

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CHARLES HARPER,

Defendant-Appellant.

UNPUBLISHED

October 28, 2010

No. 293735

Wayne Circuit Court

LC No. 07-010580-FC

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and sentenced to life imprisonment. In a prior appeal, this Court affirmed defendant's conviction, but vacated his sentence and remanded for resentencing because the trial court failed to articulate substantial and compelling reasons for departing from the sentencing guidelines range of 108 to 360 months. *People v Harper*, unpublished opinion per curiam of the Court of Appeals, issued May 14, 2009 (Docket No. 283509). On remand, defendant was resentenced to a prison term of 360 to 720 months. Defendant again appeals as of right. We affirm.

Defendant argues that resentencing is again required because he did not receive the effective assistance of counsel at his resentencing. We disagree.

Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). "Generally, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (citation omitted). This Court "review[s] de novo the ultimate constitutional question whether an attorney's ineffective assistance deprived a defendant of his Sixth Amendment right to counsel." *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

The record does not support defendant's claim that defense counsel failed to request an updated presentence report. On the contrary, at a hearing on July 8, 2009, which was approximately three weeks before defendant was resentenced, defense counsel expressed that a

full presentence report was needed and the trial court specifically directed that an updated presentence report be prepared. However, it is unclear from the record whether an updated presentence report was actually available at the resentencing proceeding. The parties did not refer to an updated presentence report at resentencing. Even if one was not available, however, defendant has not shown that he was prejudiced by its absence. He does not identify any information relevant to his resentencing that was not presented to the trial court. Accordingly, there is no basis for concluding that the alleged absence of an updated presentence report affected his sentence.

Defendant also argues that defense counsel was ineffective for failing to investigate for purposes of sentencing whether the victim was at least 13 years old at the time of the offense. We disagree. The child's age was an element of the offense. Defendant was convicted of violating MCL 750.520b(1)(a), which prohibits sexual penetration with a person less than 13 years of age. The jury's verdict shows that it found beyond a reasonable doubt that the child was less than 13 years old. Defendant has offered no independent evidence that the victim was anything other than 11 years of age. Defense counsel did not perform below an objective standard of reasonableness by failing to investigate for purposes of resentencing a fact that had already been established by the jury's verdict.

Defendant also asserts in his brief that "counsel failed to properly review Defendant's guideline scoring." Defendant does not further address the scoring of the guidelines or assert a scoring error. Therefore, that issue has been abandoned. *People v Van Tubbergen*, 249 Mich App 354, 364; 642 NW2d 368 (2002).

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens