STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2008
v	No. 279915 Berrien Circuit Court
RICHARD EUGENE MOYER, JR., Defendant-Appellant.	LC No. 2006-411480-FC

Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under the age of 13 years), and sentenced to concurrent sentences of 300 to 900 months in prison. Defendant appeals as of right. We affirm defendant's convictions, but vacate defendant's sentences and remand for resentencing.

Defendant first argues that the trial court abused its discretion when it declined the request of the deliberating jury to review the trial testimony. After approximately one hour and 45 minutes of deliberation, the jury requested the transcript of the trial. The trial court advised the jury that it was not possible to provide a transcript of the testimony, explaining that it typically took weeks for multi-day proceedings like the instant trial to be transcribed, and asked the jury to continue its deliberations, relying on its collective memory of witness testimony. We agree that the trial court violated MCR 6.414(J) by foreclosing the possibility of having testimony reviewed. Under that court rule, when responding to the request of a deliberating jury to review certain testimony or evidence, the trial court, "must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." MCR 6.414(J). While a request for the entire transcript could possibly be seen as unreasonable, the court did not in any way indicate to the jury that any part of the testimony could be made available to them, indicating only that it was "not possible" to provide the transcript. However, we conclude that no relief is warranted because trial counsel for defendant expressly stated that he had no objection to the manner in which the court responded to the jury's request. Counsel may waive a claim of error under MCR 6.414(J) by expressing satisfaction with the trial court's decision to refuse a jury request and its subsequent instruction. *People v Carter*, 462 Mich 206, 218-219; 612 NW2d 144 (2000). Trial counsel's affirmative statement of no objection to the

trial court's decision regarding a jury request for a transcript of testimony waives any claim of appellate error. *Id*.; *People v Fetterly*, 229 Mich App 511, 519-520; 583 NW2d 199 (1998).

Moreover, even if the trial court's decision is reviewed for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), a rule that applies when a claim of error is merely forfeited by failure to object, reversal is not warranted. To show that an error affected substantial rights, a defendant must show that it affected the outcome of the proceedings. *Id.* at 763. Defendant has made no such showing, and after examining the record we are not persuaded that the trial court's error affected the outcome of the case.

Defendant next asserts that he was denied the effective assistance of counsel by trial counsel's conduct in concurring with the trial court's manner of responding to the jury's request for the trial transcript. Generally, to establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding might have been different, *Strickland v Washington*, 466 US 668, 687, 690, 694; 104 S Ct 2052; 80 L Ed 2d 657 (1984); *People v Frazier*, 478 Mich 231, 242-243; 733 NW2d 713 (2007). Because no testimonial record was made, review of this claim is limited to facts contained in the record. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Counsel's decision in this regard may well have been one of trial strategy, and perhaps a successful strategy given the jury's acquittal of defendant on a third count of first-degree criminal sexual conduct. Given the lack of any testimonial record to illuminate the reasons for counsel's decision, we conclude that defendant has not met his burden of overcoming the strong presumption that the challenged action was sound trial strategy. *Strickland*, *supra* at 690; *In re Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant also has not shown a reasonable probability that, but for the alleged error of counsel, the result would have been different. *Strickland*, *supra* at 694; *Frazier*, *supra* at 243. Defendant merely argues that the case was "less than compelling" due to the lapse of time from the offenses to the trial and the fact that the victim maintained a cordial relationship with defendant in the intervening years. In fact, despite the lapse in time and the ongoing cordial relationship of the victim and defendant (her half-brother), various aspects of the testimony made it quite compelling, in particular the victim's testimony that she had not initiated the instant proceedings but had been sought out by the detective. The seeming incongruity of the allegations of sexual abuse with the victim's failure to report the incidents and her continuing relationship with defendant was dispelled by expert testimony concerning the disclosure of childhood sexual abuse. Defendant's general assertion that the case was not compelling falls far short of demonstrating a "reasonable probability" that, but for counsel's error, the result would have been different.

Finally, defendant claims that the trial court improperly relied upon the current sentencing guidelines, which were legislatively mandated to be applied to enumerated felonies committed after January 1, 1999. MCL 769.34(2). The parties appear to agree on appeal, correctly, that the judicially promulgated sentencing guidelines of 1988 were applicable to defendant, whose crimes were committed in 1986 and 1987. *People v Babcock*, 469 Mich 247, 254-255 n 6; 666 NW2d 231 (2003); *People v Potts*, 436 Mich 295, 297-299; 461 NW2d 647 (1990).

Based upon the existing record it is not possible to know which, if any, guidelines were applied by the sentencing judge. The cover page of the presentence investigation report first states, incorrectly, that the sentencing guidelines are not applicable, but then notes that "for informational purposes, this agent did score out the defendant under the 1988 guidelines and show that the guidelines would be 120 months to 300 months in both counts." The probation agent informed the court at the sentencing hearing that there was no SIR, as "[i]t's not applicable in this case. The offense predates the 1998 guidelines." At this point the court asked counsel for both parties whether they agreed, and both responded in the affirmative. The court then asked the probation agent, "And were the offense to occur today, the guidelines would be 120 to 300 months?," to which the agent responded, "Yes, your Honor." Based on this ambiguous and sometimes contradictory series of statements, it is not clear which set of guidelines the agent and the court understood to provide a minimum range of 120 to 300 months, or whether the trial court relied on any guidelines at all. Because of this lack of clarity in the record, we vacate defendant's sentences and remand for resentencing upon a record that clearly shows the basis and reasoning for the sentences imposed. We do not retain jurisdiction.

We affirm defendant's convictions. We vacate defendant's sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio