STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALLAS ROBERT COX, JR.,

Defendant-Appellant.

UNPUBLISHED
January 13, 1998

No. 179199
Recorder's Court
LC Nos. 93-008658;
94-004478

Before: Fitzgerald, P.J., and Markey and J. B. Sullivan*, JJ.

PER CURIAM.

Defendant was charged with four counts of first-degree criminal sexual conduct (CSC), MCL 750.520b; MSA 28.788(2), one count of breaking and entering an occupied dwelling with intent to commit criminal sexual conduct, MCL 750.110; MSA 28.305, and two counts of assault with intent to commit CSC involving sexual penetration, MCL 750.520g; MSA 28.788(7). He pleaded nolo contendere to one count each of first-degree CSC, breaking and entering an occupied dwelling, and assault with intent to commit CSC involving sexual penetration. He was sentenced to ten to twenty years' imprisonment for first-degree CSC, six-and-a-half to fifteen years' imprisonment for breaking and entering, and five to ten years' imprisonment for assault. He appeals as of right. We affirm in part and remand in part.

Defendant first claims he is entitled to withdraw his pleas to the breaking and entering and assault charges because the facts elicited at the plea proceeding were insufficient to convict defendant of the offenses. We disagree.

Defendant argues that the facts were insufficient to prove intent to commit criminal sexual conduct. When reviewing the sufficiency of the evidence supporting a plea, this Court must determine whether the finder of fact could properly convict the defendant of the offense based on the facts established at the plea proceeding. *People v Brownfield (After Remand)*, 216 Mich App 429, 431; 548 NW2d 248 (1996). To prove breaking and entering an occupied dwelling with intent to commit a felony, the prosecution must establish (1) a breaking and entering; (2) of an occupied dwelling; and (3) with felonious intent. *Brownfield*, *supra*. The elements of assault with intent to commit criminal sexual

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

conduct involving penetration are: (1) an assault; (2) a sexual

purpose, i.e., intent to commit an act involving some sexually improper intent or purpose; (3) involving some entry into another's genital, anal, or oral openings; and (4) some aggravating circumstances, such as the use of force or coercion. *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982). Actual touching is not required, and it is not necessary to demonstrate that the sexual act was begun or completed. *Id*. A factual basis for acceptance of a plea exists if an inculpatory inference can reasonably be drawn by a jury from the facts admitted by the defendant even if an exculpatory inference could also be drawn and defendant assets the latter is the correct inference. *Guilty Plea Cases*, 395 Mich 96, 103; 235 NW2d 132 (1975).

The facts as elicited at the plea proceeding establish that, after trying for two hours, defendant entered the home of a woman he knew and went into her bedroom in the early morning hours. He jumped on top of her while she was in bed, held her down, and covered her mouth. When told that she still loved her ex-husband, defendant replied that that was a flimsy excuse. He commented as to how good she looked at 5:00 a.m. Defendant told the victim that he knew someone else he would like to surprise visit and instructed her not to tell anyone that he was there. The fact finder could reasonably infer from these facts that defendant intended to commit a sexual act involving penetration just as it could infer that defendant held no such intent. The facts support defendant's pleas on both offenses.

Next, defendant claims that his plea bargain was illusory because it was based on the erroneous assumption that he could be convicted of four counts of first-degree CSC. Defendant failed to preserve this issue by moving to withdraw his plea in the trial court. *People v Blount*, 197 Mich App 174, 175-176; 494 NW2d 829 (1992). Nonetheless, although three charges were dismissed and defendant could only have been convicted of two of the dismissed charges,[1] defendant received a benefit from the bargain in the form of the dismissal of two charges for first-degree CSC for which defendant could possibly have been convicted and an agreement that he be sentenced at the low end of the guidelines. *People v Harris*, 224 Mich App 130, 132; ___ NW2d ___ (1997), lv pending. Hence, the plea was not illusory. *People v Gonzalez*, 197 Mich App 385, 391; 496 NW2d 312 (1992).

Defendant next argues that he was denied effective assistance of trial counsel. Because defendant failed to preserve this issue, our review is limited to the record. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). To establish that his counsel was ineffective, defendant must demonstrate, through the record, that his counsel's performance fell below an objective standard of reasonableness and the representation prejudiced the defendant to the extent that he was denied a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995), citing *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). A defendant claiming ineffective assistance of counsel must demonstrate that without trial counsel's error, there is a reasonable probability that the result of the proceeding would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The defendant must also overcome the strong presumption that his counsel's actions were sound trial strategy. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). When a defendant has been convicted by a plea, a claim of ineffective assistance of counsel is reviewed for whether the defendant voluntarily and understandingly entered his plea. *People v Haynes (After Remand)*, 221 Mich App 551, 558; 562 NW2d 241 (1997). Whether a plea is intelligently made depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases, not on whether counsel's advice was right or wrong. *Id.*

First, defendant asserts that his counsel was ineffective for failing to advise him that by pleading guilty he was giving up his right to appeal the trial court's pretrial ruling on his motion for suppression of his statement. Defendant asserts that he would not have pleaded guilty had he known that he was giving up this right. Relying on *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996), defendant contends that the trial court's ruling denying his motion for suppression of his statement would be reversed because he was not informed at the time he gave a statement that an attorney had been retained to represent him.

The instant case is factually distinguishable from *Bender*. First, the attorney who tried to contact defendant while he was being held by police had not been retained by defendant or his family. Defendant's father simply asked the attorney to try to talk to defendant. After the attorney's unsuccessful attempts to speak to defendant, he learned that other counsel had been retained for defendant. It was after other counsel was actually retained that defendant gave his incriminating statements. Hence, *Bender* does not require reversal of the trial court's decision to deny defendant's motion to suppress. Because defendant was not prejudiced by the waiver of his appeal of the trial court's ruling on his motion for suppression of his statement, we find that he was not denied effective assistance of counsel by his counsel's failure to advise him that he was giving up the appeal by pleading guilty.

Defendant also claims that counsel was ineffective by stipulating to the facts supporting defendant's pleas. Because we find that the facts supported his pleas, we find that defendant was not denied effective assistance on this basis.

Finally, defendant argues that he was denied effective assistance of his prior appellate counsel. The remedy for ineffective assistance of appellate counsel is a new appeal. *People v Brown*, 119 Mich App 656, 660-661; 326 NW2d 834 (1982). Defendant has received his "new" appeal in the form of a substitution of counsel and the filing of a new brief on appeal. Hence, we conclude that defendant has not been denied the effective assistance of appellate counsel. Further, we find one of the issues raised by prior appellate counsel to be meritorious.[2]

Defendant pleaded guilty pursuant to an agreement that he would be sentenced at the low end of the guidelines. Defendant's six-and-a-half year sentence for the B & E conviction far exceeds the recommended range of six to thirty-six months. Thus, defendant was not sentenced in accordance with the agreement despite the fact that the trial court stated that it would impose a sentence at the low end of the guidelines. It appears that the court believed that the guidelines' range was six to thirty-six *years*, not *months*. Consequently, we remand this matter for resentencing on the B & E conviction or, if that is not done, to give defendant an opportunity to withdraw his plea to the B & E conviction.

Affirmed in part and remanded in part for proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Joseph B. Sullivan

[1] The penetration relied upon for defendant's guilty plea was vaginal. According to the amended information, defendant still faced charges based on two oral penetrations. Thus, the dismissal of the three counts included the dismissal of two first-degree CSC charges for which defendant could have been convicted.

[2] Although defendant's current counsel moved to withdraw the brief filed by prior appellate counsel, in the interest of justice we will address an issue raised in the withdrawn brief because of its merit.