STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 21, 2014
v	No. 306454 Oakland Circuit Court
RODERICK LAMONT COTTON, Defendant-Appellant.	LC No. 2010-232925-FC

Before: FORT HOOD, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(*iii*), and fourth-degree criminal sexual conduct, MCL 750.520e(1)(a). The trial court sentenced defendant as a second sexual offender, MCL 750.520f, and as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 35 to 60 years for the first-degree CSC conviction and 9 to 15 years for the fourth-degree CSC conviction. Defendant appeals his sentence and conviction. For the reasons set forth below, we affirm.

Defendant was convicted of sexually assaulting the teenaged daughter of his former girlfriend, DW. DW has three teenage daughters, DJ1, DJ2, and JW. Defendant and DW also have a daughter in common, SC, who lived with defendant. Defendant was charged with criminal sexual conduct for incidents involving both DJ1 and DJ2 that occurred in February 2010. The incidents took place in defendant's apartment when DJ1 and DJ2 were babysitting SC. The prosecution presented the other-acts testimony of JW under MCL 768.27a. JW testified that defendant had once sexually assaulted her. The jury acquitted defendant of the charges involving DJ2, but convicted him of the charges involving DJ1. Following an evidentiary hearing, the trial court denied defendant's motion for a new trial based on ineffective assistance of counsel. Defendant now appeals.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he is entitled to a new trial because trial counsel was ineffective. Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, but this Court determines de novo whether the facts properly found by the trial court establish ineffective assistance of counsel. *Id.*

The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand),* 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish ineffective assistance of counsel, a defendant must "show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier,* 478 Mich 231, 243; 733 NW2d 713 (2007). The defendant must also show that "the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Under the first prong of this test, "a reviewing court must conclude that the act or omission of the defendant's trial counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission." *People v Gioglio (On Remand),* 296 Mich App 12, 22-23; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864 (2012).

It is counsel's duty to make an independent examination of the facts, laws, pleadings and circumstances involved in the matter, and to pursue all leads relevant to the issues. *People v Grant,* 470 Mich 477, 486-487, 498-499; 684 NW2d 686 (2004). The failure to conduct a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee,* 268 Mich App 600, 626; 709 NW2d 595 (2005), as can the failure to prepare for trial. *People v Caballero,* 184 Mich App 636, 640; 459 NW2d 80 (1990). Counsel may be ineffective for failing to discover and present witnesses who could have directly contradicted the prosecution's case, see, e.g., *Grant,* 470 Mich at 491-493, and *People v Johnson*, 451 Mich 115, 118-120; 545 NW2d 637 (1996), or who could have otherwise provided a substantial defense. *People v Julian,* 171 Mich App 153, 159; 429 NW2d 615 (1988). The failure to interview witnesses does not alone establish inadequate preparation. *Caballero,* 184 Mich App at 642. It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the defendant. *Id.* "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant." *People v Bass (On Rehearing),* 223 Mich App 241, 253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Decisions regarding how to cross-examine and impeach witnesses are also matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *People v McFadden,* 159 Mich App 796, 800; 407 NW2d 78 (1987). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey,* 237 Mich App at 76-77. However, counsel may be found ineffective with regard to a strategic decision if the strategy employed was not a sound or reasonable one. *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988). But the defendant is not entitled to relief unless counsel's failure deprived him of a substantial defense. *People v Hopson,* 178 Mich App 406, 412; 444 NW2d 167 (1989). "A substantial

defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

A. IMPEACHMENT OF DJ1 AND JW

The trial court did not clearly err in finding that defense counsel prepared for the cross-examination of the witnesses. That finding is supported by the documents counsel and his paralegal prepared for trial. The trial court's finding that counsel "more than sufficiently cross-examined the witnesses at trial" also is not clearly erroneous. It is supported by the record from the trial itself. Counsel impeached DJ1's credibility by showing that she gave different accounts of the incident at different times. For example, she told the police that the sexual acts were preceded by a massage, but did not mention that fact during a CARE House interview or at trial. Counsel also elicited that DJ1 failed to mention to the police that defendant penetrated her with his fingers as she testified at trial. Further, counsel noted that, contrary to DJ1's trial testimony that defendant explained why he molested her almost immediately after the incident, she told the CARE House interviewer that defendant's explanation occurred several weeks later.

In addition, counsel undermined DJ1's credibility by showing that she was unclear about the details of what happened between the time defendant sat down and the time he sexually assaulted her. Counsel also showed that DJ1 had a possible motive to fabricate the incident because she was already sexually active with her boyfriend. For example, DJ1 testified that she disclosed the incident to JW because she thought she was pregnant, but she told the doctor that she missed her period in January, a month before the charged incident occurred. DJ1 also admitted that she used the incident to try to get her mother to allow her to have sex with her boyfriend.

Because counsel's cross-examination was calculated to effectively undermine DJ1's credibility, counsel's decision not to impeach her on all contradictory aspects of her prior statements, prior testimony, and trial testimony constituted reasonable trial strategy. *McFadden*, 159 Mich App at 800. Moreover, while counsel could have impeached DJ1 with other minor details, such as how defendant was dressed, whether she and defendant watched television, where defendant ejaculated, whether defendant moved her bra, and other points cited by appellate counsel, it was reasonable not to delve into some of these areas because doing so would have reinforced that some sexual activity did occur. Therefore, defendant has not shown that counsel's cross-examination of DJ1 was objectively unreasonable.

Defendant has likewise failed to show that counsel's cross-examination of JW was objectively unreasonable. Although counsel could have impeached JW with the prior inconsistent statements itemized in defendant's brief, it was reasonable for counsel not to bring up certain matters because the prior statements would have reinforced her testimony that defendant touched her with his penis while they were in the bathroom. It was reasonable for counsel not to impeach JW with her prior statement that she lied in family court. She claimed that her grandparents put her out of the house, but they claimed that she ran away from home. JW explained that she told the court that she ran away to protect her grandparents or her uncle and the court placed her in a semi-independent living facility. Evidence that JW agreed to placement outside her home to protect her relatives may have made her appear more sympathetic to the jury. In any event, it was reasonable strategy for counsel to impeach JW with DW's

testimony that JW had recanted and said defendant "didn't do it," and with defendant's testimony that JW later apologized to him. Evidence undermining the whole of JW's testimony may reasonably be deemed more compelling than piecemeal attacks on her general credibility through impeachment with prior inconsistent statements.

B. EVIDENCE OF THE CUSTODY DISPUTE

The trial court did not clearly err in finding that defendant neglected to tell defense counsel that his ex-wife, CC, had information about an alleged custody dispute between defendant and Warren. Counsel testified that defendant never told him that CC possessed any information that would make her a potential witness at trial. While defendant testified to the contrary, the trial court found defense counsel to be the more credible witness. This Court "will defer to the trial court's resolution of factual issues, especially where it involves the credibility of witnesses." *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). That alone is not dispositive of the issue, however, because counsel testified that he knew about CC, and that she and defendant had tried to get DW to agree to grant CC guardianship of SC. Such evidence showed that counsel knew that CC might have information about a custody matter even if defendant had not told him about it. Nevertheless, defendant fails to show that CC's testimony would have provided him with a substantial defense.

Defendant seems to imply that DJ1 falsely accused defendant of sexual abuse because her mother was involved in a custody dispute with defendant over SC. However, there was no evidence of a custody dispute that could have prompted a false accusation. The evidence at trial showed that defendant obtained custody of SC from DW in 2007, if not earlier. CC testified at the evidentiary hearing that she and defendant sought a guardianship in 2009 so that CC could enroll SC in school that fall. Even though DW refused to agree to a guardianship, the parties got along regarding SC's upbringing. DW was satisfied with the existing custody arrangement, even after defendant's alleged abuse of DJ1 was disclosed, and only took physical custody of SC because a police officer said that leaving her with defendant could result in the initiation of child protective proceedings. Defendant then filed a motion to regain custody of SC. Such evidence showed that the custody dispute arose after DJ1 disclosed the alleged abuse and thus could not have prompted the disclosure.

Even assuming DW may have harbored some ill will toward defendant because of the attempt to arrange a guardianship with CC, defendant had no reason to impeach DW with that fact. Indeed, she testified for the defense that DJ1 was known to not always be honest and that JW had recanted shortly after she accused defendant of sexually assaulting her. Moreover, there is no evidence that DW did anything to influence DJ1 to accuse defendant of sexual molestation. Nor was there any evidence that DJ1 was aware of the attempt to create a guardianship and resented defendant for it—much less that it could have motivated her to make a false accusation. Against this backdrop, defendant has not shown that CC's testimony about the failed guardianship would have provided a substantial defense such that the outcome of the trial would have been different had CC testified.

C. FORENSIC PSYCHOLOGY EXPERT

The record does not support a finding that the absence of expert testimony regarding "the dangers of taint and suggestibility" deprived defendant of a substantial defense. The theory supporting the need for such testimony appears to be either: (1) a child may be led to believe that she was a victim of sexual abuse through repeated questioning involving improper leading questions, and may thus report the suggested sexual abuse as fact during a forensic interview even though the proper interview protocol is followed; or (2) a child may be led to report that she was a victim of sexual abuse during a forensic interview if the interview protocol is not followed.

The evidence showed that DJ1 and JW were questioned about the alleged abuse by others before their forensic interviews. But there is nothing to show they were questioned in a manner that was likely to cause them to develop false memories. Further, because DJ1 and JW were teenagers rather than impressionable younger girls, they were not particularly susceptible to suggestibility. The evidence also showed that DJ1 and JW underwent forensic interviews. But there is nothing to show that the interview protocol was not followed, much less that the questioning so grossly violated the protocol that it could have caused the girls to give false statements. Thus, the expert testimony would have showed only a theoretical possibility of "taint and suggestibility," not that it actually occurred in this case. Accordingly, any expert testimony would not have significantly undermined the credibility of DJ1 and JW. It was not unreasonable for counsel to rely instead on other evidence, such as DJ1's conflicting prior statements and DW's and defendant's testimony, that called the girls' credibility into question.

D. JW'S FALSE ACCUSATIONS AGAINST OTHERS

Defendant does not offer any argument regarding this aspect of his claim of ineffective assistance of counsel. He claims that the trial court erred in ruling that the absent witnesses' testimony would not have been admissible at trial and contends that, because their testimony should have been found admissible, counsel was ineffective for failing to locate the witnesses and call them to testify.

Defendant fails to provide any explanation for why the omission of this testimony deprived him of a substantial defense. We note that the witnesses could have impeached JW's general credibility by showing that she had falsely accused them of sexually assaulting her when she had testified to the contrary. However, JW's credibility was already significantly impeached by DW's testimony that JW's account of being sexually assaulted by defendant was itself false, and by defendant's testimony that JW had later apologized to him. It was reasonable strategy to reject impeachment evidence that would only suggest that JW's testimony could be untrue in favor of evidence showing that JW's testimony was in fact untrue. In any event, defendant was not charged with any offense for the incident with JW; her testimony was offered only to bolster the testimony of DJ1 and DJ2. The jury could have disbelieved her testimony in its entirety and still found DJ1 to be a credible witness. Therefore, it does not appear that the failure to present the three witnesses deprived defendant of a substantial defense.

In light of our resolution of this issue, it is unnecessary to address defendant's claim that the trial court erred in ruling that the witnesses' testimony would have been inadmissible at trial.

II. APPOINTMENT OF AN EXPERT WITNESS

Defendant says that the trial court erred in denying his postjudgment motions for appointment of an expert at public expense. The trial court's decision whether to grant an indigent defendant's motion for appointment of an expert is reviewed for an abuse of discretion. *People v Carnicom*, 272 Mich App 614, 616; 727 NW2d 399 (2006). An abuse of discretion occurs when the court selects an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). Constitutional issues are reviewed de novo on appeal. *In re Parole of Hill*, 298 Mich App 404, 410; 827 NW2d 407 (2012).

An indigent defendant does not have a right to a court-appointed expert on demand. *Carnicom*, 272 Mich App at 617. Rather, the court may exercise its discretion to appoint an expert for an indigent defendant who is "about to be tried" for a criminal offense if the defendant demonstrates that "there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial[.]" MCL 775.15. Considerations of defendant's actual indigency aside, the fact remains that defendant had already proceeded to trial and requested an expert to assist only in his pursuit of a new trial. While defendant claims a due process right to expert assistance, he has not explained how the request for an expert under such circumstances implicates due process.

A criminal defendant has a due process right to a fair trial, *People v Rose*, 289 Mich App 499, 517; 808 NW2d 301 (2010), and to present a defense at that trial. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). Those rights may be violated if, due to indigency, the defendant is unable to procure an expert witness who could counter evidence offered by the prosecution's expert witness. See *People v Tanner*, 255 Mich App 369, 405-407; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437 (2003). It is unclear what due process rights are implicated by a motion for a new trial apart from the basic procedural protection of a meaningful opportunity to be heard by an impartial decision-maker. *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005); *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). A defendant has a meaningful opportunity to be heard when he is afforded an opportunity to present his case, and to respond to the evidence and arguments of the opposing party. Defendant did not need an expert witness to do that and does not argue otherwise. Rather, he sought appointment of an expert to establish a factual basis for one of his claims of ineffective assistance of counsel, so that he might prevail on his motion for a new trial. This far exceeds the scope of procedural due process. Therefore, the trial court did not abuse its discretion in denying defendant's post-conviction motions for appointment of an expert.

While defendant contends that the trial court's rulings also violated his equal protection rights, he fails to explain what official action treated him differently than another similarly situated person and why that action did not pass muster under the applicable standard of review. See *Shepherd Montessori Ctr Milan v Ann Arbor Twp*, 486 Mich 311, 318-319; 783 NW2d 695 (2010). A party cannot "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); see also *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). Accordingly, defendant has failed to establish a violation of his equal protection rights.

III. SENTENCING

Defendant's final claim on appeal is that the trial court erred in scoring offense variables 10, 11, and 13 of the sentencing guidelines. The trial court's factual findings are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts found by the trial court are adequate to justify the scoring of a particular variable is a question of statutory interpretation that is reviewed de novo on appeal. *People v Hardy,* 494 Mich 430, 438; 835 NW2d 340 (2013).

A. OV-10

OV-10 takes into account the exploitation of a vulnerable victim. MCL 777.40(1). Ten points are scored when the defendant exploited or abused one of the following: (1) a victim's physical or mental disability; (2) a victim's youth or agedness; (3) a domestic relationship; or (4) defendant's authority status. MCL 777.40(1)(b). The instructions define the term "exploit" as "manipulat[ing] a victim for selfish or unethical purposes," MCL 777.40(3)(b), and the term "vulnerability" as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). "Abuse of authority status" is defined to mean that "a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher." MCL 777.40(3)(d). They also state that the mere existence of a factor identified "in subsection (1) does not automatically equate with victim vulnerability." MCL 777.40(2). The Supreme Court has stated that points are to be assessed for OV-10 "only when it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation" due to one of the factors enumerated in § 40(1)(b) or (c) and the defendant exploited that vulnerability. *People v Cannon,* 481 Mich 152, 158-159; 749 NW2d 257 (2008).

The trial court found that DJ1's youth and her family relationship with defendant were factors to be considered. There is no dispute that DJ1was younger than defendant; she was 14 years old and defendant was 35. A domestic relationship is characterized by a familial or cohabiting relationship. *People v Jamison,* 292 Mich App 440, 447; 807 NW2d 427 (2011). Defendant and DJ1 arguably had a familial relationship in that defendant was a father figure to DJ1 during the time that defendant and DW were a couple, and DJ1 maintained a relationship with defendant because he was the father of her sister SC. The evidence also showed that DJ1 was susceptible to injury (sexual abuse) due to those characteristics and defendant exploited them. Defendant exploited the familial relationship by using it as a reason to have DJ1 come to his home alone. Once she was there, defendant was able to accomplish the sexual act because, due to DJ1's youth, she did not know how to protect herself. The facts found by the trial court are not clearly erroneous and support the 10-point score for OV-10.

B. OV-11

OV-11 takes into account criminal sexual penetration. MCL 777.41(1). Twenty-five points are scored when one criminal sexual penetration occurred. MCL 777.41(1)(b). The court is to score "all sexual penetrations of the victim . . . arising out of the sentencing offense," but is not to score points "for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777.41(2)(a) and (c). Where the defendant engages in multiple

penetrations during a single episode, the trial court is to score each penetration except the one forming the basis of the sentencing offense. *People v Cox*, 268 Mich App 440, 455-456; 709 NW2d 152 (2005); *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004); *People v Mutchie*, 251 Mich App 273, 280-281; 650 NW2d 733 (2002), aff'd on other grounds 468 Mich 50 (2003).

DJ1 testified that defendant penetrated her vagina with his fingers as well as with his penis during a single episode. While defendant contends that DJ1 lacks credibility because of her prior inconsistent statements, the trial court found her testimony to be "credible enough" to support a finding that a second penetration occurred during the incident. This Court will defer to the trial court's resolution of factual issues that depend on the credibility of witnesses, because of the trial court's superior ability to judge witness credibility. *People v Smelley*, 285 Mich App 314, 335; 775 NW2d 350 (2009), vacated in part on other grounds 485 Mich 1023 (2010). Therefore, the trial court did not clearly err in finding that a second penetration arose out of the sentencing offense, and that finding supports the 25-point score for OV-11.

C. OV-13

OV-13 takes into account a continuing pattern of criminal behavior. MCL 777.43(1). Twenty-five points are scored if the offense "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). "[A]ll crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). However, conduct scored under OV-11 cannot be counted unless organized crime or gang activity is involved. MCL 777.43(2)(c).

There is no dispute that the incident of digital penetration that was used to score OV-11 cannot be counted. The trial court found defendant had committed three or more crimes against a person, and based this finding on the two charges of which defendant was convicted and the two charges of which defendant was acquitted. It is well established that the scoring of the guidelines need not be consistent with the jury's verdict due to the differing burdens of proof. *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). Defendant contends that the two fourth-degree CSC charges involving DJ2 were not proven by even a preponderance of the evidence, because the evidence did not show that defendant touched DJ2 "with a sexual purpose." Defendant, however, fails to discuss the substance of DJ2's testimony or explain why it was insufficient to prove that he acted with a sexual purpose. Defendant has not shown that the trial court clearly erred in finding that a preponderance of the evidence established two crimes committed against DJ2. These crimes combined with the two crimes committed against DJ1 to support the 25-point score for OV 13.

D. BURDEN OF PROOF

Defendant argues that he has a right to have a jury determine that the facts used to support the trial court's scoring decision were proved beyond a reasonable doubt in accordance with *Alleyne v United States*, 133 S Ct 2151; ___ US ___; 186 L Ed 2d 314 (2013) and other related U.S. Supreme Court cases. *Alleyne* held that because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an "element"

of the crime that must be submitted to a jury. *Id*. at 2160-2162. Judicial finding of such facts, the court asserted, constitutes a violation of the accused's Sixth Amendment rights. *Id*.

Our Court recently ruled that *Allenye* does not apply to Michigan's indeterminate sentencing scheme, and the sentencing guidelines that effectuate it, because Michigan's indeterminate sentencing scheme involves a range of possible sentence time—not mandatory minimums. *People v Herron*, __ Mich App __; __ NW2d __ (2013) (Docket No. 309320, slip op at pp 6-7, December 12, 2013). Specifically, our Court noted that *Alleyne* distinguished:

> . . . judicial fact-finding to establish a mandatory minimum floor of a sentencing range from the traditional wide discretion accorded judges to establish a minimum sentence within a range authorized by law as determined by a jury verdict or a defendant's plea. We hold that judicial fact-finding to score Michigan's guidelines falls within the "'wide discretion"' accorded a sentencing judge "'in the sources and types of evidence used to assist [the judge] in determining the kind and extent of punishment to be imposed within limits fixed by law.'" *Alleyne*, 570 U.S. at ___ n 6; 133 S Ct at 2163 n 6, quoting *Williams v New York*, 337 U.S. 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). Michigan's sentencing guidelines are within the "broad sentencing discretion, informed by judicial factfinding, [which] does not violate the Sixth Amendment." *Alleyne*, 570 U.S. at ___; 133 S Ct at 2163. [*Id*. at p 7.]

The *Herron* court further stressed that the statutes at issue in the case did:

> . . . not provide for a *mandatory minimum* sentence on the basis of any judicial fact-finding. While judicial fact-finding in scoring the sentencing guidelines produces a recommended range for a minimum sentence of an indeterminate sentence, the maximum of which is set by law . . . it does not establish a *mandatory minimum*; therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the Sixth Amendment's right to a jury trial. *Alleyne*, 570 US at ___; 133 S Ct at 2163 n 6. [*Id*. at p 6 (emphasis original).]

As the prosecutor notes, this case is analogous to *Herron*. The statutes under which defendant was convicted (MCL 750.520b(1)(b)(*iii*) and MCL 750.520e(1)(a)) do not carry mandatory minimum sentences, and the scoring process did not create a mandatory minimum sentence on the basis of judicial fact-finding. Accordingly, we reject defendant's claim that the trial court's scoring of OV 10, 11, and 13 violated his Sixth Amendment rights.[1]

[1] Defendant's other jury-related claims, which cite, among other cases, *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) have been rejected by both this Court and our Supreme Court. See *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007); and *People v Bulger*, 291 Mich App 1, 7; 804 NW2d 341 (2010).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Stephen L. Borrello