STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE H. JOHNSON,

Defendant-Appellant.

UNPUBLISHED
June 27, 1997

No. 193144
Recorder's Court
LC No. 94-013110

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIAN D. JOHNSON,

Defendant-Appellant.

No. 193445
Recorder's Court
LC No. 94-013110

Before: Markey, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

This consolidated appeal arises from the joint bench trial of both defendants for the murder and sexual assault of the victim. Defendant, Willie H. Johnson (hereinafter "Willie"), appeals as of right from his conviction of second-degree murder, MCL 750.317; MSA 28.549. Willie was sentenced to life in prison on his conviction. Defendant, Julian D. Johnson (hereinafter "Julian"), appeals as of right from his convictions of second-degree murder, MCL 750.317; MSA 28.549, and first-degree criminal sexual conduct, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c). Julian was sentenced to life in prison on the second-degree murder conviction and twenty-five to fifty years in prison on the first-degree criminal sexual conduct conviction, with the sentences to be served concurrently. We affirm as to both defendants.

Willie's first issue on appeal is that the trial court abused its discretion in denying his motion for a new trial based on his contention that his conviction was against the great weight of the evidence. Willie argues that the trial court failed to give adequate consideration to the mitigating factors Willie presented, thereby reducing Willie's role in the victim's murder to manslaughter. Willie also argues that the prosecution failed to present sufficient evidence of Willie's intent to create a situation exposing the victim to the risk of death or great bodily harm to sustain his conviction. We disagree.

We hold that the trial court correctly found that the "mitigating factors" Willie presented did not constitute adequate provocation to reduce his role in the victim's murder to manslaughter and that therefore Willie's conviction is not against the great weight of the evidence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993); *People v Wofford*, 196 Mich App 275, 277-280; 492 NW2d 747 (1992). While it is true that the victim had made homosexual advances to Willie for at least several weeks before the murder, and had done so the night before and immediately before the murder, it is equally true that the victim never threatened to hurt Willie. Willie had recognized that he could leave the victim's home and was planning to do so. Further, the evidence adduced at trial showed that Willie had had a chance to bring his passion under control before the murder. Defendants did nothing to Archie after his advances the night before the murder, but the next day agreed that they would "beat his ass" if he "did anything." We conclude that the trial court did not abuse its discretion in denying Willie's motion for a new trial based on his argument that his conviction was against the great weight of the evidence. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993).

We also hold that the prosecution presented sufficient evidence of Willie's intent to create a situation exposing the victim to a high risk of death or great bodily harm to sustain his conviction. *Wofford, supra* at 277-278. Defendants had agreed on the day of the killing that if the victim "did anything, that we were going to beat his ass." Defendants attacked the victim together, using their fists and feet. Willie also used a beer bottle. As Willie hit the victim, he continually asked the victim why the victim had made advances toward him. The victim sobbed that he was sorry. Willie told the victim, "It's too late to be sorry." Willie also held the victim down while Julian punched him. Based on our review of the evidence, we conclude that the prosecution presented sufficient evidence for a rational trier of fact to find that the essential elements of second-degree murder were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

Willie's next argument on appeal is that he was denied the effective assistance of counsel at trial. Willie contends that his trial counsel made a prejudicial error when he failed to bring before the trial court, as a further factor mitigating Willie's actions toward the victim, the fact that Willie had been sexually assaulted by one of his teachers at the age of eleven. We disagree. Trial counsel's failure to bring this fact forward at trial appears to us to be sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Trial counsel may have reasoned that bringing this fact to the trial court's attention would have injected considerations extraneous to the merits of the lawsuit into the proceedings because the information could not be verified independent of Willie's assertions. See *People v Fisher*, 449 Mich 441, 451-452; 537 NW2d 577 (1995). Even assuming that the evidence of the prior sexual assault had been brought to the trial court's attention during trial, the lower court record indicates that the information would not have substantially benefited Willie because the trial court

rejected the victim's homosexual advances as adequate provocation to reduce Willie's murder of the victim to manslaughter. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990); *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). We thus conclude that Willie has not demonstrated that his trial counsel's performance was so deficient that counsel did not function as an attorney guaranteed by the Sixth Amendment. *Daniel, supra*.

Willie also argues that the trial court erroneously scored Offense Variables (OV) 3, 4, 7, and 13. Our Supreme Court has recently instructed that an argument based on guidelines misscoring "states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). With regard to OV 3, OV 4, and OV 7, resentencing cannot be required because Willie's claims are not based on the factual predicates being "wholly unsupported" or "materially false," but rather the judge's calculation of the sentencing variable on the basis of his discretionary interpretation of the unchallenged facts. *Id.* at 176. With respect to OV 13, even assuming that Willie is correct in arguing that there is no factual basis for scoring OV 13 at five points, a score of zero would not change the guidelines range, and therefore, Willie is not entitled to any relief.

Furthermore, the trial court did not abuse its discretion, as argued by Willie, in sentencing him to life in prison for his second-degree murder conviction. Willie's life sentence is within the guidelines' recommended minimum range of 120 to 300 months or life in prison and is therefore presumptively proportionate. *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995). Willie presented no unusual circumstances to overcome this presumption of proportionality. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). The trial court also did not sentence Willie based on emotional bias sparked by the facts of the case, as Willie contends. The trial court's decision to sentence Willie to life in prison was in response to the nature and severity of the crime, and its remarks were appropriate to Willie's felonious, antisocial behavior. *People v Antoine*, 194 Mich App 189, 191; 486 NW2d 92 (1992); *People v Hunter*, 176 Mich App 319, 320-321; 439 NW2d 334 (1989).

Julian's sole argument on appeal is that the trial court abused its discretion in sentencing him to life in prison for his second-degree murder conviction and to twenty-five to fifty years in prison for his first-degree criminal sexual conduct conviction. We disagree. Julian's sentences are within the guidelines' recommended minimum range of 144 to 300 months or life in prison and are therefore presumptively proportionate. *Price, supra*. Julian has presented no unusual circumstances to overcome this presumption of proportionality. *Milbourn, supra*; *Daniel, supra* at 54.

Julian's sentences are also supported by the facts of this case. In retaliation for the victim's mild homosexual advances, Julian joined with Willie in brutally beating the victim with his fists and feet. Julian did not know whether the victim was alive or dead when Willie tied him up. Julian also admitted choking the victim and inserting the jump rope handle into the victim's rectum. Julian's sentences are proportionate to the circumstances of this offense and offender. *Milbourn, supra* at 635-636.

We affirm.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra