

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL PAUL MORGAN,

Defendant-Appellant,

UNPUBLISHED

January 19, 2012

No. 302900

Saginaw Circuit Court

LC No. 06-028161-FH

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted, following jury trial, of two counts of criminal sexual conduct, third degree (CSC-III), MCL 750.520d(1)(a) (victim aged 13 to 16). Defendant was sentenced by the circuit court to serve 124 to 180 months in prison, with credit for 723 days served. After remand from this Court,¹ defendant was resentenced to a term of 96 to 180 months in prison, with credit for 1,256 days served. We affirm.

On appeal, defendant argues that the trial court improperly scored offense variables (OVs) 3 and 11. Defendant also argued that the court should have granted his motions for continuance, appointment of mitigation experts, and downward departure from the sentencing guidelines. Defendant asserts that defense counsel was ineffective for failing to offer mitigation experts to present evidence related to defendant's mental capacity and substance abuse at defendant's sentencing hearings.

Defendant asserts that OV 3 should not have been scored because the victim did not require medical treatment, and under the relevant statute scoring is appropriate only where bodily injury requiring medical treatment occurred to a victim. MCL 777.33(1)(d) provides that 10 points may be scored if the victim sustained bodily injury requiring medical treatment, and MCL 777.33(1)(e) provides that 5 points may be scored if the victim sustained bodily injury not requiring medical treatment.

¹ *People v Morgan*, unpublished order of the Court of Appeals, entered December 2, 2009 (Docket No. 293832).

At trial, the registered nurse who examined the victim following her sexual encounter with defendant testified that the victim had sustained injuries to her “genital area.” She further testified that the injuries would heal without medical intervention. On this record, the court should have assessed 5 points for OV 3 rather than 10 points. However, this error had no effect on defendant’s sentencing range and thus was harmless.

Defendant argues next that OV 11 was improperly scored because the sentencing guidelines bar the scoring of points for the penetration that forms the basis of a CSC III conviction.² MCL 777.41(2)(c) directs the court not to “score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.” Thus, the sexual penetration required to be proved by the prosecution as an element of the offense of CSC III cannot be used in scoring OV 11. In the instant case, however, defendant was convicted of two counts of CSC III, which made the scoring of OV 11 appropriate. Further, the court’s assessment of 25 points was also appropriate, as defendant’s second conviction for CSC III was to be counted under MCL 777.41(1)(b) as one criminal sexual penetration.

Defendant also argues that he was denied his due process right to present evidence of mitigation as a result of the court’s refusal to grant his motion for continuance. Defendant also asserts that the court’s denial of his motion was more likely than not “outcome determinative.” In its written opinion denying defendant’s motion for appointment of mitigation experts, the court stated that defendant had not cited any precedent in support of his request, nor had he “raised any unique issues related to his background which would require further investigation by an expert.”

The court’s statement is responsive to defendant’s argument on appeal, as well. Defendant cites many rules and text from published cases, but it is not clear how any of them relate directly to his argument that he was entitled to a continuance or to appointment of mitigation experts, nor does he explain how the outcome of his case or the length of his sentence would have been affected if the court had granted his motion. Therefore, defendant has failed to demonstrate that he was entitled to relief on this issue, or that the trial court abused its discretion by denying his motion for continuance. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (observing that a party cannot “leave it to this Court to discover and rationalize the basis for his claim, or unravel and elaborate for him his arguments”).

Lastly, defendant argues that defense counsel was ineffective for failing to offer mitigation experts to present evidence related to defendant’s mental capacity and substance abuse at defendant’s sentencing hearings. Both the United States and the Michigan Constitutions guarantee a defendant the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. This right to counsel includes the right to effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) sets forth a two-part test to determine whether defense counsel was effective in a particular case. First, the defendant must show that counsel’s “representation

² Defendant also asserts, incorrectly, that the court assessed 50 points on this variable, when at defendant’s second sentencing hearing, the court reduced the score to 25 points.

fell below an objective standard of reasonableness.” *Id.* at 688. Second, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. See also *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994). Proof of both prongs is needed to show that a conviction “resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable.” *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), quoting *Strickland*, 466 US at 687.

Defendant does not specify what sort of evidence might have been presented by a mitigation expert. In fact, defendant does not even specify the mitigating factors that should have entitled him to a lesser sentence. See *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (defendant bears the heavy burden of showing that counsel was not effective, as effectiveness of counsel is presumed). Instead, defendant states generally that an expert could have presented “findings and opinions on the defendant’s medical history, educational history, employment and training history.” Such speculation is not sufficient to establish that counsel acted unreasonably or that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 US at 694.

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Douglas B. Shapiro