STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 16, 2004
v	No. 243416 Bay Circuit Court
KENNETH ALLEN LONEY, Defendant-Appellant.	LC No. 02-001076-FH

Before: Jansen, P.J., and Markey and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for one count of criminal second-degree sexual conduct (CSC II), MCL750.520(c). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to serve a prison term of ten to twenty-five years. We affirm.

In March 2001, defendant was living with his sister, Teresa Barney, and three of her children, including the complainant (Barney's daughter). Defendant was the only adult male living with his sister and her children at that time. Barney stated that during the time defendant was living with her, he was "playing the uncle role" to her children.

The complainant was suspected of stealing Barney's cigarettes. Barney warned complainant that she might start searching the complainant's belongings to make sure she did not have any cigarettes on her. On September 18, 2001, Barney learned that defendant had strip searched the complainant the night before. At trial, the complainant testified about a total of three occasions when defendant searched her, ostensibly, to see if she had any cigarettes on her person. Complainant testified that on the first occasion defendant made her pull up her shirt, and, that he unfastened her pants and traced around the elastic part of her underwear with his hand. According to the complainant, on the second occasion, defendant made her pull up her bra, while he proceeded to touch her bare breasts, and had her pull down her pants so that he could again feel under the waistband of her underwear. Complainant explained that, on the third occasion, defendant pulled down her pants and underwear to her knees, opened her legs, and placed his fingers on her inner thigh, in the vaginal area. The complainant testified that defendant touched her pubic hair and rubbed it with his fingers. Complainant also testified that defendant appeared to be intoxicated.

On appeal, defendant argues that offense variables (OV) 10 and 13 of the legislative sentencing guidelines were improperly scored because ten points were assessed for OV 10, and twenty-five points were assessed for OV 13. We disagree.

Application of the statutory sentencing guidelines presents a question of law that this Court reviews de novo. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). While defendant's challenge to the scoring of OV 13 was properly preserved below, defendant failed to challenge the scoring of OV 10. Accordingly, we review the scoring of OV 13 for clear error, *People v Hicks*, 259 Mich App 518, 522 ___ NW2d ___ 2003, and the scoring of OV 10 for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Scoring decisions under the sentencing guidelines are not clearly erroneous if 'there is *any* evidence in support' of the decision." *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996) (emphasis added by *Witherspoon, supra*).

I

With regard to OV 10, MCL 777.40(1)(b) states that ten points should be scored if "[t]he offender exploited the victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." The term "exploit" is defined to "mean[] to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). "'Abuse of authority status' means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher." MCL 777.40(3)(d).

Again, Barney testified that while defendant was staying in her home, he was "playing the uncle role" to her children. As an example of what "playing the uncle role" meant, Barney indicated that defendant "made sure . . . if they got grounded, they was to stick to the grounding." Thus, defendant was, at the very least, invested with the authority to enforce Barney's directives regarding the disciplining of her children. One such directive was that the complainant should not be smoking or carrying cigarettes on her person. The record establishes that defendant abused his authority by using the smoking directive as a means to sexually assault his niece on three occasions. Complainant's passive acquiescence to defendant evidences her willingness to defer to defendant's authority within the household. In these circumstances, defendant's manipulation of his niece is more than sufficient to support a finding that he abused his authority status. *Witherspoon, supra* at 335. Because the scoring of ten points for OV 10 was proper, no error, plain or otherwise, occurred. *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003) (footnote omitted).

We also reject defendant's assertion that counsel was ineffective for failing to challenge the scoring of OV 10. Defense counsel cannot be deemed ineffective for failing to raise a meritless objection. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

II

In calculating OV 13 (continuing pattern of criminal behavior), a score of twenty-five points is required if the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). "For determining the appropriate points

under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

In addressing defendant's challenge to the scoring of OV 13, the trial court stated:

> Well, I was the trial judge in this case, of course, and all three cases were, in fact tried together. After the jury verdict was returned with regard to the instant case, the prosecutor requested an order of nolle prosequi of the other two cases.
>
> But I heard the testimony concerning other two incidences – the other two charges, and the reason I concur in the scoring . . . is I believe that a jury could have found beyond a reasonable doubt that the defendant committed at least a crime, not necessarily – a felony . . . , but obviously, the jury never had a chance to do that, so in my opinion, the scoring is proper in that the offense was a pattern of felonious criminal activity involving three or more crimes against a person. The other two crimes that were nolle prossed in this case as well as the domestic violence, of course, would be a fourth, but that would be unnecessary.

Defendant argues that the language of OV 13 indicates that the sentencing guideline was intended for use in situations in which potential multiple counts were not presented to, or tested in front of, a jury. Defendant's assertion can be divided into two sub-assertions: (a) that the crimes being scored must be part of a multiple crime indictment, and (b) that the crimes must not have been presented to, or tested in front of, a jury. The first of these is contradicted by the statutory directive that "all crimes within a 5-year period . . . shall be counted[,]" which clearly suggests that such scoring would encompass situations where the crimes in issue have no relation to the sentencing offense. MCL 777.43(2)(a). The second is at odds with the well-established principle that a "sentencing court may consider all record evidence before it when calculating the guidelines . . . including testimony taken at a . . . trial." *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993). Further, if conduct for which a party has been acquitted may be considered in scoring the sentencing guidelines, see, e.g., *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991), then it is follows that conduct for which a jury has not passed judgment can also be considered. Cf. *Ratkov (After Remand)*, *supra*, 201 Mich App at 126 (observing that "situations may arise wherein although the factfinder declined to find a fact proven beyond a reasonable doubt . . . , the same fact may be found by a preponderance of the evidence for purposes of sentencing"). The complainant's detailed testimony about the three incidents provided more than enough evidence to support the finding that two other crimes occurred. *Witherspoon*, *supra* at 335.[1] The trial court could have reasonably concluded from the

[1] We also note that defendant's Presentence Investigation Report (PSIR) indicates that defendant was arrested in 1998 and charged with third-degree domestic violence, MCL 750.814, and assault and battery, MCL 750.81. Taken with the sentencing offense, these crimes also support the scoring of OV 13. See *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003).

evidence at trial that defendant committed additional felonious acts against the victim in this case. Therefore, the trial court did not err in scoring OV 13 at twenty-five points. MCL 777.43.

III

Finally, defendant argues that trial counsel was ineffective for failing to call child advocate Amy Hendrix as a witness. Again, we disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id*. at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843, 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Hendrix was present at the September 18, 2001 interview of the complainant that was conducted at the police station. Decisions on what witnesses to call at trial are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). "The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

It is clear from the record that defendant was not denied a substantial defense by defense counsel's failure to call Hendrix. During cross-examination of the complainant, defense counsel repeatedly referenced the complainant's September 18, 2001, statement. Defense counsel was able to effectively draw attention to several discrepancies between the complainant's trial testimony and what she had told Hendrix without calling Hendrix to testify. As such, defendant has failed to show that counsel's decision regarding how to present the issue of the complainant's inconsistent statements was objectively unreasonable. See *Bell, supra* at 695; *Toma, supra* at 302. Based on the record, upon a de novo review of this constitutional issue, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. See *LeBlanc, supra* at 579.

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage