STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 2009
v	No. 282966 Kalkaska Circuit Court
ERIC LEE MOORE, Defendant-Appellant.	LC No. 07-002799-FC

Before: Whitbeck, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(i)(a) (victim under 13 years old). Defendant was sentenced to a prison term of 85 months to 30 years. Defendant appeals as of right and we affirm.

Defendant first contends that he was denied effective assistance of counsel. We disagree. Our review of the unpreserved claim is limited to mistakes apparent on the record. *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). In order to prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant claims that he was denied effective assistance of counsel when his trial counsel failed to have him evaluated by a medical professional to determine whether he could present an insanity or temporary insanity defense based on pedophilia and involuntary intoxication. "A defendant is entitled to have his counsel investigate, prepare, and present all substantial defenses." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). When a claim of ineffective assistance of counsel is based on the failure to present a defense, the defendant must show that he made a good faith effort to avail himself of the right to present that defense and that the defense was substantial. *Id.* A substantial defense is one that might affect a trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

In Michigan, a person is legally insane if, "as a result of mental illness . . . that person lacks substantial capacity either appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). Further, "mental illness . . . does not otherwise constitute a defense of legal insanity." *Id*.

Defendant argues that the nature of the charged offense suggests that it is likely that he suffers from a mental disease such as pedophilia. However, defendant has failed to provided any support for his contention that he may suffer from a mental disorder generally, or pedophilia specifically. Pedophilia is characterized by "intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children" lasting over at least six months. DSM-IV-TR, p 572. There is nothing in the record to suggest that defendant satisfies this characteristic. In fact, the presentence investigation report indicates that defendant has no psychiatric history and that defendant reported he is in good mental health.

Defendant also argues that there is record evidence to suggest that he has a history of substance abuse and alcohol abuse that could lead to a finding that he was involuntarily intoxicated. In fact, the PSIR indicates that defendant has no substance abuse history. While the PSIR indicates that defendant's wife stated that defendant used marijuana "a couple times a week," defendant denied any drug use or addiction. Moreover, there is no indication on the record that at the time of the charged offense, defendant was under the influence of drugs or alcohol, whether voluntarily or involuntarily.

Moreover, defendant has not argued that the alleged mental illness or substance abuse issues resulted in the lack of capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law, as required by MCL 768.21a. Because there is no basis for concluding that an insanity defense was a substantial defense, defendant cannot establish his claim for ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that the trial court improperly admitted prior other acts evidence. The testimony cited was offered by the younger sister of the victim and concerned a particular method defendant would use to punish the victim and his sister for misbehavior. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2006).

MRE 404(b)(1) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as 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, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if such evidence is (1) offered for a proper purpose, (2) relevant under MRE 402 to a fact or consequence at trial, and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Further, "the trial court, upon request, may provide a limiting instruction under MRE 105." *People v Sabin* (*After Remand*), 463 Mich 43, 56; 614 NW2d 888 (2000).

The "other acts" evidence here was testimony from the victim's sister, who explained that it was defendant's practice to punish her by taking her to the bathroom, blindfolding her, and placing an unidentified object in her mouth. The victim testified that defendant would punish him in the same way, including the time when the victim removed the blindfold and saw that the object in his mouth was defendant's penis. The trial court instructed the jury that it could consider the evidence to the extent that it showed "that the defendant used a plan, system, or characteristic scheme that he had used before or since as in terms of a method of punishment as to the children." Moreover, the trial court instructed the jury not to use the testimony to consider defendant "a bad person" or "likely to commit crimes," and that they must not "convict the defendant here because you think he is a bad person." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant contends that the testimony was not offered for a proper purpose and was unduly prejudicial. We disagree. Defendant conceded in his own testimony that he actually was in the practice of punishing the children in the manner they both described, and we find he cannot have been unduly prejudiced by the admission of testimony that coincided with his own. The testimony was offered to show a common scheme or plan and to demonstrate opportunity, both of which are proper purposes under MRE 404(b); the trial court admitted it for both purposes.

The trial court's determination that the evidence was admissible for both purposes under MRE 404(b) was proper. There was no evidence that defendant also inserted his penis into the victim's sister's mouth when using his particular form of punishment. However, the similarity in the way he treated both children is strikingly high. So high, in fact, that we conclude that it amounts to more than the "mere similarity" rejected as sufficient by itself in *Sabin*, *supra* at 64-66. The repetitive, ritualized manner in which defendant treated both the victim and his sister is sufficient to permit the inference that they were part of a common plan, scheme, or system. Furthermore, evidence that defendant was home alone and in charge of taking care of the victim and his sister for much of the time the children were visiting their mother, that he was accepted as an authority figure who could impose consequences for misbehavior, that he had blindfolded the children and placed something in their mouths on prior occasions as a consequence for misbehavior, and that the children accepted such discipline tends to establish that he had the means to commit the actus reus of the charged crime. Where defendant implied at trial that the entire incident was fabricated, the inference that defendant had the opportunity and the means to commit the crime is relevant to show that the crime was committed. Therefore the testimony was relevant to whether defendant committed the charged act. *People v Drohan*, 264 Mich App 77, 87; 689 NW2d 750 (2004).

Defendant next argues that he is entitled to resentencing due to numerous errors. We disagree. Defendant argues that his sentence is constitutionally barred by the United States

Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) and its progeny. However, our Supreme Court has clearly and consistently held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. See, e.g., *People v McCuller*, 479 Mich 672, 683; 739NW2d 563 (2007).

Defendant also argues that the trial court failed to consider mitigating factors before imposing his sentence. Because defendant failed to bring this issue to the trial court's attention during sentencing, we review it for plain error affecting substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). Defendant contends that his strong family support and "undisputed" addictions to alcohol and marijuana constitute mitigating factors that the trial court should have considered when passing sentence. However, defendant has provided no support for his alleged substance abuse and alcohol additions and the PSIR does not support allegations of the same. In addition, the trial court indicated that it had reviewed the letters of support from family members. Thus, there is no evidence that the trial court failed to consider any relevant mitigating evidence in sentencing defendant. *People v Nunez*, 242 Mich App 610, 618; 619 NW2d 550 (2000).

In addition, defendant argues the trial court incorrectly assessed 15 points under offense variable (OV) 8. OV 8 calls for the scoring of 15 points if the victim was asported to another place of greater danger. MCL 777.38(1)(a). When defendant took the victim to the bathroom to punish him for misbehaving, defendant effectively removed the victim from observation by others thereby increasing the likelihood of avoiding detection, which in turn results in an elevated danger of molestation. Therefore, the trial court's decision was supported by the evidence. *People v Spanke*, 254 Mich App 642, 647-648; 658 NW2d 504 (2003).

Defendant's argument that he is entitled to resentencing because the trial court relied on incomplete information is equally unpersuasive. Defendant specifically argues that the trial court should have conducted "an assessment as required under MCR 6.425(A)(5) of [his] rehabilitative potential through intensive alcohol, drug, and psychiatric treatment." MCR 6.425(A)(5) requires that prior to sentencing a written report must be submitted to the court which includes "the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report." While it is true that there was no current psychological or psychiatric report was included in defendant's PSIR, the court rule requires such a report only "if indicated." Defendant's claim that it is undisputed that he has alcohol and substance abuse issues is belied by the contents of the PSIR. Therefore, in the instant case, a psychological or psychiatric report was not required. A PSIR is presumed to be accurate, and a trial court may rely upon the report unless effectively challenged by the defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003).

Defendant's argument that the sentence imposed was improper because the trial court failed to articulate how it arrived at the sentence of 85 months to 30 years, thereby entitling him to resentencing, must also fail. "The articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines." *People v Conley*, 270 Mich App 301, 312-313; 715 NW2d 377 (2006). The trial court satisfied the articulation requirement in the instant case when it noted that it was following the guidelines when it imposed the sentence of 85 months to 30 years.

Because defendant's sentence was within the appropriate guidelines range and there was no error in the scoring, this Court must affirm defendant's sentence, *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003), unless his assertion that the sentence amounts to cruel and unusual punishment has merit. US Const, AM VIII; Const 1963, art 1, § 16. A defendant's claim that his sentence violates constitutional principles is not subject to the limitation on review set forth in MCL 769.34(10). "[A] sentence within the guidelines range is presumptively proportionate, and a sentence that is presumptively proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Because defendant's other claims of sentencing error are without merit, he fails to overcome the presumption of proportionality, and thus cannot show a constitutional violation. *Id.* at 324.

Affirmed.

/s/ William C. Whitbeck
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher