STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL S. JOHNSTON,

Defendant-Appellant.

UNPUBLISHED
January 5, 1999

No. 201652
Oakland Circuit Court
LC No. 96-143664 FC

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and four counts of second-degree CSC, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. The trial court sentenced defendant to fifteen to twenty-five years' imprisonment for the first-degree CSC conviction and to ten to twenty-two and one-half years' imprisonment for each count of second-degree CSC. While the judgment of sentence does not indicate which convictions were vacated, the trial court sentenced defendant to fifteen to twenty-two and one-half years' imprisonment for the habitual offender conviction.[1] The sentences were to run concurrently. Defendant appeals as of right and raises three issues: effective assistance of counsel, the excited utterance exception to the hearsay rule, and sentencing. We affirm.

I. Standard Of Review

A. Effective Assistance Of Counsel

To establish that the right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). We evaluate defense counsel's performance against an objective standard of reasonableness without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Furthermore, effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People*

v Stanaway, 446 Mich 643, 687; 521 NW2d 557 (1994). Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Whether or not to present an insanity defense can be an issue of trial strategy. *People v Newton*, 179 Mich App 484, 493; 446 NW2d 487 (1989); *People v Lotter*, 103 Mich App 386, 391; 302 NW2d 879 (1981). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy or assess counsel's competency with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

B. Excited Utterance Exception To The Hearsay Rule

On appeal, this Court reviews the trial court's decision to admit evidence for an abuse of discretion. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996).

C. Sentencing

On appeal, this Court reviews the trial court's decision to increase a habitual offender's sentence for an abuse of discretion. *People v Hansford*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). However, we review the issue of whether a sentencing court recognized that it has discretion whether to enhance a sentence de novo. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

II. Effective Assistance Of Counsel

Defendant argues that he was denied effective assistance of counsel when his trial attorney withdrew his insanity defense at the close of the prosecutor's case in chief. However, defendant failed to offer a report by any mental health professional who believed that he was legally insane at the time of the offenses. While one doctor believed that defendant was incompetent to stand trial, she offered no insight into defendant's criminal responsibility. The doctor believed that defendant would be competent to stand trial after receiving the proper treatment. Although defense counsel was aware that defendant had a history of mental disorders, there was no expert willing to testify that defendant was legally insane. Further, if defense counsel had pursued the insanity defense, the prosecution could have called a number of doctors to testify that defendant was sane at the time of the offense and criminally responsible for his actions. Because defendant admitted that he sexually abused the girls to the examining physicians, there was also a good possibility that the trial court would have allowed these admissions into evidence.

Without the insanity defense, the case hinged on the credibility of two young victims, who had somewhat conflicting recollections of the events. Focusing on credibility was trial strategy. Because defense counsel properly investigated potential defenses and concluded that the chance of success of an insanity defense was minimal, defendant was not denied effective assistance of counsel. We also note that defendant *agreed* to withdraw his insanity defense on the record; it is scarcely ineffective assistance of counsel to follow the instructions of one's client.

Moreover, there is no evidence to support defendant's contention that he was prejudiced by any of his counsel's decisions. To find prejudice, a court must determine that there was "'a reasonable

probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Pickens, supra* at 312 (citing *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984)). Although the nature and circumstances surrounding the offenses suggest that defendant suffered from a form of mental illness, the available evidence does not indicate that he was legally insane at the time he engaged in sexual abuse of his victims.

III. Excited Utterance Exception To The Hearsay Rule

Defendant asserts that the trial court erred by admitting testimony concerning an out-of-court statement under the excited utterance exception to the hearsay rule. "A hearsay statement is an unsworn, out-of-court statement that is offered to establish the truth of its contents." *People v Jensen*, 222 Mich App 575, 580; 564 NW2d 192 (1997); MRE 801(c). The term "statement" means an assertion. MRE 801(a); *People v Jones (On Reh After Remand)*, 228 Mich App 191, 204; 579 NW2d 82 (1998). An assertion is capable of being true or false. *Id.* Unless the rules of evidence provide otherwise, hearsay statements are inadmissible as substantive evidence. MRE 802.

Here, the prosecutor asked the mother of one of the victim's if her daughter ever asked her what a colloquialism for cunnilingus meant. The mother testified that her daughter had asked such a question roughly half an hour after she returned home from the incidents in question. Defense counsel raised a hearsay objection, believing that the statement was not admissible as an excited utterance. In response, the prosecution stated that he was eliciting testimony concerning a question, not an assertion. The trial court allowed the testimony.

We find that the trial court properly admitted into evidence the testimony concerning the victim's question, since she made no assertion through the question she posed to her mother. See *Jones, supra* at 204-205. The question was incapable of being true or false. Because the question was not an assertion, it was not inadmissible as hearsay. Furthermore, defendant cannot maintain that the question should have been inadmissible as hearsay because it implied that defendant engaged in oral sex. In *Jones*, this Court rejected any such implied assertion theory. *Id*. at 225-226. Moreover, even if the trial court erred in admitting the evidence, any error would be harmless in light of the evidence of defendant's guilt presented at trial. There is little likelihood that the alleged error affected the outcome of the trial. *Jensen, supra* at 583.

IV. Sentencing

Defendant contends that he is entitled to resentencing because the trial court failed to recognize that the enhanced maximum sentence provided for by the habitual offender statute was not mandatory. We disagree.

"[W]hile the habitual offender act provides that the court 'shall' punish a second felony offender in accordance with the statute, the Legislature provided that the court 'may' sentence such a second offender to a maximum term of up to one and one-half times the maximum term prescribed for a first conviction, 'or for a lesser term.'" *People v Bewersdorf*, 438 Mich 55, 66; 475 NW2d 231 (1991). Because the language is permissive, not mandatory, only the upper boundary of the court's sentencing

discretion is fixed. *Id*. The sentencing court is not obligated to impose an enhanced punishment upon a convicted habitual offender. *Id*. See also *People v Turski*, 436 Mich 878; 461 NW2d 366 (1990); *People v Mauch*, 23 Mich App 723, 730-731; 179 NW2d 184 (1970).

Here, the trial court never indicated a belief that it was without discretion in setting defendant's maximum sentence based on his status as an habitual offender. Instead, the trial court expressed a belief that defendant needed to be punished in a manner consistent with the severity of his crimes and expressed a need to protect society. The trial court doubted whether defendant could control his conduct if he were allowed to return to life outside of an institution. Unlike the cases cited by defendant to support his position, the trial court never stated that it believed that it was mandatory to increase defendant's maximum sentence pursuant to the habitual offender statute. Because the trial court took permissible factors into account before sentencing defendant, we find that the trial court used its discretion when sentencing defendant.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[1] This is the sentence given by the trial court on the record. However, the judgment of sentence appears to reverse the sentences for Count II and Count IV. According to the judgment of sentence, the trial court sentenced defendant to fifteen to twenty-five years' imprisonment on Count II, which the trial court then reduced to second-degree CSC and to ten to twenty-two and one-half years' imprisonment on Count IV for the habitual offender conviction. Furthermore, the judgment of sentence incorrectly reduced Count II from first-degree CSC to second-degree CSC, when the record indicates that the trial court reduced Count I from first-degree CSC to second-degree CSC.