STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS JOHN HENDRICKS,

Defendant-Appellant.

UNPUBLISHED
October 15, 2002

No. 233303
Otsego Circuit Court
LC No. 00-002564-FH

Before: Hood, P.J., and Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under age 13). Defendant was sentenced to 66 to 180 months' imprisonment for each conviction, to run concurrently. Defendant appeals as of right. We affirm.

Defendant first argues the trial court abused its discretion in declining the request for an adjournment after defendant failed to appear for the second day of trial. We disagree.

We review the lower court's decision regarding a request for an adjournment for an abuse of discretion resulting in prejudice to the accused. *People v Gross*, 118 Mich App 161, 164; 324 NW2d 557 (1982). A defendant has a constitutional, statutory, and common law right to be present at his trial. Const 1963, art 1, § 17, 20; MCL 768.3; *People v Mallory*, 421 Mich 229, 246 n 10; 365 NW2d 673 (1984). This includes the right to be present at every stage of trial where a defendant's substantial rights may be affected. *People v Bowman*, 36 Mich App 502, 510; 194 NW2d 36 (1971). However, "[a] defendant's voluntary absence from the courtroom after trial has begun waives his right to be present and does not preclude the trial judge from proceeding with the trial to conclusion." *People v Swan*, 394 Mich 451, 452; 231 NW2d 651 (1975) (emphasis omitted); *People v Woods*, 172 Mich App 476, 479; 432 NW2d 736 (1988). Waiver is the intentional relinquishment or abandonment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation omitted). A valid waiver requires a defendant's specific knowledge of the right to be present and an intentional decision to abandon the protection of the right. *Woods*, *supra* at 479. Prejudice warranting reversal requires a showing of a reasonable possibility of prejudice. *Id*. at 479-480.

Both the trial court and defense counsel reiterated to defendant the importance of his timely attendance and participation. Separate records made on the first and second day of trial

indicated that defendant was informed of his constitutional rights and had decided to participate at trial. However, defendant failed to participate. His absence was instead an intentional choice made out of his fear of conviction and an attempt to avoid the consequences of his actions. Thus, defendant effected a valid waiver of his right to be present. *Swan*, *supra* at 452; *Woods*, *supra* at 479.

Defendant next argues counsel was ineffective for failing to argue that defendant was incompetent to proceed to trial because he did not understand the nature of the proceedings against him, and, therefore, was unable to assist in his defense. We disagree.

Generally, to establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (quotation omitted); and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Because defendant failed to move for a *Ginther*[1] hearing, review is limited to the facts on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

Our review of the record finds ample evidence that defendant was capable of understanding the nature and object of the proceedings against him and of assisting in his defense in a rational manner. The record provides evidence that defendant understood the nature of his case. Similarly, at sentencing, defendant was read the contents of his presentence investigation report (PSIR) and confirmed that it was accurate, declined the court's offer to allocute, and insisted that he would be appealing. In total, defendant's behavior at trial belies his present claim that he was incompetent to stand trial. Thus, defendant has failed to rebut the presumption of competency. MCL 330.2020(1).

Because defendant was competent and has presented no evidence that should have raised a "bona fide doubt" regarding his competency, his argument on this issue fails. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990) (citation omitted). An attorney is not ineffective for failing to bring a futile motion. *People v Stanley L. Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

A criminal defendant is presumed competent to stand trial. MCL 330.2020(1). To support a claim of incompetence, a trial court must find that a defendant is "incapable because of his medical condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner." *Id*.; see also *People v Snyder*, 108 Mich App 754, 757; 310 NW2d 868 (1981). In the case at bar, aside from bald allegations presented both during trial and at sentencing that defendant was incompetent, defendant has provided no specific instances or facts to aid our review. Accordingly, we cannot conclude that defendant was unable to assist in his defense or understand the nature of the proceedings against him. See *People v Belanger*, 73 Mich App 438, 447; 245 NW2d 551 (1976).

---

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant also argues that counsel was ineffective for failing to move for suppression of his statement to the police because defendant did not knowingly and intelligently waive his *Miranda*[2] rights given his mental deficiency. We disagree.

Whether defendant's statement was voluntary, knowing, and intelligent is a question of law we review under the totality of the circumstances. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000); *People v Snider*, 239 Mich App 393, 416; 608 NW2d 502 (2000). Initially, we note that the parties concede defendant was in custody. Admissions of fact that do not themselves show guilt require no determination of voluntariness. *People v David Gist*, 190 Mich App 670, 671; 476 NW2d 485 (1991). "An admission of fact is distinguished from a confession of guilt by the fact that an admission, in the absence of proof of facts in addition to those admitted by the defendant, does not show guilt." *Id.* at 671-672. Defendant's statement in this case was not inculpatory and was introduced to undermine his credibility by contrasting defendant's incredible denial with the evidence presented. His statement did not show he committed the crime of which he was convicted. Accordingly, there was no error in admitting it. *Id.*

Similarly, defendant has presented no evidence that the statement was other than knowingly and intelligently made. While there are levels of mental deficiency so severe that they preclude a defendant from knowingly and intelligently waiving his rights, under normal circumstances, mental ability is only one factor in the "totality of circumstances" inquiry. *People v Abraham*, 234 Mich App 640, 648; 599 NW2d 736 (1999).

As noted, the only evidence of defendant's incompetency was that he could not read or write. Indeed, the circumstances of the interrogation provide no support for a finding that his statement was coerced. Defendant's willingness to waive his rights and deny the allegations was consistent with his theory that the charges were fabricated. Counsel is not required to advocate a meritless position, *Stanley L. Gist*, *supra* at 613, and on the record presented, we cannot perceive a reasonable probability of success had counsel sought to suppress the statement based on a *Miranda* violation.

Similarly, implicit in counsel's challenge under MRE 801(d)(2), was his determination of the likelihood of success between the various possible challenges. Consequently, one could reasonably conclude that counsel decided as a matter of strategy to object under MRE 801(d)(2) rather than request suppression based on *Miranda*. We will not substitute our judgment for that of counsel regarding matters of trial strategy, *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999), or require counsel to file a futile motion, *Stanley L. Gist*, *supra* at 613. Measured against an objective standard of reasonableness, counsel was effective in this case. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant also contends that we should remand this case for resentencing because the trial court erred in scoring the guidelines' variables and the sentence imposed was disproportionate to the offense and the offender. We disagree.

---

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Generally, a trial court is allowed considerable discretion to allocate points to individual offense variables; however, there must be record evidence to adequately support a particular score. *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000); *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Accordingly, a sentencing court may use a broad range of information when weighing the sentencing factors including the facts underlying uncharged offenses. *People v Ewing (After Remand)*, 435 Mich 443, 446 (Brickley J.), 473 (Boyle J., with Riley and Griffin, JJ., concurring); 458 NW2d 880 (1990); *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

Here, contrary to defendant's position, record evidence supported the scoring of OV 13 at 25 points. At trial, one victim testified to a pattern of sexual assaults in the year preceding his arrest. It is irrelevant that defendant was only charged with one count of CSC – the statute does not require that there be a conviction of the other crimes. MCL 777.43(2)(a). Taken together, the record evidence of defendant's multiple assaults on one victim plus his assault on the second victim support the score. *Leversee*, *supra* at 348-349.

Likewise, defendant's sentence was valid because it was within the guidelines' recommendation. Absent substantial and compelling reasons for a departure, a sentence must be imposed within the guidelines range and appellate review is limited by the statute. MCL 769.34(2), (3), (10), (11); *People v Babcock*, 244 Mich App 64, 73, 77-78; 624 NW2d 479 (2000).

Thus, we must affirm a sentence that is within the applicable guidelines' range absent inaccurate information provided at sentencing or an error in scoring. Because defendant's sentence also comports with the principle of proportionality, further review is precluded. *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001); *People v Babcock (After Remand)*, 250 Mich App 463, 468-469; 648 NW2d 221 (2002).

Affirmed.

/s/ Harold Hood
/s/ William C. Whitbeck
/s/ Peter D. O'Connell