minimum sentence guidelines' range of 120 to 300 months (ten to twenty-five years') imprisonment.

The trial court sentenced defendant to concurrent terms of thirty to sixty years' imprisonment, stating:

> And I do think that this is a heinous crime. I do think that you tortured these women. It was not just rape. By making them strip and dress and strip and dress several times, standing out in the cold in December and in an abandoned building, is torture in my opinion. And although you have no criminal record, there is not much else in your background that is redeeming.

The trial court also noted that defendant "is a danger to society and a predator." Further, the trial court specified that these were the reasons for exceeding the guidelines' range. On appeal, defendant maintains that the trial court deviated from the guidelines' recommended range on the basis of factors already accounted for in the guidelines. However, it is well-settled that a trial court may depart from the guidelines range on the basis of factors already considered in the guidelines calculation. *People v Crear*, 242 Mich App 158, 170; 618 NW2d 91 (2000); *People v Rockey*, 237 Mich App 74, 79; 601 NW2d 887 (1999). In the instant case, the trial court appropriately considered the special characteristics of these offenses in fashioning sentence. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). The trial court also appropriately considered the impact of defendant's crime on the victims. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). The trial court deviated from the minimum sentence range by only five years and adequately stated appropriate reasons for the deviation. Because the sentences were proportionate to the circumstances surrounding the offense and the offender, we are satisfied that the trial court did not abuse its discretion in imposing sentence.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Peter D. O'Connell