

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER LEE WINKLER,

Defendant-Appellant.

UNPUBLISHED

July 31, 2008

No. 278499

Kent Circuit Court

LC No. 05-007427-FH

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted. Defendant challenges the sentence of five to 15 years in prison imposed on his plea-based conviction of criminal sexual conduct in the second degree (CSC II), MCL 750.520c. For the reasons set forth in this opinion, we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant agreed to plead guilty to one count of CSC II in exchange for dismissal of two counts of criminal sexual conduct in the third degree (penetration), the victim being at least 13 years of age but less than 16 years of age, MCL 750.520d(1)(a). Defendant admitted that he touched the victim's breasts.

The guidelines as scored by the trial court recommended a minimum term range of 43 to 86 months. The trial court sentenced defendant to five to 15 years in prison.

Under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied on by the trial court in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). A party may not raise on appeal an issue challenging the scoring of the guidelines or the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. *Id.*

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v*

Hornsby, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review a trial court's scoring of the guidelines to determine whether that court properly exercised its discretion and whether the evidence supports the scoring decisions. We review the trial court's findings of fact for clear error. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), *aff'd* 473 Mich 399 (2005).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different, *id.* at 600, and that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

On appeal, defendant objects to the scoring of three OV's. Defendant did not object to the scoring of these OV's at trial, did not move for resentencing in the trial court, and did not move for remand in this Court. MCL 769.34(10). Therefore, our review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant objects to the scoring of OV 3, MCL 777.33, physical injury to victim, at five points for bodily injury not requiring medical treatment. MCL 777.33(1)(e). Defendant asserts that this OV should have been scored at zero points because no evidence supported a finding that he injured the victim in any way, including infecting her with a sexually transmitted disease. We disagree.

The rules of evidence do not apply at sentencing hearings. MRE 1101(b)(3). A victim has the right to make a written statement to be used in the preparation of the presentence investigation report (PSIR). MCL 780.763(1)(c); MCR 6.425(A)(7). The victim's mother wrote a letter to the court indicating that the victim, who was 14 years old, had contracted venereal warts as a result of engaging in sexual intercourse with defendant, and had undergone medical treatment for the condition. The letter, which was made a part of the record and was referred to during the sentencing hearing, constituted sufficient evidence to support the trial court's scoring of OV 3 at five points. *Hornsby*, *supra* at 468.

Defendant objects to the scoring of OV 4, MCL 777.34, psychological injury to victim, at ten points. Ten points are to be scored for OV 4 if serious psychological injury requiring treatment occurred to a victim. The fact that a victim might not yet have sought treatment is not conclusive in making the scoring decision. MCL 777.34(2). Defendant asserts that no evidence supported a finding that the victim suffered serious psychological injury requiring treatment. We disagree.

The letter from the victim's mother stated that the victim blamed herself for what had occurred, and had become angry, self-destructive, and withdrawn. The victim had difficulty trusting adult men. The statements in the letter from the victim's mother supported the trial

court's finding that the victim suffered serious psychological injury requiring treatment. The finding was not clearly erroneous, *Houston, supra* at 471, notwithstanding the fact that the victim had not yet sought such treatment. MCL 777.34(2).

Offense Variable 10 is to be scored at ten points if the defendant "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). The term "exploit" is defined as "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b).

Defendant objects to the scoring of OV 10 at ten points. He acknowledges that the victim was 14 years old, but notes that the "mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability." MCL 777.40(2). Defendant asserts that no evidence showed that he manipulated the victim.

The letter written by the victim's mother indicated that defendant became friends with her son, and met the victim when she was 11 years old. The letter also indicated that after defendant began having intercourse with the victim, he told the victim that she was special, and that she must keep their actions secret. The letter also stated that defendant asked the victim to recruit other young girls for him. At sentencing, defense counsel denied that defendant ever made such a request; however, the letter constituted some evidence on which the trial court could rely to score OV 10 at ten points. *Hornsby, supra* at 468. Contrary to the arguments of defendant, the trial court did not score OV 10 at ten points based solely on the victim's age.

Defendant argues that had OV 3, OV 4, and OV 10 been scored at zero points, the guidelines would have recommended a minimum term range of 29 to 57 months. MCL 777.64. Defendant asserts that trial counsel rendered ineffective assistance by failing to object to the scoring of these OVs at sentencing, and that he is entitled to be resentenced.

The trial court's scoring of OV 3, OV 4, and OV10 was supported by the requisite evidence, and did not constitute an abuse of discretion. The objections raised by defendant in this appeal would have failed at sentencing. Trial counsel was not required to raise meritless objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello