STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2001
v	No. 225784 Oakland Circuit Court
TERRANCE RAYMOND HAMILTON, Defendant-Appellant.	LC No. 99-167959-FH

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

PER CURIAM.

After a jury trial, defendant was convicted on five counts of third-degree criminal sexual conduct contrary to MCL 750.520d(1)(a) and sentenced to concurrent prison terms of 5 ½ years to 15 years. The trial court denied defendant's motion for new trial or resentencing. Defendant appeals by right alleging the verdict was against the great weight of the evidence; the trial court committed error allowing certain hearsay testimony; and improper information was contained in the presentence report. We affirm.

On appeal, this Court reviews the trial court's grant or denial of the motion for new trial based on the verdict being against the great weight of the evidence for an abuse of discretion. *People v McCray***,** 245 Mich App 631, 637; 630 NW2d 633 (2001); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627, 642; 576 NW2d 129 (1998); *Gadomski*, *supra*.

Motions for new trial on the ground that the verdict was against the great weight of the evidence based on witness credibility are not favored and should be granted only in exceptional cases. *Lemmon, supra,* 639. The burden that the moving party must overcome is one of the highest in the law and only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result should the motion be granted. *Id*., 639-640. Exceptional circumstances are necessary before the trial court may substitute its view of witness credibility for that of the constitutionally guaranteed jury determination of facts. *Id.* 642. As discussed by our Supreme Court in *Lemmon, supra*, 643-644, exceptional circumstances include: where testimony contradicts indisputable physical facts or laws; where testimony is patently incredible or defies physical realities; where testimony is inherently implausible that it could not

be believed by a reasonable juror; or where the witnesses testimony has been seriously impeached and the case marked by uncertainties and discrepancies.

None of the above exceptional circumstances apply to the case at bar. While the victim's testimony was impeached, most notably by her recanting allegations of abuse in 1994 when she was eight years old, it was not marked by uncertainties or discrepancies so that a rational jury could not believe it. Indeed, her testimony that at least five acts of abuse occurred as charged was uncontradicted. Moreover, the victim's explanation for her 1994 recantation was not only uncontradicted, it was supported by the testimony of her mother. The victim testified she recanted her allegations of abuse in 1994 because of pressure from defendant, and in essence, family pressure when her mother did not believe her and she "felt like she was letting everyone down by telling." Likewise, the victim's mother testified that the victim changed her story in 1994 after talking to defendant and came to "regret" making the 1994 allegations only after numerous telephone calls from defendant. The victim's mother also confirmed that she did not believe the victim in 1994. Thus, a rational jury could have believed the victim's explanation for the main point of impeachment, her 1994 recantation of 1993 abuse.

In summary, the jury resolved the issue of the victim's credibility against defendant and the evidence did not preponderate heavily against the verdict. *Id.*, at 642. Based on the record in this case, the trial court's denial of defendant's motion for new trial was not an abuse of discretion. *McCray, supra,* 637.

Defendant also argues that the prosecutor improperly used leading and argumentative questions during the testimony of the victim and her mother. This claim has no merit. As to the victim's testimony, no objection was raised at trial and as to the testimony of the victim's mother, defense counsel only objected that the prosecutor was impeaching her own witness and that the prosecutor was not permitting the witness to finish her answers. Defendant has waived any error by failing to raise the specific objection at trial he seeks to argue on appeal. MRE 103(a)(1); *People v Kilbourn*, 454 Mich 677, 684-685; 563 NW2d 669 (1997); *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994).

Defendant also claims error warranting reversal occurred when the victim testified that her mother did not believe her 1993-1994 allegation of abuse and also when a prosecution witness testified to statements made by the victim's mother. Defendant has waived these claims of error by failing to object at trial. MRE 103(d); *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000).

Defendant also argues the cumulative effect of evidentiary errors denied him a fair trial. This argument has no merit. In order to reverse on grounds of cumulative error, there must be errors of consequence that are seriously prejudicial to the point that defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). Prejudicial error has not been identified in this case and absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Next, defendant argues it was error for the dismissed 1994 CSC charge to be included in the presentence investigation report and, therefore, defendant must be resentenced. Alternatively,

defendant argues he was denied his constitutional right to effective assistance of counsel when counsel failed to object to inclusion of reference to the dismissed charge in the presentence report. Therefore, defendant argues the trial court abused its discretion in denying his motion to be resentenced. Defendant's arguments have no merit.

A trial court's authority to resentence a defendant depends on whether the initial sentence was invalid. MCR 6.429(A). A valid sentence cannot be set aside. *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994); *In re Dana Jenkins*, 438 Mich 364, 368; 475 NW2d 279 (1991). However, a court has the authority to correct an invalid sentence. MCR 6.429(A); *People v Miles*, 454 Mich 90, 98; 559 NW2d 299 (1997). A sentence is invalid when it is based on inaccurate information. *Id.*, 96-98; *People v Harris*, 224 Mich App 597, 599-600; 569 NW2d 525 (1997).

In the present case, defendant's attorney informed the trial court that the presentence report was accurate. Also, defendant was twice specifically asked whether there was anything factually inaccurate in the report and replied "no" each time. Defendant has forfeited his claim that the presentence report contained inaccurate information when he did not raise the issue at or before sentencing. MCR 6.429(C); MCL 771.14(6); *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000); *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). Defendant's claim is therefore reviewed for plain error affecting substantial rights. *McCrady, supra*, 32.

In the case at bar, the presentence report contained an entry concerning defendant's criminal history that he was charged on 12/31/93 with first-degree criminal sexual conduct but that the charges were dismissed on 07/25/94. This information was established at trial (except as to the exact dates) and was in fact the focal point of defendant's defense to the instant charges. In addition, information in a presentence report is presumed to be accurate and the trial court is entitled to rely upon it unless effectively challenged by the defendant. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). Here, the defendant and his attorney not only failed to challenge information in the presentence report, they both affirmed it was accurate.

Defendant implies that information concerning the 1994 charges may not be included in the presentence report because they did not result in a conviction. However, the presentence report may include arrests that do not result in convictions. *People v Potrafka*, 140 Mich App 749, 752; 366 NW2d 35 (1985). Furthermore, the trial court may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided the defendant is afforded the opportunity to challenge the information, and if challenged, the information is substantiated by the preponderance of the evidence. *People v Ewing (After Remand)*, 435 Mich 443, 446 (Brickley, J.), 473 (Boyle, J.); 458 NW2d 880 (1990); *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Moreover, as here, at sentencing, the trial court may consider evidence admitted during the trial. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998); *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997).

Thus, no error occurred when the trial court relied on the presentence report in this case. Likewise, the prerequisites of ineffective assistance of counsel, that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings

would have been different, have not been established. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defense counsel is not required to advocate positions that lack merit. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001); *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Finally, the legislative sentence guidelines apply to the present case because the instant offenses were committed on or after January 1, 1999. MCL 769.34(1), (2); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). Because the trial court imposed a sentence within the guidelines, and because the record does not establish that the trial court relied upon inaccurate information, appellate relief from the sentence imposed is not available. MCL 769.34(10); *Babcock, supra*, 73; *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Affirmed.

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