STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 30, 2010
v	No. 292543 Kalamazoo Circuit Court
ANTHONY ROMON SMITH, Defendant-Appellant.	LC No. 2007-000801-FC

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his convictions for five counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(c); first-degree home invasion, MCL 750.110a(2); and unlawful driving away of a motor vehicle, MCL 750.413. Defendant was sentenced as a habitual offender, third offense, MCL 769.11, to 35 to 60 years' imprisonment for each CSC-1 conviction; 20 to 40 years' imprisonment for the home invasion conviction; and five to ten years' imprisonment for the unlawful driving away conviction. We affirm.

Defendant argues that defense counsel rendered ineffective assistance of counsel by failing to raise or preserve an insanity or temporary insanity defense. Because his claim for ineffective assistance of counsel is unpreserved, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Defendant must overcome a strong presumption that defense counsel's performance constituted sound trial strategy to prevail on his claim of ineffective assistance of counsel. *Id.* at 58. Defendant must also prove that defense counsel's performance was deficient and that, but for that deficient performance, the outcome of the trial would have been different. *Id.* at 57-58.

Defense counsel renders ineffective assistance of counsel by failing to investigate and present a meritorious insanity defense. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988). MCL 768.21a(1) provides:

> It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness . . . or as a result of being mentally retarded . . . that 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. . . .

A defense of temporary insanity may arise "when the chemical effects of drugs or alcohol render the defendant temporarily insane." *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992).

In the instant case, there is no evidence indicating that defendant had a history of mental illness or mental retardation affecting his mental capacity, or that he was under the influence of drugs or alcohol when he committed the instant offenses. Thus, on this record, there are no facts indicating that defendant was legally insane when he committed the charged offenses and nothing in the record supports his claim that he had a meritorious insanity defense. On appeal, defendant offers only speculation that he may have been suffering from "a serious mental disease or defect" in committing the instant offenses. Defendant has not provided any affidavits or documentation indicating that he had any medical or psychological condition at the time of the offenses to support his assertion that exploration of an insanity defense might have been objectively reasonable. Having failed to establish the necessary factual predicate of his claim, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), defendant has not proven his claim of ineffective assistance of counsel.

Next, defendant claims that the trial court erroneously scored offense variables (OV) 4 and 11. We review these unpreserved allegations of scoring error under the plain error rule. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant first challenges the sentencing court's OV 4 scoring of ten points, reflecting that a "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). MCL 777.34(2) provides that "the fact that treatment has not been sought is not conclusive." At trial, the victim testified that following the instant offenses, she now lived in fear for her life and the lives of her children, and that she was afraid to go outside or to be at home alone with her children. She also suffered from anxiety as a result of the attack, and obtained prescription medications to treat her anxiety. At trial, she indicated that the sexual assault was a traumatic event, and that she was embarrassed and humiliated to testify about it. The record evidence supported the trial court's scoring of ten points for OV 4. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

Second, defendant challenges the trial court's OV 11 scoring of 50 points, reflecting that "[t]wo or more criminal sexual penetration occurred." MCL 777.41(1)(a). Under MCL 777.41(2)(c), "[p]oints should not be scored, however, for the one penetration underlying a CSC-1 conviction." *Matuszak*, 263 Mich App at 61. For 50 points to be scored for OV 11, there must have been two or more additional sexual penetrations that arose out of the sentencing offense. *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006). *Any* intrusion however slight constitutes a sexual penetration. MCL 750.520a(r) (emphasis added). In this case, defendant was charged with five counts of CSC-1 for engaging in two digital/vaginal penetrations and three penile/vaginal penetrations with the victim. The victim's testimony supports that there were at least seven distinct intrusions into her vagina in this case. Because there were two additional sexual penetrations in this case, OV 11 was properly scored at 50 points. *Kegler*, 268 Mich App at 190.

We reject defendant's related claims of ineffective assistance of counsel because defense counsel does not have to make meritless objections. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). We also reject defendant's contention that the guidelines scoring improperly

increased his sentences based on factual findings not made by a jury contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) because *Blakely* does not affect our indeterminate sentencing scheme, wherein the trial court sets the minimum sentence but cannot exceed the statutory maximum. *People v Drohan*, 475 Mich 140, 157, 164; 715 NW2d 778 (2006). Here, the trial court imposed 35 to 60 years' imprisonment for the CSC-1 convictions, which was less than the statutory maximum of life imprisonment, MCL 750.520b(2)(a); MCL 769.11(1)(b). The trial court also imposed 20 to 40 years' imprisonment for the first-degree home invasion conviction, and five to ten years' imprisonment for the unlawful driving away of a motor vehicle conviction, both of which were the maximum for such a conviction under MCL 769.11. "As long as the defendant receives a sentence within the statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* at 164.

Defendant also asserts that the trial court committed numerous sentencing errors with respect to the imposition of his sentences for his multiple convictions. We conclude that defendant's sentences were proper. All of his minimum sentences were within the recommended minimum sentence range under the legislative guidelines and the applicable statutes set the maximum sentence. *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003). Because defendant's sentences are within the appropriate sentencing range, no scoring errors were committed, and inaccurate information was not used in determining his sentences, defendant's unpreserved assertions of sentencing error are not appealable. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Notably, after a thorough review of the record, we conclude that none of the alleged sentencing errors require vacation of defendant's sentences or a remand for resentencing. Defendant's related claims of ineffective assistance of counsel are abandoned for failure to address the merits of such claims. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

Defendant next claims that the trial court erroneously denied jail credit for time served pending the instant trial and sentencing. This unpreserved allegation of error lacks merit. Defendant was not entitled to any credit for time served against his instant sentences because he committed the instant offenses while on parole. Thus, credit for time served pending the instant trial and sentencing was applied to the offenses from which defendant was on parole. *People v Idziak*, 484 Mich 549, 566-567, 588; 773 NW2d 616 (2009). Defendant's related claim of ineffective assistance of counsel is abandoned because he failed to address the merits of that claim. *McPherson*, 263 Mich App at 136.

Finally, defendant claims that the trial court improperly imposed attorney costs without assessing his ability to pay such costs. However, a trial court is not required to assess a defendant's ability to pay attorney costs before imposing such costs. *People v Jackson*, 483 Mich 271, 292, 298; 769 NW2d 630 (2009). The ability-to-pay assessment is only necessary when that imposition is enforced and the defendant contests his ability to pay, *id.* at 298, and there is no indication that there has been any attempt to enforce the order. When such an enforcement action is commenced, defendant may raise an objection based on his alleged inability to pay. *Id.* at 292. At such time, the trial court should evaluate defendant's ability to pay in order to determine whether "defendant is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time*." *Id.* at

293. Defendant's related claim of ineffective assistance of counsel is also abandoned for failure to address the merits of that claim. *McPherson*, 263 Mich App at 136.

Affirmed.

/s/ Peter D. O'Connell
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro