

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ALLEN MILLER,

Defendant-Appellant.

UNPUBLISHED
February 10, 2009

No. 273488
Ottawa Circuit Court
LC No. 05-028876-CC

ON REMAND

Before: Davis, P.J., and Murphy and Beckering, JJ.

PER CURIAM.

We previously reversed defendant's conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration with person under 13 years of age), finding that a new trial was mandated where a convicted felon served as a juror at trial. Defendant had been sentenced to 171 to 360 months' imprisonment. Because of the nature of our earlier holding it was unnecessary to rule on the other appellate issues raised by defendant. Our Supreme Court reversed our decision, holding that a new trial was not required given defendant's failure to show that he was actually prejudiced by the presence of a convicted felon on the jury. *People v Miller*, 482 Mich 540; ___ NW2d ___ (2008). The Supreme Court remanded the case in order for us "to address defendant's remaining issues." *Id.* On review of the remaining issues, we affirm defendant's conviction and sentence.

Defendant argues that he was deprived of his constitutional rights when the trial court denied defense counsel's motions to withdraw and defendant's request for appointment of substitute counsel. After review of the record, we conclude that defendant was negligent in asserting his right to have new counsel appointed, that defendant was merely attempting to delay the trial, that there was no "legitimate" reason for appointing new counsel, and that defendant has not established prejudice. See *People v Atkins*, 259 Mich App 545, 557, 675 NW2d 863 (2003) (setting forth factors to consider in regard to review of a motion to withdraw and request to appoint substitute counsel).¹ Accordingly, the trial court did not abuse its discretion in denying the motions. *Id.* at 556-557.

¹ The Court indicated that while the Sixth Amendment provides a defendant with the right to retain counsel of choice, the right is not absolute and must be balanced against the public's
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Defendant next argues that he was deprived of his right to effective assistance of counsel when trial counsel failed to raise and preserve an insanity or temporary insanity defense on the basis of pedophilia and involuntary intoxication. We first note that defendant does not cite any authority for, or conduct any relevant analysis in support of, the proposition that pedophilia is a mental illness for purposes of our insanity defense statute, MCL 768.21a. Accordingly, the pedophilia argument fails. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) (it is not up to the appellate court to unravel and elaborate a party's arguments and then search for supporting authority). Also, defendant does not claim on appeal that he "lack[ed] substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). Furthermore, defendant failed to establish the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant provides no evidence of an alcohol or substance abuse problem,² nor is there any indication in the record that he was involuntarily intoxicated during the illegal sexual act. Without any evidence or authority showing that an insanity defense should have been investigated on the basis of involuntary intoxication and pedophilia, we cannot conclude that counsel's performance was deficient, nor that defendant incurred prejudice; therefore, the claim of ineffective assistance fails. *Hoag, supra* at 5-6.

Finally, defendant presents multiple sentencing challenges. He argues that the trial court erred in scoring 50 points with regard to offense variable 13 (OV 13), MCL 777.43. Further, defendant argues that his sentence was unlawful because the court never stated how it arrived at the sentence, because the court never articulated why the sentence was proportionate, because the court never considered defendant's rehabilitative potential, because there was a basis for a downward departure in light of, possibly, drug and alcohol addictions that impaired his judgment, because the court lacked accurate and complete information about defendant given an incomplete assessment of his rehabilitative potential under MCR 6.425(A)(5), because the sentence was cruel and unusual, and because it violated his right to a jury trial under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L ED 2d 403 (2004).

With respect to OV 13, a score of 50 points is proper when an offense is part of a pattern of felonious criminal activity involving three or more sexual penetrations against a person or persons less than 13 years of age. MCL 777.43(1)(a). It is undisputed that the victim was under 13 years of age at the time of the alleged incidents. While defendant argues that there was no evidence that he engaged in three sexual penetrations with the victim, there was testimony from a detective, on questioning by defense counsel, that there were more than five incidents involving illegal sexual acts between defendant and the victim. Therefore, because 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), we affirm the trial court's scoring of OV 13.

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interest in the prompt and efficient administration of justice. *Atkins, supra* at 557.

² The presentence investigation report (PSIR) provided that there were no known substance abuse issues.

With respect to the additional challenges, there is simply no basis for reversal. The trial court sentenced defendant within the legislative sentencing guidelines range. Indeed, defendant was sentenced to a minimum term of 171 months, which was at the bottom of the guidelines range of 171 to 285 months. Unless there was an error in scoring or reliance on inaccurate information in the PSIR, this Court must affirm a sentence that falls within the guidelines range. MCL 769.34(10). There was no scoring error here, nor was the PSIR inaccurate. In regard to the proportionality argument, our Supreme Court has stated that the sentencing guidelines themselves, by considering both the severity of the offense and the defendant's prior record, incorporate the principle of proportionality. *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003). *Babcock* suggests that a sentence within the guidelines is presumptively proportionate, noting that a court should depart from the guidelines where there are "substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant's conduct and his criminal history." *Id.* at 264. The sentence in the case at bar was proportionate to the seriousness of the offense and defendant's conduct and proportionate to the seriousness of defendant's criminal history; a downward departure would not be justified. *Id.*; *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990).³

With respect to defendant's articulation argument, "[t]he articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines." *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). The trial court expressly relied on the sentencing guidelines in imposing sentence; therefore, the articulation requirement was satisfied. In regard to defendant's argument that the sentence was cruel and unusual, because the sentence was within the guidelines range and proportionate, the sentence was not cruel and unusual. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004), *aff'd* 475 Mich 140 (2006).

Finally, with respect to defendant's argument that the trial court's scoring of the sentencing factors violated his constitutional right to a jury trial under *Blakely*, our Supreme Court has definitively ruled that *Blakely* does not affect Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Jane M. Beckering

³ Defendant's lengthy criminal history belies his argument that his rehabilitative potential demands resentencing. Moreover, MCR 6.425(A)(5) does not require the court to do an assessment of defendant's rehabilitative potential. Rather, MCR 6.425(A)(5) merely indicates that, depending on the circumstances, the PSIR must include "the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report."