STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 2, 2000
v	No. 214503 Missaukee Circuit Court
KELVIN DAVID MOFFIT, Defendant-Appellant.	LC Nos. 97-101309-FC 97-101310-FC

Before: Meter, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). The trial court sentenced defendant to twenty-five to forty years' imprisonment on two of the CSC I counts, twenty to forty years' imprisonment on the remaining two CSC I counts, and ten to fifteen years' imprisonment on the two CSC III counts, all to be served concurrently. We affirm, but remand for the trial court to correct the Presentence Investigation Report (PSIR) and to determine whether resentencing is required.

Defendant first argues that he was deprived of the effective assistance of counsel because his trial attorney did not pursue as a defense theory defendant's claim that the accusations against him may have been prompted by family animosities. To justify reversal, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant's burden to prove otherwise is a heavy one. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To demonstrate that counsel's performance was deficient, "a defendant must also overcome the presumption that the challenged action was trial strategy." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). To demonstrate prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In this case, the father of one of the victims initially told the police that the victim's mother probably put her up to making false allegations. Defense counsel did not pursue this as a defense theory. However, the father testified at trial, and defense counsel elicited testimony from him that the victim was untruthful, in his opinion. The prosecutor asked the father about his initial statement to the police, emphasizing that he had just been through a bitter divorce with the victim's mother. On redirect, defense counsel elicited testimony that the divorce did not change the father's opinion regarding the victim's truthfulness or untruthfulness. Defendant has failed to overcome the presumption that defense counsel's decision not to pursue a particular theory was reasonable trial strategy. It would be reasonable to believe that pursuing defendant's theory would only serve to undermine the credibility of the witness' opinion of the victim's truthfulness or untruthfulness. It could appear to the jury that the father's belief that the accusations against defendant were fabricated was founded not in fact, but in his animosity toward his ex-wife. Defense counsel was aware of the witness' potential testimony and chose not to pursue the matter. This choice clearly constitutes trial strategy. See *Rockey*, *supra* at 77 (counsel's decision not to call witnesses was trial strategy where counsel was aware of their potential testimony). Defendant was not denied the effective assistance of counsel.

Defendant also challenges the sufficiency of the evidence supporting his convictions. When reviewing the sufficiency of the evidence presented at trial, we view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Defendant's argument is merely an attack on the credibility of the victims' testimony. The two victims gave testimony about defendant's sexual assaults that conflicted in various details. Defendant argues that the testimony of the two victims was so contradictory as to make their testimony "false on its face." However, we will not interfere with the jury's role to weigh the evidence and determine the credibility of witnesses. *Id*. at 514-515. Defendant cites no authority that would persuade us to abandon this principle and second-guess the jury's determination of credibility. Moreover, given the young age of the victims and the trauma they experienced, their confusion as to some of the details was understandable.

Defendant also argues that his sentences were disproportionately harsh. We review the sentences imposed for an abuse of discretion, which exists if the principle of proportionality is violated. *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). The principle of proportionality "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant repeatedly sexually penetrated two young girls staying in his home. We reject defendant's argument that he merits a lesser sentence because the victims were not physically harmed and did not resist. Under the circumstances of this case, we are satisfied that defendant's sentences are proportionate.

Defendant also argues that resentencing is required because the sentencing judge considered prior convictions that were too old for scoring under the sentencing guidelines. The PSIR indicated that

defendant was discharged from probation for the convictions in 1988, when he was in fact discharged from probation in 1985. However, defendant does not challenge the existence or validity of the prior convictions—he only challenges the resultant scoring of the sentencing guidelines.

A challenge to the scoring of the sentencing guidelines "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). The sentencing guidelines are only a tool to assist the trial court in fashioning a proportionate sentence. *Id*. at 178. Here, because defendant's sentences were proportionate, his challenge to the guidelines scoring does not provide a basis for resentencing.

Defendant claims that his due process right to be sentenced on the basis of accurate information was violated. See *Townsend v Burke*, 334 US 736, 740-741; 68 S Ct 1252; 92 L Ed 1690 (1948). However, "there is no basis for the assertion of a due process right to be sentenced on correct information unless the sentence is based on an 'extensively and materially false' foundation." *Mitchell*, *supra* at 173, quoting *Townsend*, *supra* at 741. Here, the error in the date defendant was discharged from probation did not constitute an *extensively* and materially false foundation for the sentence. Defendant was indeed convicted of the offenses listed in the PSIR, and he does not challenge any other aspect of the information contained in the PSIR. Under these circumstances, defendant was not denied due process.

Although defendant was not denied due process, and his sentence was proportionate, we remand to the trial court for correction of the PSIR. On remand, the court should determine whether its sentence would be changed in light of the corrected information. *People v Polus*, 197 Mich App 197, 201-202; 495 NW2d 402 (1992). "If the trial court determines that it would impose a different sentence, it shall bring defendant before the court for resentencing." *Id*. at 202. However, if the court determines that it would have imposed the same sentence, it may simply enter an order affirming its original sentence without bringing defendant before the court. *Id*.[1]

Affirmed, but remanded for correction of the PSIR. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

[1] The basis on which the Court in *Polus* granted relief (error in scoring the guidelines) is not a proper basis for relief in light of *Mitchell*, *supra*. However, we conclude that the relief granted in *Polus* is appropriate under the circumstances of this case.