STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2010
v	No. 292415 Oakland Circuit Court
DAVID MICHAEL BOWMAN, Defendant-Appellant.	LC No. 2008-220170-FC

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b)(i) (sexual penetration with a person at least 13 years old but less than 16, and the actor is a member of the same household as the victim). The trial court sentenced him to 17.5 to 40 years' imprisonment for each of his two convictions. Defendant appeals as of right. We affirm his convictions and sentences, but remand to the trial court for it to remove the lifetime tether provision from defendant's judgment of sentence.

I. BASIC FACTS

The complainant, 14 years old at the time of the incidents in question, was in the legal custody of Brenda Bowman, the complainant's mother's sister. The complainant's father had died and her mother was a drug addict. Defendant was Brenda's ex-husband. Brenda and the complainant lived in Michigan and then moved to Utah. In late May 2006, defendant traveled from Michigan to Utah to bring the complainant back to Michigan to live with him. The complainant lived with defendant and defendant's brother in a house in Oakland County. The complainant testified that, when she and defendant lived together, they had sex on nearly a daily basis. They would have vaginal intercourse and perform oral sex on one another. Defendant was arrested in late August 2006 after police received a tip that the complainant was being sexually abused.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first contends that his trial counsel was ineffective. We disagree.

The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich

575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was 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 proceeding would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant argues that his counsel was ineffective for failing to interview and subpoena as witnesses Brenda, Amy Freels, the complainant's sister, and John Bowman, defendant's brother. Defendant does not propose that Freels or Brenda would offer testimony favorable to him. In defendant's brief on appeal, defense counsel states that he was advised by defendant that he (defendant) would obtain affidavits from Freels and Brenda. However, none have been provided to this Court to date. The evidence adduced at trial suggests that Freels and Brenda would not have provided testimony favorable to defendant. Detective Michael Gagnon testified that Freels reported to him that she witnessed the complainant and defendant having sex, and also that defendant would supply her and the complainant with alcohol and marijuana. Sergeant Don Sypniewski testified that he went to defendant's home to conduct a welfare check after receiving a phone call from Brenda, who stated that she was concerned that defendant was at risk of harming himself and the complainant. Since defendant cannot substantiate his claim that Freels and Brenda would have provided testimony favorable to him, counsel did not err in failing to interview and subpoena these witnesses. See *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990) (stating that the failure to interview witnesses standing alone will not establish inadequate preparation; instead, it "must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused.").

Trial strategy also supported counsel's decision not to call Freels or Brenda as a witness. Counsel presumably was aware that Freels and Brenda both contacted the police and made negative reports regarding defendant. Counsel decided not to call Freels and Brenda to the stand, where they would have most likely given testimony damaging to defendant, and instead chose to expressly use their absence to defendant's advantage. During closing argument, defense counsel repeatedly stated that, if Freels or Brenda could provide testimony favorable to the prosecution, the prosecution would have called them as witnesses. Counsel's decision not to call Freels or Brenda was a matter of trial strategy and cannot be the basis for finding ineffective assistance of counsel. See *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002) (stating that decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy).

With regard to counsel's failure to call defendant's brother, John, as a witness, defendant does not substantiate his claim that John could provide favorable testimony. Defendant alleges that John would testify that he (John) never saw any sexual activity between defendant and the

complainant while living with the two at the time in question. Without an affidavit or some other corroboration, defendant's claim is unconvincing.

Defendant further contends that counsel was ineffective for failing to request the complainant's confidential records from Vista Maria, the group home at which the complainant was placed after defendant's arrest. According to defendant, the records would show that the complainant attempted to run away from Vista Maria, and only after she was unable to leave did she make allegations regarding a sexual relationship with defendant. Defendant suggests that the complainant made the allegations because she believed that doing so would facilitate her release from the facility.

MCL 600.2157a(2) provides that reports or statements given or made in connection with a consultation between a victim and a sexual assault counselor "shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim." Defendant fails to cite record evidence that the complainant gave written consent. In any event, we find no error in the trial court's finding that the complainant, as a minor, could not consent to the release of the records.

"[W]here a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense." *People v Stanaway*, 446 Mich 643, 649-650; 521 NW2d 557 (1994). Here, defendant falls short of making such a showing.

Defendant overemphasizes the relevance of hospital records indicating that the complainant had attempted to escape before disclosing her sexual relationship with defendant. There is no dispute that the complainant did not like Vista Maria and was intent on leaving. A foster care specialist testified that the complainant *entered* Maria Vista under medium security because she was a flight risk. Further, defendant elicited testimony acknowledging that the complainant had attempted to escape from Maria Vista near the same time as the disclosures. Specifically, the complainant's therapist testified:

> *Q.* Okay. Now my question to you is, did Kayla try to run before she made a disclosure to you, or after?
>
> *A.* During. During the -- it was probably the same time period. Just dealing with the emotions of facing everything that happened to her and what she went through.

Defendant fails to articulate how evidence that the complainant had attempted to escape Maria Vista before making any disclosures is significantly different from evidence that the complainant had attempted to escape Maria Vista during the period in which she made disclosures.

Moreover, the complainant denied that her disclosure of the sexual relationship to her therapist at Vista Maria was an effort to be released from the facility. Even if the Vista Maria records were to show that the complainant disclosed the relationship only after denying it and attempting, unsuccessfully, to escape, this would not necessarily suggest that the complainant's claim of an affair was false. Additionally, even if the records at issue were admitted into

evidence, defendant could not demonstrate a reasonable probability of acquittal. At trial, the complainant unequivocally testified that she and defendant engaged in various sex acts on nearly a daily basis over the course of months. A jury may convict on the uncorroborated evidence of a CSC victim. *People v Lemmon*, 456 Mich 625, 643 n 22; 576 NW2d 129 (1998); MCL 750.520h. The testimony adduced at trial was sufficient to sustain defendant's convictions.[1] Consequently, defendant cannot demonstrate prejudicial error sufficient to prevail on an ineffective assistance of counsel claim, and the trial court did not err in failing to order an in camera review of the requested records.

III. SENTENCING

Next, defendant contends that offense variables (OV) 8, 10 and 19 were misscored. We disagree.

This Court reviews a trial court's scoring decision for an abuse of discretion to determine whether the evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court will uphold the trial court's scoring decision if there is any evidence in the record to support it. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

OV 8 is scored for victim asportation or captivity. MCL 777.38. Defendant received 15 points for OV 8. Assessing 15 points is appropriate where "[a] victim was asported to another place of greater danger or to a situation of greater danger . . . ." MCL 777.38(1)(a). The trial court observed that defendant traveled to Utah to bring the complainant back to Michigan. He then kept her at his house in Michigan despite the fact that there was an outstanding bench warrant for her, as she was a runaway from Child Protective Services (CPS) custody. Although the complainant willingly went back to Michigan with defendant, the complainant was only 14 years old at the time, and her "consent," to the extent that it can be called that, is not dispositive. Once they were back in Michigan, defendant and the complainant engaged in sexual activity on nearly a daily basis. Defendant removed the complainant to a place of greater danger when he took her from Utah to Michigan because, in Michigan, defendant was able to seclude the complainant from her family and from authorities and engage in sexual relations with her. Defendant likely could not have done so in Utah under Brenda's watch. We find that these facts support the OV 8 score.

OV 10 is scored for exploitation of a victim's vulnerability. MCL 777.40. Defendant received 15 points for OV 10. Assessing 15 points is appropriate where predatory conduct was involved. MCL 777.40(1)(a). Predatory conduct is an offender's preoffense conduct directed at a victim for the primary purpose of victimization. MCL 777.40(3)(a). The trial court found that defendant created an "isolated cocoon situation in which he could victimize the victim." Defendant harbored the complainant in his home while there was an outstanding bench warrant

[1] The elements of MCL 750.520b(1)(b)(i) are that the actor engaged in sexual penetration with a person who is at least 13 years old, but less than 16, and the actor is a member of the same household as the victim. MCL 750.520b(1)(b)(i).

for her. The complainant testified that defendant led her to believe that they were boyfriend and girlfriend who might one day get married and raise a family. Defendant also frequently plied the complainant with marijuana and alcohol. The complainant was a particularly vulnerable victim given her young age and the fact that both of her parents had died, one of a drug overdose and one of suicide. Defendant's conduct could reasonably be construed as preoffense conduct, the purpose of which would be to facilitate having sexual relations with the complainant. Accordingly, the OV 10 score was justified.

Finally, OV 19 is scored for interfering with the administration of justice. MCL 777.49. Defendant received ten points for OV 19. Ten points are appropriate where the offender "interfered or attempted to interfere with the administration of justice." MCL 777.49(c). In explaining why it assessed ten points, the trial court indicated: "[h]e lied to the police, he had to be tasered, he harbored her in his home. That's more than sufficient for 10 points."[2] However, in applying our Supreme Court's recent decision in *People v McGraw*, 484 Mich 120, 122; 771 NW2d 655 (2009), this Court is prohibited from considering defendant's conduct in lying to the police and being tasered. *McGraw* held that "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *McGraw*, 484 Mich at 122. MCL 777.49(c) does not provide that conduct beyond the sentencing offense may be used in scoring OV 19. Therefore, defendant's conduct that occurred after the CSC offenses – including lying to police and being tasered – is not properly considered in scoring OV 19.

Notwithstanding, we find that the OV 19 score was justified where the charged acts occurred while the complainant was supposed to be in CPS custody. The complainant had run away from the group home in which CPS had placed her, and ultimately ended up with defendant in his home. She stayed there for three months, having sexual relations with defendant on nearly a daily basis. Defendant instructed the complainant not to tell her family about her whereabouts. Defendant's actions in keeping the complainant in his home while she was a runaway from CPS custody support a finding that he interfered with the administration of justice. Because this interference occurred concurrently with the sentencing offenses, we are not convinced that the OV 19 score contravenes *McGraw*. Resentencing is not required here.

Next, defendant argues that the trial court erred by imposing a lifetime tether sanction. We agree. Statutory interpretation and application is a question of law that this Court reviews de novo. *People v Stone Transport, Inc*, 241 Mich App 49, 50; 613 NW2d 737 (2000).

Both defendant's original judgment of sentence and his amended judgment of sentence provide that defendant "must serve lifetime tether upon release from prison." Defendant alleges that the trial court erred in imposing such a sanction since, pursuant to MCL 750.520n,[3] the

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[2] When officers showed up at defendant's door and inquired regarding the complainant, defendant lied and indicated that she was not at his home. Defendant then tried to close the door on the officer who was attempting to make an arrest. Defendant was tasered.

[3] MCL 750.520n provides:

> A person convicted under section 520b or 520c for criminal sexual conduct

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sanction is only invoked where the victim is less than 13 years old. Here, it is undisputed that the complainant was 14 years old at the time of defendant's offenses. The prosecution concedes that the trial court erred in imposing the lifetime tether requirement. Accordingly, we remand to the trial court for it to engage in the ministerial task of removing the lifetime tether provision from defendant's judgment of sentence. See *People v Russell*, 254 Mich App 11, 22; 656 NW2d 817 (2002) (remanding for the ministerial task of correcting a mistake in the presentence report), rev'd on other grounds *People v Russell*, 471 Mich 182 (2004).

Finally, defendant argues that the trial court erred in departing from the guidelines without substantial and compelling reasons. We disagree.

Whether a particular sentencing factor exists is a factual determination for the sentencing court to determine, and it will be reviewed for clear error. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003), on rem 258 Mich App 679 (2003). Whether a particular sentencing factor is objective and verifiable will be reviewed de novo. *Id.* Whether the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence will be reviewed for an abuse of discretion. *Id.*

Defendant's sentencing guidelines provided for a minimum term of 108 to 180 months. The trial court departed from the guidelines and sentenced defendant to a minimum term of 210 months. Defendant argues that he is entitled to resentencing within the guidelines because the trial court did not articulate substantial and compelling reasons for its departure.

MCL 769.34(3) provides:

> A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.

A substantial and compelling reason must be construed to mean an objective and verifiable reason that keenly or irresistibly grabs the court's attention, is of considerable worth in deciding the length of a sentence, and exists only in exceptional cases. *Babcock*, 469 Mich at 258, citing *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). "The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

The trial court based its upward departure on two factors: defendant manipulating the complainant's vulnerability, and the long-term nature of the sexual relationship. We are persuaded that the exploitation of the complainant's vulnerability was adequately taken into

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> committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285.

account when the trial court assessed 15 points, the highest amount of points possible, for OV 10 (exploitation of a victim's vulnerability). In scoring OV 10, the court concluded that predatory conduct was involved. It found that defendant created an "isolated cocoon situation in which he could victimize the victim." The trial court agreed with the prosecution that the complainant was exploited where defendant harbored her in his home while there was an outstanding bench warrant for her; defendant led the complainant to believe that they were boyfriend and girlfriend who might one day get married and raise a family; and defendant frequently plied the complainant with marijuana and alcohol. We conclude that the trial court erred in basing its departure on defendant's exploitation of the complainant's vulnerability, where that vulnerability was adequately taken into account by the OV 10 score.

However, we find that the departure was justified by the court's remaining reason – the longstanding nature of the sexual abuse. No offense variable took into account the fact that defendant and the complainant had sex nearly every day for three months. The longstanding nature of the abuse is a significant factor. A substantial and compelling reason can be found where abuse occurred over an extended period of time. See *People v Smith*, 482 Mich 292, 301; 754 NW2d 284 (2008) (stating, in reference to a 15-month period of abuse: "That sexual abuse occurred over a long period is an objective and verifiable reason for departure. The abuse in this case was not something that was completed quickly."). Furthermore, the fact that the trial court repeatedly referenced the length of the abuse, while also expressing its belief that the length of abuse was a serious and compelling factor, supports a conclusion that the court would have departed to the same degree on the basis of this singular substantial and compelling reason. See *Babcock*, 469 Mich at 271. Finally, we are persuaded that the trial court did not err in concluding that the extent of the departure – 30 months – is justified. The departure is not so large as to be unreasonable. The trial court concluded as much when it noted that it was moving defendant only one OV-grid higher than what the guidelines called for. Accordingly, the departure can be upheld, and resentencing is not required.

We affirm defendant's convictions and sentences, but remand to the trial court for it to remove the lifetime tether provision from defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter