# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 4, 2009 |
| v | No. 282220<br>Oakland Circuit Court |
| ZENO ANTHONY STAGGER,<br><br>Defendant-Appellant. | LC No. 2007-213315-FC |

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

PER CURIAM.

A jury convicted defendant of five counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim younger than 13), arising from the sexual assault of his girlfriend's daughter. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent prison terms of 30 to 50 years for each conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for administrative correction of his OV score.

## I. Insanity Defense

Defendant initially contends that his counsel was ineffective for failing to investigate and present an insanity defense. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*[1] hearing, "our review is limited to mistakes apparent on the record." *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish a claim of ineffective assistance of counsel, the burden rests on defendant to show that his counsel made an error "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," and that counsel's deficient performance so prejudiced the defense that it deprived defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997) (internal quotation omitted). "A criminal defendant is denied effective assistance of counsel by his attorney's failure to properly prepare a meritorious insanity defense. The defendant is entitled to a new trial if this omission by counsel deprives him of a reasonably likely chance of acquittal." *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988).

[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

A person meets the legislative definition of "legally insane" if when the offense occurs, as a result of mental illness or mental retardation "the person lacks substantial capacity either to 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). In this case, nothing in the record tends to support defendant's assertion that he may have qualified as legally insane at the time of the charged sexual assaults. According to the presentence report, defendant has no history of mental illness. Although the report documents that defendant has a history of marijuana and alcohol use, defendant correctly recognizes that voluntary intoxication cannot form the basis for an insanity defense. MCL 768.21a(2); *People v Caulley*, 197 Mich App 177, 186-188; 494 NW2d 853 (1992). Defendant emphasizes that involuntary intoxication may support an insanity defense, but our review of the record reveals no evidence of defendant's intoxication at the time of the offenses, let alone any support for a finding of involuntary intoxication. We observe that defendant testified at trial and gave no indication that any form of intoxication may have affected his charged conduct, and instead denied that the charged incidents ever occurred.

In summary, because no record support exists for a meritorious insanity defense, defendant has not met his burden of showing that defense counsel was ineffective for failing to investigate or prepare an insanity defense at trial.

## II. Missing Evidence Instruction

Defendant next maintains that he must receive a new trial because the trial court neglected to read a missing evidence instruction to address the prosecution's failure to produce a recording of the victim's interview at Care House. Because defendant did not request a missing evidence instruction at trial, we review this unpreserved claim only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

Defendant does not specify what particular instruction he believes the trial court should have given. Presumably, he intends to refer to an instruction that, "where the prosecution fails to make reasonable efforts to preserve material evidence, the jury may infer that the evidence would have been favorable to defendant." *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993). However, this instruction only applies if the prosecution acts in bad faith in failing to produce evidence. *Id*. at 515. Here, the record substantiates that because of a faulty recording mechanism, no recording of the victim's Care House interview ever existed. The examiner who interviewed the victim testified that although she intended to record the interview, nothing was actually recorded due to an apparent mechanical malfunction. The prosecution neither suppressed nor destroyed the recording of the victim's interview, which simply never existed, and no other evidence tended to substantiate that the prosecution somehow acted in bad faith. Consequently, we detect no error, plain or otherwise, arising from the trial court's failure to give a missing evidence instruction.

## III. Sentencing Challenges

### A. Scoring of Sentencing Guidelines

Defendant insists that resentencing must occur because the trial court erroneously scored several sentencing guidelines offense variables (OV's). When scoring the sentencing guidelines,

"[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 Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id*. This Court reviews de novo the legal questions involved in applying and interpreting the legislative sentencing guidelines. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

We reject defendant's claim that the trial court erred in scoring five points for OV 3 on the basis that "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). The victim testified that on two occasions, defendant engaged in acts of penetration that "hurted." This testimony amply supports the trial court's scoring of five points for OV 3, unlike the situation presented in *Endres*, *supra* at 417-418, in which no record evidence tended to prove that defendant's conduct caused the victim bodily injury. The trial court thus properly scored OV 3.

Defendant additionally challenges the trial court's 15-point score for OV 8, which addresses "victim asportation or captivity." MCL 777.38(1). A sentencing court should score 15 points for OV 8 when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). In finding that 15 points should be scored for OV 8, the trial court relied on evidence that the victim accompanied defendant from the living room to the bedroom, an asportation of the victim to a place of greater danger. The victim testified that while she played video games in the living room of defendant's residence, he "told her to go in" his bedroom, closed the door, and sexually assaulted her. The trial court did not abuse its discretion in scoring 15 points for OV 8 because the victim's testimony establishes that defendant directed her to a place of greater danger, his closed bedroom, where the assault took place with no one else present. See *People v Cox*, 268 Mich App 440, 454; 709 NW2d 152 (2005) (finding no abuse of discretion in the trial court's assignment of 15 points for OV 8 where the defendant, without physical force, transported the victim to his house where a sexual assault took place); *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003) (upholding the trial court's scoring of 15 points for OV 8 because "[t]he victims were moved, even if voluntarily, to defendant's home where the criminal acts occurred," and "[t]he victims were without doubt asported to another place or situation of greater danger, because the crimes could not have occurred as they did without the movement of defendant and the victims to a location where they were secreted from observation by others").

Defendant next complains that the trial court improperly scored 10 points for OV 9, on the basis that there were "2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). The trial court determined that it would score 10 points because the victim's sibling was also a victim of charged sexual abuse by defendant. But irrespective whether the evidence at trial would support a finding that defendant committed a sexual offense against the victim's sibling, "when scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *People v Sargent*, 481 Mich 346, 350, 750 NW2d 161 (2008); MCL 777.39(2). In this case, the record simply contains no evidence that the victim's sibling was placed in danger of injury or loss of life at the time defendant committed his sexual assaults of the victim. Therefore, the trial court should have scored zero points for OV 9.

The subtraction of the 10 points erroneously added under OV 9 does not affect defendant's minimum guidelines range. Although the deletion lowers defendant's total OV score from 95 to 85, he still falls within OV Level V. MCL 777.62. Consequently, resentencing is not required. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). However, we remand for administrative correction of defendant's OV score by the trial court in recognition that even when an OV scoring error does not affect the appropriate guidelines range, "a scoring error may still affect a defendant through such things as its effect on the calculation of parole eligibility." *People v Melton*, 271 Mich App 590, 593, 596; 722 NW2d 698 (2006).[2]

B. Sentence Constitutionality

Defendant additionally challenges his sentence on the basis that the trial court's disregard of "all mitigating evidence" violated his constitutional rights to due process, equal protection, and other guarantees. Because defendant concedes that none of these constitutional complaints were raised before the trial court, we consider them only for plain error affecting his substantial rights. *Carines*, *supra* at 763-764, 774.

In making this claim, defendant does not specify what mitigating circumstances the trial court should have considered. We will assume that defendant intends to refer to the facts that he supported his family and had a history of substance abuse, which he mentions in a subsequent issue. However, a review of the sentencing hearing reveals that the trial court had awareness of these and other allegedly mitigating factors. Defense counsel urged the trial court at the hearing to consider that defendant had family support, financially supported his children and his elderly parents, and had a record of military service. Defendant's prayerful allocution made the court aware of his strong religious beliefs. The trial court remarked that it had reviewed the PSIR, and thus knew that defendant had acknowledged a history of alcohol and marijuana use. The PSIR also reflected a prior charge without conviction of marijuana possession, and defendant's convictions of kidnapping, unarmed robbery, and assault and battery. Because the court presided at trial, it also plainly had awareness of the repeated acts of sexual abuse that defendant inflicted on the young victim.

In summary, we find no plain constitutional due process or equal protection error affecting defendant's substantial rights because the trial court imposed a presumptively proportionate sentence within the guidelines range, and defendant has failed to overcome the

[2] We note that defendant incorrectly argues that the trial court violated *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), by relying at sentencing on facts not found by the jury or admitted by defendant. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge had authority to increase the defendant's maximum sentence on the basis of facts not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). A defendant possesses no constitutional right to a sentence lower than the statutory maximum. *People v McCuller*, 479 Mich 672, 682; 739 NW2d 563 (2007).

presumption by presenting any evidence suggesting that the trial court lacked awareness of all appropriate circumstances in crafting defendant's sentence. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

Defendant additionally criticizes his sentence as violative of the United States Constitution's prohibition against cruel and unusual punishment, US Const, Am VIII, and the Michigan Constitution's prohibition against cruel or unusual punishment, Const 1963, art 1, § 16, given the likelihood that he has a serious mental illness, his substance abuse history, his support of his family, and the sentencing goal of rehabilitation. Because defendant first raises these issues on appeal, the scope of our appellate review again is limited to whether any plain constitutional error affected defendant's substantial rights. *Carines*, *supra* at 763-764, 774. "[A] sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *Powell*, *supra* at 323. Consequently, we discern no plain constitutional error in this regard affecting defendant's substantial rights.[3]

IV. Defendant's Standard 4 Brief

Defendant raises several more issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, none of which have merit.

Defendant first asserts that medical testimony should have been admitted at trial because "there would have been a noticable [sic] amount of evidence still there if [the] allegations were true." Defendant does not clearly explain the legal basis for his argument. To the extent that he presents this as an evidentiary issue, we reject his claim. Although he cites authority for permitting expert testimony, we find no indication in the record, nor does he even argue, that he attempted to present relevant medical testimony at trial but was foreclosed from doing so.

To the extent that defendant suggests that his counsel was ineffective for failing to call a medical witness, we reject this claim because nothing in the record substantiates that a medical witness would have provided a substantial defense. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). "Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense." *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). "A

[3] With respect to defendant's additional complaint that the trial court failed to explain why it imposed a 50-year maximum term, the Legislature has prescribed a sentence of life or any term of years for first-degree criminal sexual conduct, and defendant's maximum term falls within that limit. MCL 750.520b(2)(a). "Proportionate sentences may thus be imposed throughout the statutory range." *People v Merriweather*, 447 Mich 799, 806; 527 NW2d 460 (1994). Lastly, because no constitutional errors affected defendant's sentence, we reject his related suggestion that his counsel was ineffective for failing to raise the constitutional objections before the trial court.

substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The allegations in this case involved digital penetration of the victim's vagina, cunnilingus, and an inference of anal penetration. No evidence described blood, any injury requiring medical attention, or ejaculation. And the allegations were not reported to the police until more than a month after the victim initially disclosed the abuse. Given the nature of the victim's allegations and the delay in reporting them to the police, no reasonable likelihood existed that any physical or medical evidence of substantial evidentiary value existed. Contrary to defendant's contention, the absence of physical evidence of his assaults of the victim would not have established that the allegations lacked veracity. Because the failure to call a medical witness did not deprive defendant of a substantial defense, his ineffective assistance claim must fail.

Defendant next asserts that the prosecution included a false statement on page nine of its sentencing memorandum, but he does not identify the particular statement that he believes is untrue. The referenced section discusses why 10 points should be scored for OV 4, "[s]erious psychological injury requiring professional treatment." MCL 777.34(1)(a). The trial court resolved this issue in favor of defendant, ultimately determining that it would score zero points for OV 4. Whatever false information the prosecution allegedly may have included, it plainly did not affect defendant's sentence. MCL 769.26.

Defendant lastly maintains that the victim's sibling changed her testimony and stated that her aunt told her to say untruthful things. Again, defendant fails to fully explain the legal basis for his position. Because defendant does not assert that he preserved this issue by raising it below, he has the burden of showing a plain error affecting his substantial rights. *Carines*, *supra* at 763, 774. Defendant cites authority recognizing the admission of prior inconsistent statements, but he has not shown that he was prevented from offering any prior inconsistent statements at trial. Moreover, the available record does not support defendant's claim that the victim's sibling accused her aunt of telling her to say untruthful things. The record instead discloses that the victim's sibling testified that her aunt told her to go to court and testify, and that her aunt told her to tell the truth. We simply can find no plain error with respect to this issue. Furthermore, the jury acquitted defendant of the sole charge involving the victim's sibling, and the sibling admitted that she had no personal knowledge of the allegations involving the victim. Therefore, defendant has failed to demonstrate that the sibling's testimony affected his substantial rights in any respect.

We affirm defendant's convictions and sentences, but remand for administrative correction of his OV score. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher