

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER WATTS,

Defendant-Appellant.

UNPUBLISHED

January 10, 2008

No. 274715

Wayne Circuit Court

LC No. 06-009087-01

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of fourth-degree criminal sexual conduct, MCL 750.520e(1)(c), and sentenced to three years' probation. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The complainant, KR, testified that she lived with her aunt and defendant, the aunt's live-in boyfriend, and their two children. On the night in question, defendant was at the house when KR came home from work, but left sometime before she went to bed. KR shared a bed that night with defendant's four-year-old son. Shortly before dawn, after KR's aunt had left for work, KR awoke to find that the comforter was no longer over her body, the leg of her boxer shorts had been pushed up, and defendant was licking her inner thigh.

Defendant testified that he never left the house but simply went to bed. Later, after KR's aunt left for work, defendant entered his son's bedroom to collect some of his belongings because he planned to move out. He found what he was looking for and left the room. He denied ever touching KR.

The trial court found KR to be the more credible witness and found defendant guilty as charged.

Defendant argues that trial counsel was ineffective for failing to challenge the scoring of offense variable 4, MCL 777.34, of the sentencing guidelines. Because defendant did not raise this claim below in a motion for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Relief is not available unless the defendant shows that counsel's representation was unreasonable and that counsel's error affected the outcome of the proceedings. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001). To prevail on a claim of ineffective assistance in this context, defendant must show that a successful challenge to the scoring of the guidelines would have affected the guidelines range under which he was sentenced. *People v Wilson*, 252 Mich App 390, 394, 396-397; 652 NW2d 488 (2002).

The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). "A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Fourth-degree CSC is a Class G offense subject to the statutory guidelines. MCL 777.16y. Defendant received zero points for the prior record variables and 20 points for the offense variables, placing him in the A-III category, for which the minimum sentence range is 0 to 9 months. MCL 777.68. Ten of defendant's 20 points were scored for OV 4 (victim suffers serious psychological injury that may require professional treatment). MCL 777.34(1)(a) and (2).

KR did not appear at sentencing and did not provide a victim's impact statement for the presentence report. However, she indicated in her trial testimony that she felt violated, embarrassed, and upset by the incident. As soon as defendant left the room, KR barricaded the door and sat awake in bed holding her little cousin until her aunt came home on a break. This evidence indicates that the incident left KR fearful and anxious, which is sufficient to support the ten-point score. *People v Wilkens*, 267 Mich App 728, 741; 705 NW2d 728 (2005). *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

Because the evidence supported the trial court's scoring of OV 4, defense counsel was not ineffective for failing to object. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski