

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 20, 2015

v

COURTNEY CORTEZ HALLIBURTON,
Defendant-Appellant.

No. 322607
Wayne Circuit Court
LC No. 12-004355-FC

Before: GLEICHER, P.J., and SAWYER and MURPHY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b)(i) (victim at least 13 years old but less than 16 and member of same household). Two of the counts regarded penis-to-genital penetrations, and the third count pertained to an act of penetration involving cunnilingus. Defendant was sentenced to 14 to 25 years' imprisonment for each of his convictions. We vacate one of the convictions, affirm the other two convictions, vacate defendant's sentences, and remand for resentencing.

Defendant first contends that there was insufficient evidence to support one of the convictions with respect to a charged penis-to-genital penetration. The prosecution concedes error relative to defendant's argument, and we shall honor that concession. Accordingly, we vacate one of the CSC I convictions (penis-to-genital). Further, the prosecution agrees with defendant that the vacation of the CSC I conviction results in the need to resentence defendant. We agree for the reasons explained below.

Prior record variable (PRV) 7, MCL 777.57, must be assessed 20 points when "[t]he offender has 2 or more subsequent or concurrent convictions[,]" § 57(1)(a), but only 10 points when "[t]he offender has 1 subsequent or concurrent conviction[,]" § 57(1)(b). A sentencing court is directed to "[s]core the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed." MCL 777.57(2)(a). The trial court assessed 20 points for PRV 7, considering that there were two concurrent CSC I convictions, along with the scored CSC I conviction. Having now vacated one of the CSC I convictions, only 10 points can be assessed for PRV 7. The deduction of 10 points from defendant's total PRV score results in a change in the minimum sentence range, lowering it from 126 to 210 months to 108 to 180 months. Defendant was sentenced to a minimum term of

168 months' imprisonment. With respect to preserved claims of error, resentencing is required if a minimum guidelines range is altered, even if the minimum sentence actually imposed by a court is still within the modified range. *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006). Here, defendant raises the issue concerning the scoring of PRV 7 for the first time in his appellate brief, requesting a remand for resentencing. Given that at sentencing defendant had three convictions for CSC I and that one of the convictions was not vacated until our ruling today, thereby affecting the proper scoring of PRV 7, defendant's request for a remand for resentencing for the first time in his appellate brief suffices for purposes of preservation under MCL 769.34(10).¹ See *People v Jackson*, 487 Mich 783, 799-800; 790 NW2d 340 (2010) ("We conclude that when the request to remand will not be ripe for review until after the Court of Appeals has adjudicated the merits, the mandate of a *proper motion* in MCL 769.34(10) is met when a defendant makes a request to remand for resentencing with supporting grounds within his appellate brief."). Accordingly, defendant is entitled to resentencing.

Finally, in defendant's Standard 4 brief, he asserts that he was denied the effective assistance of counsel. Whether a defendant received the effective assistance of counsel is a mixed question of fact and law that we review, respectively, for clear error and de novo. *People v Ackley*, __ Mich __, __; __ NW2d __ (2015); slip op at 6. "To obtain relief for the denial of the effective assistance of counsel, the defendant must show that counsel's performance fell short of . . . [an] objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the outcome . . . would have been different." *Id.* at __; slip op at 7 (quotation marks omitted). A defendant must overcome the strong presumption that counsel's performance constituted sound trial strategy, but an appellate court is not permitted to insulate the review of counsel's performance by simply calling it trial strategy – the strategy must be sound, with decisions being objectively reasonable. *Id.* "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first contends that counsel was ineffective for failing to object to defendant's removal from the courtroom prior to the polling of the jury. We have carefully reviewed the record, and there is no clear indication that defendant was actually absent from the courtroom during the polling of the jury.² Thus, defendant has not established the factual predicate of his claim, and his argument fails. Moreover, defendant has inadequately briefed the issue in the

¹ MCL 769.34(10) provides in relevant part:

A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

² There is no dispute that defendant was present when the verdict was read by the foreperson.

context of an ineffective assistance claim, and we thus deem it waived. *People v Kammeraad*, 307 Mich App 98, 143; 858 NW2d 490 (2014).

Defendant also contends that counsel was ineffective for failing to ask the victim two particular questions during cross-examination, for failing to conduct an adequate pretrial investigation, mainly with respect to meeting with defendant and interviewing a specific witness, and for failing to file a motion to quash the information on the basis of alleged false and coerced testimony. These claims all fail, considering that they are not supported by the record (lack of factual predicate), do not reflect deficient performance, and/or do not give rise to a reasonable probability that the outcome would have been different but for any presumed errors by counsel. We note that in a written statement made to police, defendant admitted to one act of sexual penetration, penis-to-genital. We find no basis to remand for a *Ginther*³ hearing.

We affirm two of the CSC I convictions (penis-to-genital penetration and cunnilingus penetration), vacate the remaining CSC I conviction, vacate defendant's sentences, and remand for resentencing. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ William B. Murphy

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).