STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 6, 2008
v	No. 277934 Oakland Circuit Court
STEVEN ALLEN THOMASON, Defendant-Appellant.	LC No. 2006-208760-FH

Before: White, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a).[1] He was sentenced to 57 to 180 months' imprisonment. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's niece testified that when she was ten or 11 years old, defendant touched her breasts over her clothes on two separate occasions. She did not report the incidents until she was 17 years old.

Defendant first argues that his counsel provided ineffective assistance when, in exchange for an instruction on the lesser included offense of fourth-degree criminal sexual conduct (CSC IV), counsel agreed to the admission of an arguably inculpatory letter written by defendant. We disagree.

Our review is limited to the facts contained on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The transcript establishes that the letter was admitted *before* counsel requested the CSC IV instruction, and was not in exchange for an agreement to admit the letter. Moreover, defendant has not identified any basis on which the letter would have been subject to exclusion. Counsel is not required to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

[1] Defendant was acquitted of a second count of this offense.

Counsel requested the CSC IV instruction because defendant had indicated in the letter that his goal for the previous five years had been not to hurt anyone. Because his niece was 13 years old five years earlier, this statement raised the possibility that she was 13 at the time of the alleged incidents. Defendant points out that a CSC II conviction may be based on sexual contact with a person between the ages of 13 and 16 if the victim is a relative within the fourth degree of consanguinity. See MCL 750.520c(1)(b). However, the jury was instructed that it could convict of CSC II if it found that complainant was younger than 13 years, and that it could convict of CSC IV if it concluded she was 13, 14, or 15 years old. The jury was never advised that a conviction could be based on the uncle/niece relationship. Thus, error, if any, could only have inured to defendant's benefit. Moreover, the jury necessarily concluded that defendant's niece was 11 years old at the relevant time because this finding was necessary to convict defendant of CSC II based on the instructions given. Because defendant cannot show that but for counsel's error the result would have been different, he has failed to establish ineffective assistance of counsel. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant next argues that the trial court erred in scoring Offense Variable (OV) 13 at 25 points based on a pattern of felonious criminal activity involving 3 or more crimes against a person. See MCL 777.43(1)(b). We disagree.

MCL 777.43(2)(a) indicates that the focus should be on the date of the crime or offense, not the date of conviction. Thus, the fact that more than five years passed between a guilty plea to a CSC II charge and defendant's acquittal and conviction on the present charges is irrelevant, where the record indicates that the crimes themselves were within a five-year period. Accordingly, the score of 25 points for OV 13 was accurate.

Defendant has filed a voluminous pro per supplemental brief. We find no merit to the additional arguments he raises, but will briefly address them. First, defendant erroneously states that anguish, not age, is the primary element of CSC II. MCL 750.520c(1)(a) does not mention anguish. Defendant's argument that the jury was improperly instructed based on this erroneous premise is therefore without merit.

Defendant claims the prosecutor concealed 24 or more res gestae witnesses, manufactured evidence, concealed additional letters and a social worker report that exonerated him, and misled the jury with deliberate lies, including representations that complainant was consistent. There is no evidence of the existence of the letters, and defendant suggests that they may have been destroyed. Defendant suggests the social worker report would have indicated that he touched complainant's thigh, not her breast. Defendant does not cite to the record to support these assertions. While a prosecutor may not knowingly use false testimony to obtain a conviction, has a constitutional obligation to make a report when a witness lies under oath, and has a duty to correct false evidence, *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998), defendant has failed to establish that any of these things actually occurred.

Defendant avers that the investigating officer failed to conduct even "the slightest investigation." Even if this were a ground for reversal, there is no evidence to support this assertion.

Defendant claims reasonable doubt based on the jurors taking longer to reach a verdict than they did to hear the evidence. However, the length of time would be consistent with careful

review of the evidence or disagreement before consensus, but not a failure to establish guilt beyond a reasonable doubt.

Defendant asserts counsel failed to investigate and request the prosecutor's discovery. While the failure to reasonably investigate can constitute ineffective assistance of counsel, *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005), there is nothing more than an assertion to support this claim. Defendant also claims that counsel failed to use numerous tools for his defense, including calling the other res gestae witnesses, impeaching witnesses, and introducing other letters. Defendant contends the witnesses would have established that the alleged touching took place eight feet from a kitchen table that was always filled with people. However, since the victim indicated that no one else was around at the time the incidents occurred, and it is implausible that there *always* would have been people present, the decision to forego calling these witnesses was likely a matter of trial strategy, and will not be disturbed. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defendant claims counsel stated that he was guilty, but does not cite the record in support of this assertion. Presumably, he is referring to counsel's strategy of using the letter to argue that a crime, if any, was CSC IV given the age of complainant. In doing this, counsel did not concede defendant's guilt. Cf. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Defendant also says counsel should have developed the defense that his niece was blackmailing him because he refused to pay for her to go to college. However, the defense summarized in counsel's closing argument was that defendant never called complainant a liar because he believed she thought something untoward had happened, but because she had misinterpreted his actions. The decision to forego a defense at odds with this one was likely a matter of strategy.

Defendant also claims counsel had no contact with him while in jail, did not advise him of his rights, apparently with regard to sentencing, and did not instruct him on certain sentencing matters. These matters cannot be verified by the record. He asserts that he was denied allocution because his lawyer told him to be quiet. The transcript establishes that he was asked if he wanted to say anything but declined, citing advice of counsel. There is nothing to suggest this advice was unreasonable.

Finally, defendant asserts his sentence is so excessive that it is cruel and unusual, averring that it was not based on the crime described by the prosecutor and complainant, and that it is more excessive than that given to other inmates based on MDOC statistics. He avers it is disproportionate since it was at the highest end of the guidelines range. He claims he was entitled to a sentence below the guidelines range and even that he should have received probation. However, a minimum sentence within the appropriate sentencing guidelines range must be affirmed absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Defendant has not identified any inaccurate information on which the sentence allegedly was based. Although he asserts the offense variable for serious psychological injury, MCL 777.34, should be scored at zero points since complainant stated only that she was uncomfortable, the presentence investigation report indicates that complainant reported emotional and mental anguish. Defendant avers that the pattern of crimes score, discussed above, should have been zero because there was only one crime. As discussed above, there were three. He asserts that another man's record was referenced in his presentence investigation report, which is not borne out by a review of the document. Finally, he avers that the trial court

failed to state reasons for the sentence on the record. However, articulation is sufficient if the court expressly relies on the sentencing guidelines or if it is clear from the context of the court's remarks that the court relied on the guidelines. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006).

Affirmed.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski