STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY RENARDO KELLY, a/k/a GREGORY RAY KELLEY,

Defendant-Appellant.

UNPUBLISHED
January 10, 2008

No. 272820
Kent Circuit Court
LC No. 05-010336-FH

Before: Bandstra, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Defendant Gregory Renardo Kelly appeals as of right his jury trial convictions for four counts of transporting a female for prostitution, MCL 750.459. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 180 to 480 months' imprisonment for each of his four convictions. We affirm.

Defendant argues that he was denied the effective assistance of counsel by his trial counsel's failure to object to testimony regarding defendant's alleged violent actions toward the women who engaged in prostitution for his benefit. We disagree. The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of defendant's trial would have been different, and (3) the resulting trial was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

On the record before us, we find that most of the challenged evidence was relevant and properly admissible. The prosecution was required to prove that defendant transported the victims for the purpose of prostitution, MCL 750.459. Evidence that defendant treated the victims, and other women who worked as prostitutes for him, with violence when they tried to keep their earnings or flee from him, assisted the prosecution in proving that defendant's purpose

was to engage the women in prostitution. Moreover, the record does not show that the probative value of this evidence was outweighed by unfair prejudice to the defendant. MRE 403.

Nevertheless, some of the challenged evidence, specifically that defendant kicked a pregnant prostitute to induce her to miscarry, threatened to kill a prostitute for disrespecting him, and "dragged" another prostitute off the street and assaulted her, was likely inadmissible under MRE 404(b). These actions were not sufficiently similar to those alleged here so that they showed the existence of a common design or plan, *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). Therefore, defense counsel probably should have objected to these three limited areas of testimony. However, even though defendant's trial counsel's performance may have fallen below the objective standard of reasonableness with respect to this limited testimony, defendant cannot show that, but for his trial counsel's error, the outcome of the trial would have been different.

At trial, each of the victims testified that defendant transported them from Grand Rapids to Detroit for the purpose of engaging in prostitution. The victims also testified that, while they were in Detroit engaging in prostitution on defendant's behalf, they frequently stayed in room 304 of the Best Value Inn in Dearborn. It is difficult to believe that they concocted this story to falsely accuse defendant. An employee of the Best Value Inn presented records indicating that, in addition to numerous other dates, defendant rented room 304 continuously from December 1, 2004, through February 6, 2005, and from May 2, 2005 until May 27, 2005. A police officer testified that, while she was undercover in Detroit, defendant approached her in an area known for prostitution and attempted to entice her into entering his car by offering her illegal substances and cellular telephones. Defendant's parole officer testified that defendant twice informed her that he was late for a meeting because he had car trouble traveling between Detroit and Grand Rapids. Defendant's parole officer also testified that defendant was able to pay his fines, even though she was unable to verify his employment.

There was overwhelming evidence of defendant's guilt, and defendant cannot show that but for the relatively insignificant error of his trial counsel, the outcome would have been different. *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant next argues that the trial court abused its discretion by denying his motion to sever the trials, because the four offenses for which he was charged were not related, thus mandating severance. We disagree. We review the denial of a motion to sever related charges for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). MCR 6.120 governs the severance of charges in criminal trials. MCR 6.120 provides, in relevant part,

> (B) **Postcharging Permissive Joinder or Severance.** On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.

(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

(a) the same conduct or transaction, or

(b) a series of connected acts, or

(c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

(3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

(C) **Right of Severance; Unrelated Offenses**. On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

One of the victims testified that she traveled with defendant from Grand Rapids to Detroit "about 15 times," and that she traveled from Detroit to Grand Rapids with defendant to "get more females" to engage in prostitution in Detroit. Another victim testified that defendant initially approached her while she was in the company of a third victim, on Plainfield Avenue in Grand Rapids. Therefore, the trial court did not abuse its discretion when it concluded that all of the charges involved a single scheme to transport women from Grand Rapids to Detroit to engage in prostitution. Severance was not mandated.

Defendant also asserts that he is entitled to resentencing because the trial court plainly erred in its scoring of Offense Variable (OV) 1, MCL 777.31; OV 4, MCL 777.34; and OV 9, MCL 777.39. Generally, we review a trial court's scoring of a sentencing variable for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). However, when, as here, an objection to the trial court's sentencing decision is unpreserved, a defendant's sentence is "only appealable" if it is outside the appropriate guidelines range. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). The trial court sentenced defendant to a minimum of 180 months based on a guidelines range of 87 to 290 months. Even were defendant to prevail on each of his scoring challenges as to all four offenses of which he was convicted, his sentence would still fall within the appropriate guidelines range of 78-260 months. Therefore, defendant's sentence is not "appealable." *People v Francisco*, 474 Mich 82, 91 n 8; 711 NW2d 44 (2006); *Kimble, supra*.

Defendant next argues that he received ineffective assistance of counsel because his trial counsel failed to object to the trial court's improper scoring of OV 1, OV 4 and OV 9 at sentencing. We disagree.

To establish a claim of ineffective assistance of counsel at sentencing, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the sentencing proceedings would have been different, and (3) the resulting trial was fundamentally unfair or unreliable. *Toma, supra* at 302; *Mack, supra* at 129. Counsel will not be deemed ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

As our Supreme Court explained in *Kimble*, supra at 309, "[u]nder the statutory sentencing guidelines, the trial court must score the applicable offense and prior record variables to determine the appropriate range for the minimum sentence." Offense variables are to be scored "only with respect to the specific criminal transaction that gives rise to the conviction for which the defendant is being sentenced unless the instructions for a variable specifically and explicitly direct the trial court to do otherwise." *People v Chesebro*, 206 Mich App 468, 471; 522 NW2d 677 (1994). A PSIR is presumed to be accurate, and a trial court is entitled to rely upon factual information therein unless the defendant effectively challenges it. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

Defendant was convicted of four separate counts of transporting a female for the purpose of prostitution, for driving Sara Schmuck, Misty Hesselink, Theresa Mockerman and Bridgette Watkins from Grand Rapids to Detroit to engage in prostitution on his behalf. It appears from the PSIR that defendant's four offenses were scored identically. Defendant was assessed a prior record variable (PRV) score of 90, placing him at PRV level F; defendant was assessed a total OV score of 45, placing him at OV level IV (35-49 points). The resulting minimum sentence guidelines range, for a fourth habitual offender, is 87-290 months. MCL 777.63. Defendant argues that his trial counsel was ineffective for failing to challenge the trial court's scoring of OV 1 at five points, OV 4 at 10 points and OV 9 at ten points for each of his four convictions.

OV 1 allows a trial court to score five points if "a weapon was displayed or implied" during defendant's crimes. MCL 777.31. In *People v Lange*, 251 Mich App 247, 256-257; 650 NW2d 691 (2002), we defined "weapon" in this context to include any article or instrument used for bodily assault or defense. We find that there was evidence in the record to support the scoring of OV 1 at five points for the offenses relating to the transportation of Watkins, Hesselink, and Mockerman.[1] However, we find no evidence in the record to support a score of five points on OV 1 for the offense relating to transporting Schmuck.[2] Therefore, as to Schmuck, OV 1 should have been scored at zero.

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[1] Watkins testified that defendant struck her with a dildo. Hesselink indicated that she was afraid of defendant because he struck her and displayed items he used as weapons in his car. Defendant's PSIR indicates that defendant intentionally struck Mockerman with his car.

[2] Although Schmuck witnessed defendant strike others with his hands, she did not testify to (continued…)

OV 4 allows a trial court to score ten points if, because of defendant's crimes, "serious psychological injury requiring professional treatment occurred to a victim," regardless whether the victim actually seeks or receives such treatment. MCL 777.34*; People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). In *Apgar*, we affirmed a score of ten points for OV 4 because "the victim testified that she was fearful during the encounter with defendant." *Id.* at 329. This Court has also upheld a trial court's decision to score ten points under OV 4, based in part, on the trial court's observations of the demeanor of the victim. See *People v Wilkens*, 267 Mich App 728, 740-741; 705 NW2d 728 (2005). Here, the trial court had the opportunity to view the demeanor of the victims and to hear their descriptions of the offenses, including the abusive and degrading treatment defendant subjected them to and their continued fear of defendant. Therefore, we conclude that the trial court did not plainly err in scoring OV 4 at ten points for psychological injury to each victim.

Finally, defendant argues that the trial court erred in scoring ten points for OV 9, the offense variable relating to the "number of victims." At the time of defendant's sentencing, OV 9 allowed a trial court to score ten points if there were 2 to 9 persons "placed in danger of injury or loss of life as a victim" of the sentencing offense. MCL 777.39; *People v Melton*, 271 Mich App 590, 595; 722 NW2d 698 (2006).[3] Based on our review of the record, only Mockerman provided information permitting the conclusion that there were 2 to 9 victims of the sentencing offense.[4] Thus, there was no basis for the trial court to score OV 9 for those offenses relating to the transportation of Schmuck, Hesselink or Watkins.

Based on our review of the record, then, we conclude that defendant's total OV score of 45 was correct for the offense relating to the transportation of Mockerman, that the correct total OV score is 35 for the offenses relating to the transportation of Watkins and Hesselink, and that the correct total OV score is 20 for the offense relating to the transportation of Schmuck. Defendant's total OV scores for the offenses relating to the transportation of Watkins and Hesselink remain within level IV, resulting in no change in the appropriate sentence guidelines for those offenses. Thus, defendant cannot establish that any failure to object to the scoring of these offenses prejudiced him in any way. Further, while defendant's corrected OV score for the offense relating to the transportation of Schmuck places defendant at OV level II, his sentence remains within the appropriate minimum sentence range (78-260 months) for that OV level. MCL 777.63. And, there is no reason to believe that the trial court would have sentenced defendant less severely for the offense relating to Schmuck than it did for the other three offenses, especially given defendant's fourth habitual offender status, that each of these offenses was part of a single plan or scheme to transport women to the Detroit area to engage in

(…continued)

seeing him use or display any weapon.

[3] At the time defendant was sentenced, injury was interpreted to include physical injury only. *Melton, supra* at 592. Effective March 30, 2007, MCL 777.39 was amended to also allow a court to score OV 4 based on victims placed in danger of property loss.

[4] Mockerman testified that she returned from Detroit to Grand Rapids with defendant to "get more females" and that on one occasion, defendant transported both Mockerman and Mockerman's friend "Holly," to the Best Value Inn, to engage in prostitution.

prostitution for defendant's benefit, and that the sentences are to run concurrently. Therefore, we conclude that defendant has not established that there is a reasonable probability that, but for counsel's error in failing to object to the scoring of OV 1 and OV 9 for the offense relating to the transportation of Schmuck, the result of defendant's sentencing proceedings would have been different.

We affirm.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering