

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERREL STEVON HAYGOOD,

Defendant-Appellant.

UNPUBLISHED

December 14, 2001

No. 226431

Oakland Circuit Court

LC No. 98-161426-FC

Before: K.F. Kelly, P.J., and Hood and Doctoroff, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct, (CSC), MCL 750.520c. Defendant was sentenced to consecutive terms of twenty to forty years' imprisonment for the first-degree CSC conviction and eight to fifteen years' imprisonment for the second-degree CSC convictions. Defendant appeals as of right, and we affirm.

The eleven year old victim considered defendant, a relative, a mentor. When he asked her to come to his apartment and clean it for his birthday, she agreed. Defendant transported the victim to his apartment. The victim went into defendant's bedroom where there was cable television. The victim testified that defendant changed into a bathrobe, removed her shorts and underwear, and put his "privacy inside" her "behind." The victim told defendant that she needed to use the bathroom to stop the continuation of the act. When she returned from the bathroom, defendant had changed clothing, and she resumed watching television. However, defendant changed into his bathrobe again, and the victim ultimately testified to two more acts of anal penetration¹ and one act of vaginal penetration. On cross-examination, the victim contradicted her testimony regarding the extent of any anal penetration.²

When interviewed by police, defendant admitted to the act of vaginal penetration in a written statement. At trial, defendant denied having any sexual contact with the victim. He

¹ While the victim ultimately testified to three acts of anal penetration, only two acts were charged.

² The victim apparently gestured to demonstrate the degree of the intrusion. Defense counsel then inquired if it was the "barest, smallest amount," and the victim said "yes."

testified that any admission was coerced because of threats by police. On cross-examination, defendant denied that he fled the state when the victim disclosed the acts to her mother. Rather, defendant testified that he was visiting relatives. Although charged with three acts of first-degree CSC, the jury convicted defendant of one count of first-degree CSC and two counts of second-degree CSC.

Defendant did not participate in the preparation of the presentence investigation report (PSIR). At sentencing, defendant's trial counsel stated that he had provided defendant with information regarding the interview with probation and told defendant to cooperate. Defense counsel did not offer personal information regarding defendant to the court at the sentencing hearing. Instead, defense counsel stated that nothing additional could be provided that was not previously before the judge and jury.³ Defense counsel did address portions of the PSIR involving his advice to defendant. Also, at sentencing, the trial court was advised of an offer, through an attorney, to pay the victim's family \$100,000 to drop the charges. The prosecutor advised the court that the offer was tape recorded, the offer was being investigated, and the attorney involved was not defendant's trial counsel. When given his right of allocution, defendant denied committing the offenses.

Defendant argues that offense variable twelve was improperly scored at fifty points and that the sentence was disproportionate. We disagree. Our review of sentencing guidelines is limited. *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 56 (1997). A sentencing court has discretion when determining the points scored, provided there is evidence on the record that supports that particular score. *Id.* Review of the record reveals that the scoring of fifty points was supported by the record. Accordingly, defendant's contention is without merit. Furthermore, we conclude that the sentence, which was within the guidelines, was proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant also argues that the trial court improperly made an independent finding of guilt on acquitted charges, relied on false information in the PSIR, and did not give defendant the opportunity to challenge the contents of the PSIR. We disagree. Review of the record reveals that the trial court did not make an independent finding of guilt, but properly considered the evidence at trial that established higher charges, although defendant was acquitted of them. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).⁴ Defendant's argument that the trial court relied on false information in the PSIR is not preserved for appellate review. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). This issue was not raised and

³ Indeed, information about defendant had been presented to the court during a hearing regarding the voluntariness of his confession. *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965). Defendant had also initially challenged his mental state, and a psychological report had been submitted to the trial court. Additionally, defendant testified at trial. Thus, through the course of the progression of the case, the trial court was provided with information regarding defendant's background, employment history, and lack of prior record.

⁴ At the hearing regarding the motion for resentencing, the trial court asked if it was bound by the jury's determination, and appellate counsel answered no.

addressed in defendant's motion for resentencing or at the hearing regarding the motion.⁵ A defendant may not harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Defendant's contention that the trial court did not comply with the requirements of MCR 6.425 is also without merit. It is evident from the transcript that the contents of the PSIR were discussed by reference to defendant's noncompliance with the process and the issue of the monetary offer. While the trial court did not formally state that it was addressing the requirements of MCR 6.425(D)(2), defendant has failed to identify any authority requiring such a formal announcement.

Defendant also argues trial counsel was ineffective for failing to raise these issues at sentencing. A *Ginther*⁶ hearing was not held below. Therefore, our review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Defendant must demonstrate that trial counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability that the outcome would have been different. *Id.* Defendant has failed to meet this burden. Throughout the course of defendant's case, defense counsel was able to advise the trial court of defendant's service record and employment history. A psychological evaluation was submitted to the court, but was not raised at trial. The trial court was able to examine the credibility of defendant at the *Walker* hearing. The trial court stated that it "vividly" recalled the trial. Accordingly, this claim of error is without merit.⁷

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Martin M. Doctoroff

⁵ The failure to raise these factual issues below is fatal to appellate review. For example, defendant argues that the PSIR improperly stated that he was unemployed. At the time of preparation of the report, defendant had been incarcerated for over a year. Irrespective of his prior employment history, he was nonetheless currently unemployed. Thus, the probation evaluation was correct in reference to conditions at the time of preparation. Furthermore, defendant contends that the PSIR improperly states that he was a substance abuser. We do not have the benefit of the full record because the psychological evaluation has not been provided. Additionally, the probation department was not asked to provide a reference for this information by appellate counsel at any time in the lower court proceedings. These deficiencies demonstrate that preservation requirements are imperative for appellate review.

⁶ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁷ Because of our disposition of these issues, defendant's request for resentencing before a different trial judge is moot.