STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 19, 2011
v	No. 297660 Oakland Circuit Court
JASON NEWCOMBE HAYES, Defendant-Appellant.	LC No. 09-228117-FC

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b), one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b), and one count of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(d). The trial court sentenced defendant as a habitual offender, second-offense, MCL 769.10, to a term of 15 to 30 years' imprisonment for both counts of CSC I, and a term of 10 to 22½ years' imprisonment for the CSC II and CSC III counts, with credit for 46 days. Defendant appeals as of right. We affirm.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first alleges that he was deprived of effective assistance of counsel because his trial counsel failed to have defendant evaluated for, or raise and preserve an insanity or temporary insanity defense. A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact, if any, for clear error, and review the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo. *Id.* Because this Court denied defendant's motion for remand, review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005) (quotation and citation omitted). "Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (2000).

Here, defendant's defense at trial was that he was innocent—that the events never took place and that his statements that "it happened" were misunderstood. This Court has held that an attorney's "decision to follow his client's wishes and argue that he was innocent at trial rather than raise an insanity defense was a matter of trial strategy." *People v Newton* (*After Remand*), 179 Mich App 484, 493; 446 NW2d 487 (1989). Further, the mere fact that a strategy is unsuccessful does not mandate a conclusion that its use constituted ineffective assistance. *People v Stewart* (*On Remand*), 219 Mich App 38, 42; 555 NW2d 715 (1996). Finally, there is no evidence in the record to support that defendant had an arguable insanity defense. Defendant refers to his "substance abuse history." However, his presentence investigation report (PSIR) states, "[defendant] reported that he is in good mental and physical health," that defendant is "maintaining [his] innocen[c]e," that "defendant denied any prior history of drug or alcohol abuse," and that "[n]o mental health problems were reported." Accordingly, there is nothing in the record to suggest that an insanity defense was viable, let alone "substantial." *In re Ayres*, 239 Mich App at 22. Consequently, defendant has not overcome the presumption that his trial counsel's decision was sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). We conclude that defendant's counsel was not ineffective for failing to raise or preserve an insanity defense.

II. EVIDENCE OF UNCHARGED SEXUAL ASSAULTS

Defendant next argues that the trial court erred in admitting other-acts evidence, specifically evidence of additional, uncharged sexual assaults against the victim, contrary to MRE 404(b). We review a trial court's admission of evidence for an abuse of discretion, but review de novo the preliminary question of law of whether a rule of evidence precludes the admission. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). However, because defendant did not object to the admission of the evidence, our review is for plain error that affected defendant's rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

First, defendant's reliance on MCR 404(b) is inapplicable, as this Court has held that "MCL 768.27a control[s] over MRE 404(b) when 'listed offenses' against minors are at issue." *People v Smith*, 282 Mich App 191, 204; 772 NW2d 428 (2009). This is because, "the Legislature's intent in enacting MCL 768.27a was to broaden the range of acts that could be admitted into evidence, going beyond the evidence admissible under MRE 404(b), with respect to trials in which a defendant is charged with sex crimes against children." *Id.* MCL 768.27a(1) provides, in relevant part, "[E]vidence that the defendant committed another listed offense against a minor is inadmissible and may be considered for its bearing on any matter to which it is relevant." Thus, the evidence of the uncharged sexual assaults against defendant's son was completely admissible under MCL 768.27a and the trial court did not err in admitting it.

Based on our resolution of this issue, we find meritless defendant's assertions that plain error occurred when his trial counsel failed to object to the admission of the evidence and failed to request an other-acts instruction. Because the evidence was properly admitted, defendant's counsel's failure to object was not error. *People v Snider*, 239 Mich App 373, 425; 608 NW2d 502 (2000). Furthermore, because MCL 768.27a allows the uncharged sexual acts to "be considered for its bearing on any matter to which it is relevant," defendant was not entitled to the limiting instruction giving for other-acts evidence admitted under MRE 404(b). There was no error.

III. SENTENCING

Defendant next alleges that the trial court erred when it scored 10 points for offense variable (OV) 4. "Trial courts are afforded broad discretion in calculating sentencing guidelines, and appellate review of those calculations is very limited. Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996) (citations omitted).

MCL 777.34 provides that 10 points must be scored when "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). "[T]he fact that treatment has not been sought is not conclusive." MCL 777.34(2). We are not persuaded by defendant's contention that there was no evidence of serious psychological injury to the victim requiring psychological treatment. The victim testified that he was confused and coping with sexuality issues based on his father's sexual assaults. In addition, defendant himself testified that his son was damaged by his actions: "He dropped out of school in 9th grade, had problems in school, had problems with drugs, had problems with alcohol." This constituted sufficient evidence to uphold the trial court's score of 10 points. See *People v Wilkens*, 267 Mich App 728, 741; 705 NW2d 728 (2005) (Upholding a score of 10 points for OV 4 in a CSC I case where "the evidence indicate[d] that defendant's action caused the female victim anxiety, altered her demeanor, and caused her to withdraw"). Because we uphold the trial court's score of 10 points for OV 4, we find defendant's contention that trial cousel was ineffective for failing to object meritless. *Snider*, 239 Mich App at 425.

Defendant's additional sentencing issues are also without merit. There is no error in the trial court making factual determinations for the purposes of sentencing the guidelines because *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) is inapplicable to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). As for defendant's contention that the trial court failed to consider mitigating evidence, the record does not support the facts defendant alleged were mitigating circumstances. That is, there is no evidence of family support, substance abuse, or remorse. Indeed, defendant denies any substance or mental health issues and continues to deny the events occurred. Furthermore, even assuming the record did support these facts, defendant's sentence is not subject to proportionality review because it fell within the legislatively-mandated guidelines. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003). "[A] sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (citation omitted).

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro