STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2009
v	No. 281154 Washtenaw Circuit Court
JAMES HOLLAND, JR., Defendant-Appellant.	LC No. 06-000621-FC

Before: Murray, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

On July 31, 2007, after a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, one count of armed robbery, MCL 750.529, and three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to consecutive sentences of 56 to 80 years' imprisonment for each CSC I conviction, 56 to 80 years' imprisonment for the armed robbery conviction, and 18 to 30 years' imprisonment for each CSC II conviction. He appeals as of right. We affirm.

This case arose from a robbery and sexual assault that took place at a tanning salon in Ypsilanti, Michigan. On December 12, 2005, the victim was working alone at the tanning salon in the early evening. Defendant entered the store through the front door while the victim momentarily stepped out the back door. When the victim returned to the salon, defendant inquired about the price of a tanning package. He then suddenly rushed the victim, knocked her to the ground, repeatedly punched her, forced her to remove her pants and underwear, and held an object that felt like metal to the victim's neck. Defendant forced the victim to crawl to the front of the store and give him money from the cash register and her purse. He then instructed her to enter a tanning room, where he attempted to penetrate her with his penis, engaged in multiple acts of digital penetration, and forced her to perform fellatio. Defendant fled when another customer entered the store.

On appeal, defendant first argues that evidence of other bad acts was erroneously admitted pursuant to MRE 404(b).[1] We review a trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d (1998).

MRE 404(b) excludes the admission of evidence of prior bad acts to show a defendant's bad character or propensity to act in conformity therewith. However, this evidence is admissible for other purposes, such as to show "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." MRE 404(b)(1). The evidence must be offered for a proper purpose, it must be relevant, and the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). The trial court may provide a limiting instruction when requested. *Id.* at 75.

The trial court did not clearly abuse its discretion in determining that the MRE 404(b) evidence was admissible. The prosecution offered the evidence for a proper purpose, i.e., to show identity, scheme, or plan in doing an act, and to show the absence of mistake regarding the victim's perceptions. MRE 404(b). As the trial court noted, the question of identity was a material issue in this case. It is insufficient, however, for a prosecutor to merely articulate a proper purpose under the evidentiary rule; he must also demonstrate that the evidence is logically relevant, i.e., he must explain how the evidence relates to the articulated purpose. *Crawford, supra* at 387-390. Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Defendant's identity as the perpetrator was a key issue at trial. The victim could not identify defendant as her assailant at a line-up or at trial. Defendant's defense focused on the prosecution's lack of identification evidence. In *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), this Court articulated the test to be used to determine relevance when similar-acts evidence is being used to demonstrate identity through modus operandi:

> Although the *VanderVliet* Court adopted a new test for admission of evidence under MRE 404(b), the four-part test of *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), remains valid to show logical relevance where similar-acts evidence is offered to show identification through modus operandi. *People v McMillian*, 213 Mich App 134, 138; 539 NW2d 553 (1995). The *Golochowicz* test requires that (1) there is substantial evidence that the defendant committed the similar act, (2) there is some special quality of the act that tends to prove the defendant's identity, (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. *Golochowicz, supra* at 307-309.

In other words, when other-acts evidence is admitted in order to demonstrate identity through modus operandi, as is the case here, the prosecution must show that there is "substantial evidence that the defendant actually perpetrated the bad act" and that there is "some special quality or

[1] The other-acts evidence introduced at trial was the victim's testimony in a related case.

circumstance of the bad act tending to prove the defendant's identity . . . ." *Golochowicz, supra* at 309; *People v Smith*, 243 Mich App 657, 671; 625 NW2d 46 (2000), remanded on other grounds 465 Mich 931 (2001) (finding that the *Golochowicz* tests remain valid when evidence is introduced to show identification through modus operandi). The link between the similar-acts evidence must be "forged with sufficient strength to justify admission of evidence of the separate offense only where the circumstances and manner in which the two crimes were committed are '[s]o nearly identical in method as to earmark [the charged offense] as the handiwork of the accused.'" *Golochowicz, supra* at 310, quoting McCormick, Evidence (2d ed), § 190, p 449.

The other-acts evidence in this case was relevant because it related to a material issue at trial; if believed, it tended to identify defendant as the assailant through modus operandi evidence. See *Smith, supra* at 673-674. Although there were some differences between the incidents, the record reflects substantial evidence that defendant committed the similar act to which another witness testified. In fact, defendant confessed to that crime.[2] Further, the incidents had sufficient special qualities or circumstances in common to be admitted for identification purposes: (1) the victims were white females, (2) they were alone, (3) the attacks were in Ypsilanti, (4) defendant knocked the victims to the ground and physically overpowered them, (5) defendant placed his hand over each victim's mouth and nose to prevent her from screaming, (6) while on the ground, defendant forced the victims to disrobe, (7) defendant purposefully stayed behind the victims during the incidents and instructed the victims not to look at him so that the victims could not identify him, (8) defendant engaged in and/or attempted to engage in forced vaginal, anal, and oral sex with the victims multiple times, (9) defendant either used or requested both lubricant and a condom during the sexual assaults, (10) defendant used a weapon or an object fashioned as a weapon, and (11) defendant also demanded and received money in the form of cash from the victims. The fact that the two attacks bore such similarities indicates that the same individual using the same modus operandi committed them. See *Ho, supra* at 187; *McMillan, supra* at 138. The evidence was logically relevant identity evidence.

We reject defendant's argument that the prejudicial nature of the other-acts evidence was so great that it was impossible to overcome even with a limiting instruction. Evidence is unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). However, a trial court's determination that the probative value of the evidence is not outweighed by its prejudicial effect is "best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony . . . ." *VanderVliet, supra* at 81. The evidence in this case was probative because of the critical issue of identification and the similarities between the incidents. Moreover, the trial court twice instructed the jury that it should limit its consideration of the other-acts evidence to its proper purpose, including identity evidence, and not use the evidence as propensity evidence. Jurors are presumed to follow their instructions, and we assume that they did so in this case. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). On the record, the trial court did not abuse its discretion.

[2] Evidence of defendant's confession to the other assault was presented to the jury. Defendant does not challenge the admission of that evidence on appeal.

In ruling, we also hold that the other-acts evidence was properly admissible to show a common scheme, plan, or system of doing an act. MRE 404(b)(1). The degree of similarity necessary to show scheme or plan is less than that required to show identity; thus, there was sufficient similarity between the incidents to show a common scheme, plan, or system in this case. *People v Sabin* (*After Remand*), 463 Mich 43, 65-66; 614 NW2d 888 (2000).

Next, defendant asserts that his counsel was ineffective for failing to obtain a DNA expert or present this expert at trial, and for failing to adequately question the prosecution's DNA expert and challenge her testimony regarding evidence not admitted at trial. Because defendant did not preserve the issue, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Defendant must demonstrate that his counsel's performance "fell below an objective standard of reasonableness and that the representation prejudiced the defendant to the extent that it denied him a fair trial." *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). "To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.* at 146.

The record does not support defendant's claim that his counsel failed to obtain a DNA expert in this case. The trial court record reflects that defense counsel requested funds for obtaining a DNA expert to review the DNA evidence and testify if necessary, and the trial court granted these funds. Defense counsel later requested additional funds, and this request was also granted. We cannot conclude that defense counsel failed to obtain an expert.

Based on the record, we conclude that defense counsel's decisions not to have a DNA expert witness testify at trial and not to further question the prosecution's DNA expert on rebuttal were discretionary decisions that deserve deference as matters of sound trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). We will not second-guess these decisions with the benefit of hindsight. *Id.* Defense counsel is ineffective for failing to call a witness only if it deprives defendant of a substantial defense, i.e., a defense that might have made a difference in the outcome of the trial. *Id.*; *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The record does not reflect that defendant was deprived of a substantial defense. Instead, the record reflects that defense counsel questioned the prosecution's expert regarding the areas of potential fallibility that defendant claims a rebuttal expert would have covered, namely, the DNA sample size, the use of statistics, and the validity of the analysis. Defense counsel questioned the prosecution's expert regarding her use of statistical analysis to support her conclusion that she would only expect to find the DNA on the victim's rectal swab, which matched defendant's DNA, once in the entire population of the world and in "one in 789.2 quadrillion" African American people. Defense counsel repeatedly asked the expert about the use of statistics, questioned whether the sample size affected the results, and asked the expert how she could be sure that the sample matched defendant. Counsel also emphasized these points during his closing argument. Defense counsel indicated to the trial court that he believed, in his professional opinion, that further questioning of the prosecution's expert would be detrimental to defendant's case. Defendant has therefore failed to demonstrate that he was deprived of a substantial defense, and he cannot overcome the presumption that his counsel's decisions not to call an expert witness or to further question the prosecution's expert were matters of sound trial strategy. In reaching this conclusion, we note that other than claiming that her statistics were

"fantastic," defendant has offered no countervailing statistics, authority, or a rebuttal expert opinion that would support his assertion.

Defendant also asserts that his counsel was ineffective for failing to challenge the testimony of the prosecution's DNA expert regarding facts that were not contained in the lower court record, in violation of MRE 703. Pursuant to MRE 703, "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." Although defendant asserts that the expert, who was a forensic scientist for the Michigan State Police, relied upon a DNA analysis conducted by a "private laboratory" and that no technicians from that laboratory testified at trial, a review of the record reveals that this assertion is erroneous. The record reflects that the expert testified about the DNA testing that she performed herself, and she did not testify about the results of tests performed by another laboratory. The expert only referred to a private laboratory with respect to other evidence about which she did not testify, and not when discussing the victim's rectal swab or the known DNA samples from defendant and the victim. The expert tested and analyzed the DNA from the victim's rectal swab and the known samples of defendant and the victim herself. Therefore, defendant has failed to substantiate his claim that the jury was improperly presented with facts not in evidence. Accordingly, defense counsel was not ineffective for failing to raise a meritless objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).[3]

Defendant also challenges the admissibility of his tape-recorded confession, played for the jury at trial, on grounds that it was involuntary. Defendant moved to suppress his confession in the trial court, which denied his request after a *Walker* hearing.[4]

"This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence." *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). We examine the entire record and we make an independent determination whether the confession was voluntary based on the totality of the circumstances. *People v Sexton*, 458 Mich 43, 67-68; 580 NW2d 404 (1998). We review the trial court's findings of fact for clear error. *Id.* at 68. We review de novo issues of law, such as the application of a constitutional standard to uncontested facts. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000). We defer to the trial court's determinations regarding the credibility of the witnesses at a *Walker* hearing. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005).

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[3] Defendant also confusingly asserts that his counsel was ineffective for the reasons argued in "Argument I, *supra*" regarding the violation of his right to confront the witnesses against him. In the case at bar, Issue I concerns MRE 404(b) evidence, and defendant never argued that he was denied the right to confront the witnesses against him. The confrontation issue does not appear in his statement of the questions presented, and defendant provides no further analysis or citation to authority. Because this claim was not contained in his statement of the questions presented, defendant waives this claim of error. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000); MCR 7.212(C)(5). Defendant has also abandoned this claim because he "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

[4] *People v Walker* (*On Rehearing*), 374 Mich 331, 338; 132 NW2d 87 (1965).

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *Akins*, *supra* at 564, citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We consider the following nonexhaustive list of factors in making this determination, although no one factor is dispositive:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.*, quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

After reviewing the evidence presented at the hearing, we conclude that the trial court's findings of fact were not clearly erroneous, and the totality of the circumstances indicates that defendant's confessions on January 12 and 13, 2006, were voluntary. Defendant was 39 years old when he made his confession; he had some post-high school education, and the interviewers noted that he was articulate. Defendant also had a record of other juvenile and adult convictions, indicating that he had experience with the criminal justice system. In particular, defendant indicated that he had been read his *Miranda* rights and understood them when he was a juvenile. Further, defendant was advised of his *Miranda* rights during a January 6, 2006, interview and requested an attorney, which halted the questioning. This earlier request indicates that defendant understood his rights and how to invoke them. The record also reflects that defendant was advised of his *Miranda* rights on several occasions throughout the interviews on January 12 and 13, 2006, and each time defendant indicated that he understood his rights and signed the waiver form. There was also no evidence of an unnecessary delay in bringing defendant before a magistrate, that defendant was injured, drugged, or intoxicated,[5] or that defendant was physically abused or threatened with physical abuse.[6]

We further defer to the trial court's finding that defendant was not suffering from ill health and did not inform the interviewers of any health problems. Instead, the evidence presented at the *Walker* hearing indicated that on January 6, 2006, the day after defendant turned himself in for a parole violation, he exhibited no symptoms of drug withdrawal. Further, defendant's interviewers testified that he did not exhibit symptoms of drug withdrawal during the interviews on January 12 and 13. In addition, no evidence indicates that defendant complained

[5] In particular, defendant testified that he did not request or receive any illegal or legal drugs while in jail.

[6] Defendant's interviewers testified that defendant was not physically abused, and defendant did not refute these statements.

to the prison staff or the interviewers regarding any alleged ailments or that he requested or received medical treatment.

We also hold that the trial court's finding that defendant was not deprived of food or sleep was not clearly erroneous. The record reflects that defendant was provided food in the afternoon on January 12, 2006, and breakfast and lunch on January 13, 2006. Harold Raupp, the polygraph examiner, testified that defendant told him that he had eaten. Defendant also acknowledged that he was given food on January 13;[7] defendant cannot argue that he was deprived of food when he simply chose not to eat the food offered to him. Moreover, although defendant testified that he slept poorly or could not sleep in the holding cell at the Washtenaw County Jail, there was no evidence that the interviewers or the corrections officers purposely deprived him of sleep. In addition, although defendant might have been tired during the interview, the interviewers noted that he was nonetheless coherent, articulate, and indicated that he wanted to proceed with the interview. In fact, Raupp refused to administer the polygraph examination on the night of January 12 even though defendant wanted to continue, because Raupp believed that defendant was too tired and he wanted defendant to rest that night and come back the next day. The next day, defendant exhibited no signs of extreme sleep deprivation and indicated that he wanted to take the polygraph test.

We also find that the trial court did not clearly err in concluding that defendant was not subjected to several hours of coercive questioning. The record reflects that the interviewers originally planned to talk to defendant only regarding his role as a witness in an upcoming murder trial. Years earlier, defendant had told police that the suspected murderer, who was slated to go to trial in February of 2006, told defendant about the 1991 homicide. When the police spoke with defendant in January 2006, however, he changed his story, indicating that he was actually present during the murder when the suspected murderer committed it. The police then wanted to give defendant a polygraph test to verify his statements. During defendant's interview with Raupp before the polygraph examination, defendant volunteered that he had "aces up his sleeve," and that he was the man "they were looking for." Defendant indicated "that he was going to lay it on the table. He was going to lay it all out." Defendant then revealed his participation in crimes about which Raupp had no previous knowledge, and Raupp attempted to redirect defendant's attention to his knowledge as a witness in the murder case. Raupp testified that defendant never answered questions in an automatic manner during these conversations and that he was articulate and eager to proceed.

Additionally, the record reflects that defendant was in jail since January 5, 2006, because of a parole violation, and he was interviewed on January 12 beginning late in the afternoon and ending at approximately 9:00 p.m. Raupp refused to administer the polygraph examination at 9:00 p.m. because defendant looked too tired. The polygraph test and interview on January 13 began at approximately 9:00 a.m. and lasted until approximately 11:00 a.m. or 12:00 p.m. Defendant was given breaks, food, and water. After carefully reviewing the testimony presented at the *Walker* hearing and the portions of defendant's tape-recorded statements played for the

[7] Specifically, defendant testified that he was offered a hamburger on January 13 but was not hungry at the time.

trial court, we conclude that the trial court did not clearly err in finding that defendant was not coerced into making a statement and that he was actually speaking in full sentences, explaining why he desired to confess. Based on the record evidence, we defer to the trial court's decision to credit the interviewers' testimony and the tape-recorded evidence over defendant's testimony and assertions that he was subjected to hours of coercive questioning. *Tierney*, *supra* at 708.

Defendant also argues that his request for counsel during an interview conducted on January 6, 2006, is sufficient reason, standing alone, to suppress his statements and confession on January 12 and 13. Once a defendant invokes his right to counsel during custodial interrogation, this request must be honored "*unless the accused himself initiates* further communication, exchanges or conversations with the police." *People v Paintman*, 412 Mich 518, 525; 315 NW2d 418 (1982), quoting *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981) (emphasis in original). This rule also applies where the police subsequently attempt to question the defendant regarding a matter unrelated to the initial interrogation. *Arizona v Roberson*, 486 US 675, 687; 108 S Ct 2093; 100 L Ed 2d 704 (1988).

Regardless, the record reflects that defendant initiated the discussion about his involvement in the case at bar and that he was not being interrogated at the time he confessed. The interviewers only intended to ask defendant about his knowledge as a witness against the suspected murder in a homicide investigation. Raupp knew nothing about defendant's involvement in other crimes and he tried to redirect the conversation back to defendant's knowledge as a witness in the murder case. An "interrogation" is "express questioning and [] any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the subject." *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). See also *People v McCuaig*, 126 Mich App 754, 760; 338 NW2d 4 (1983) (no interrogation occurred where the police informed the defendant of the charge against him and why the police believed the defendant was responsible, because the police statements were not intended to elicit a response, but to provide information). The questions posed to defendant were directed toward his knowledge as a witness in a homicide investigation in which defendant was not a suspect; these questions were not reasonably likely to elicit information about the case at bar.

Defendant also alleges that his confession is inadmissible because it was induced by a promise. We disagree. The existence of a promise is just one of the circumstances to consider in examining whether, under the totality of the circumstances, the statement was made voluntarily. *People v Givans*, 227 Mich App 113, 119-120; 575 NW2d 84 (1997). Raupp testified that defendant first introduced the topic of speaking with his family, although defendant claims that Raupp brought it up. We find no basis to upset the trial court's determination that Raupp's testimony was more credible on this issue. See *Tierney*, *supra* at 708. Considering that Raupp had no knowledge of defendant's other crimes before defendant told him, Raupp had no reason to promise defendant anything in order to obtain a confession. In fact, Raupp was unaware that there was even the possibility of obtaining a confession or confessions. In addition, Raupp did not have the authority to grant defendant's request to see his family. To the extent there was any promise, it was merely Raupp's promise to pass along defendant's request to see family to Raupp's supervisors. Accordingly, the record does not support a finding that defendant was induced or coerced into making the incriminating statements, and the trial court did not err in holding that defendant's incriminating statements were not improperly induced by a promise.

Finally, defendant argues that the trial court abused its discretion in sentencing defendant to 56 to 80 years' imprisonment for the CSC I convictions. Defendant claims that because he was 40 years old at the time of sentencing, his sentence is excessive.

Defendant's sentence was within the recommended minimum sentence range under the legislative guidelines, which called for 270 to 675 months' imprisonment. "[I]f the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); MCL 769.34(10).[8] "Under 769.34(10), this Court may not consider challenges to a sentence based exclusively on proportionality if the sentence falls within the guidelines." *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002). In the legislatively-enacted sentencing scheme, MCL 777.1 *et seq.*, the trial court's task is no longer to determine whether the sentence is proportional based on the circumstances of the offense and the offender, but to sentence a defendant within the recommended guidelines range and, if not, to justify a departure with substantial and compelling reasons. *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). Because defendant's sentence was within the recommended guidelines range and he does not allege a scoring error or indicate that the trial court relied on inaccurate information when calculating his sentencing range, we decline to review this claim of error.

Also, we note that defendant advocates for the reconsideration of our Supreme Court's decisions in *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994), and *People v Mary Lemons*, 454 Mich 234, 258-260; 562 NW2d 447 (1997). In both cases, our Supreme Court held that the trial court is not required to consider a defendant's age when sentencing the defendant to a term of years, overruling *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989). However, we must follow Michigan Supreme Court precedent and are powerless to overturn a Supreme Court decision. *People v Tims*, 202 Mich App 335, 340; 508 NW2d 175 (1993), rev'd on other grounds 449 Mich 83 (1995). Thus, the trial court was not required to sentence defendant to a term of years that he could reasonably be expected to complete. *Lemons*, *supra* at 258.[9]

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[8] MCL 769.34(10) provides, "If a maximum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence."

[9] We also will not adopt the statutory morality tables set forth in MCL 500.834, which are applicable in the life insurance annuity context, because trial courts are not required to consider a defendant's age in sentencing, *Lemons*, *supra* at 258, and the legislatively-enacted guidelines set forth the criteria to be considered in sentencing, *Babcock*, *supra* at 263-264.

Finally, we note that at oral argument, defendant's attorney, with the prosecutor's permission, made an oral motion to remand this case to the lower court to conduct a *Ginther* hearing. See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). After accepting and considering this oral motion and reviewing the lower court record, we deny defendant's motion to remand for a *Ginther* hearing.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Alton T. Davis