STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2013
v	No. 311815 Wayne Circuit Court
JEREMY MATTHEW HANCOCK, Defendant-Appellant.	LC No. 11-012446-FC

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Defendant, Jeremy Matthew Hancock, appeals as of right his jury-trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and second-degree criminal sexual conduct (CSC II), MCL 750.520c. The trial court sentenced defendant to concurrent sentences of 25 to 26 years' imprisonment for the CSC I conviction and 10 to 15 years' imprisonment for the CSC II conviction. Evidence was presented at trial establishing that in the summer of 2011, defendant sexually assaulted a nine-year-old girl who was spending the night at the home of his girlfriend, where defendant was living at the time. Defendant raises three issues on appeal. Because we conclude that defendant was not deprived of the effective assistance of counsel, he was not entitled to a directed verdict with respect to the CSC II charge, and the twenty-five-year mandatory minimum sentence does not constitute cruel or unusual punishment, we affirm.

I

Defendant first contends that he was deprived of the effective assistance of counsel. To preserve a claim of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther*[1] hearing. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant failed to preserve his claims of ineffective assistance of counsel by doing so; therefore, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Johnson*, 293 Mich App 79, 90; 808

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

NW2d 815 (2011). We review a trial court's factual findings, if any, for clear error, and we review de novo any constitutional questions. *Id.*

To establish a claim of ineffective assistance of counsel, defendant must prove that "(1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). There is a strong presumption of effective assistance of counsel when it comes to matters of trial strategy because "many calculated risks may be necessary in order to win difficult cases." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defendant first contends that his trial counsel was constitutionally ineffective because he failed to present key evidence regarding past allegations made by the victim against a third party. It is well established that "[d]ecisions regarding whether to call or question witnesses are presumed to be matters of trial strategy." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Defense counsel's decision not to question the victim about a previously made sexual-abuse allegation against another person is presumed to be a trial strategy, and this Court cannot substitute its judgment for that of defense counsel in matters of trial strategy. See *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

The record reveals that defense counsel was aware of a prior sexual-abuse allegation made by the victim against another person because he inquired about the allegation during the preliminary examination. During the preliminary examination, defense counsel asked the victim whether she had previously made similar allegations of sexual abuse. The victim answered, "No." Subsequently, defense counsel asked the girlfriend of the victim's father whether the victim had ever made allegations of anyone touching her. She responded, "Yes[,]" and she began to testify about the circumstances surrounding the allegation. An objection was raised before she could provide any details about the allegations. Although defendant claims in his brief on appeal that the alleged prior allegation was false, the record does not indicate whether the allegation was true or false. Defense counsel, presumably aware of the circumstances surrounding the allegation, elected not to inject the matter into the trial. Accordingly, this Court cannot conclude that defense counsel's failure to question the victim about a prior sexual-abuse allegation she made fell below an objective standard of reasonableness. Further, defendant has not established that there is a reasonable probability that the result of the proceedings would have been different had defense counsel introduced the issue at trial. See *Lockett*, 295 Mich App at 187.

Defendant also claims that his trial counsel was constitutionally ineffective because he failed to figure out a way to introduce statements made by the victim's father about the incident that were contained in the police report. Defendant did not provide this Court with a copy of the police report; thus, we are unable to determine how the statements in the report would have assisted defendant in his defense. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) ("[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel . . . ."). Moreover, police reports are generally hearsay and inadmissible if used to prove the truth of their contents. See *People v Herndon*, 246 Mich App 371, 410-411; 633 NW2d 376 (2001). In fact, the alleged statements in the police report constitute hearsay within hearsay because the victim's father was not present at the time of the offense and, thus,

must have received the information from someone else. Accordingly, defendant has failed to establish that defense counsel's conduct in failing to offer inadmissible hearsay evidence was objectively unreasonable or that, but for defense counsel's conduct, there is a reasonable probability that the result would have been different.[2] See *Lockett*, 295 Mich App at 187.

II

Defendant also claims that the trial court erred by denying his motion for a directed verdict because there was insufficient evidence for the jury to convict him of CSC II. "This Court reviews de novo a trial court's decision on a motion for directed verdict to determine whether the prosecutor's evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt." *People v Martin*, 271 Mich App 280, 319-320; 721 NW2d 815 (2006).

The elements of CSC II are (1) the defendant engaged in sexual contact with another person and (2) that other person is under 13 years of age. *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997), citing MCL 750.520c(1)(a). "Sexual contact" is the

> intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:
>
> *(i)* Revenge.
>
> *(ii)* To inflict humiliation.
>
> *(iii)* Out of anger. [MCL 750.520a(q).]

"'Intimate parts' includes the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(e).

Defendant denies that there was evidence that he engaged in any "sexual contact" for the jury to convict him of CSC II. The record, however, reveals that sufficient evidence existed for a rational jury to conclude beyond a reasonable doubt that defendant engaged in sexual contact with the victim when he placed his hand inside the front of her underwear. At trial, the victim

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[2] We note that defendant suggests various options for how defense counsel could have sought to introduce the father's alleged statements contained in the police report, including filing a motion in limine, calling the responding officer, or arguing that the information was not being offered for the truth of the matter asserted; however, defendant has failed to address the merits or viability of his contentions and, therefore, has abandoned this claim. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

testified that, after defendant inserted his finger in her vagina, he went to smoke a cigarette in the kitchen. She fell asleep but awoke when she felt defendant's hand inside her underwear. The victim testified that she wore purple sweatpants with an elastic band and a pair of purple underwear underneath the sweatpants. According to the victim, defendant's hand was "halfway" inside the front of her underwear. This evidence, when viewed in a light most favorable to the prosecution, was sufficient for a reasonable jury to find beyond a reasonable doubt that defendant touched the victim's intimate parts or the clothing covering the immediate area of the victim's intimate parts.

Accordingly, the trial court did not err by denying the motion for directed verdict.

III

Lastly, defendant argues that his sentence constitutes cruel or unusual punishment because the facts and circumstances of his case do not sufficiently justify a mandatory 25-year minimum sentence. We review issues of constitutional law de novo. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011).

MCL 750.520b(2)(b) provides that a conviction for CSC I is punishable by "imprisonment for life or any term of years, but not less than 25 years" if the offense is committed by "an individual 17 years of age or older against an individual less than 13 years of age." In addition, the Michigan Constitution prohibits cruel or unusual punishment, while the United States Constitution prohibits cruel and unusual punishment. *Benton*, 294 Mich App at 204. Accordingly, the federal constitution provides narrower protection than the Michigan constitution; thus, "[i]f a punishment 'passes muster under the state constitution, then it necessarily passes muster under the federal constitution.'" *Id.*, quoting *People v Nunez*, 242 Mich App 610, 618-619 n 2; 619 NW2d 550 (2000). To determine the constitutionality of a penalty, this Court applies "a three-pronged test that considers (1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states." *Id.*

In *Benton*, this Court determined that a mandatory 25-year minimum sentence for a defendant convicted of CSC I does not violate the federal and state constitutions. *Id*. at 204-207. The defendant in *Benton* argued that the mandatory 25-year minimum sentence constituted cruel and unusual punishment because it imposed an excessively long term of imprisonment and precluded judicial discretion to consider mitigating factors or other particular circumstances of the offense and the offender; however, the *Benton* Court disagreed. *Id*.

The Court concluded that CSC I is a serious offense and that the public policy underlying the statute is to protect children below a specific age from sexual contact because of their immaturity and innocence. *Id*. at 205. The *Benton* Court also concluded that the mandatory 25-year minimum sentence is not unduly harsh when compared to penalties for other offenses under Michigan law. *Id*. at 206. It reasoned:

> We are not persuaded that these comparisons render the 25-year minimum sentence disproportionate to the offense. The perpetration of sexual activity by an

> adult with a preteen victim is an offense that violates deeply ingrained social values of protecting children from sexual exploitation. Even when there is no palpable physical injury or overtly coercive act, sexual abuse of children causes substantial long-term psychological effects, with implications of far-reaching social consequences. The unique ramifications of sexual offenses against a child preclude a purely qualitative comparison of sentences for other offenses to assess whether the mandatory 25-year minimum sentence is unduly harsh. [*Id*.]

The Court resolved that a comparison of Michigan's penalty and penalties imposed for the same offense in other states does not support an attack on the constitutionality of Michigan's sentencing statute. *Id.* at 206-207. It noted that "several other states have laws that also impose a mandatory 25-year minimum sentence for an adult offender's sexual offense against a preteen victim, regardless of the presence of aggravating factors such as force or violence." *Id.* at 206.

Defendant contends that there are several mitigating factors that the trial court should have considered before imposing the mandatory 25-year minimum sentence. The *Benton* Court considered and rejected similar constitutional arguments; thus, defendant's attack on the constitutionality of MCL 750.520b(2)(b) is without merit. Defendant was convicted of CSC I and CSC II. These offenses are serious, and, as noted in *Benton*, the attempt by defendant to minimize the severity of these offenses conflicts with the statute's public policy to protect children from sexual contact. See *id.* at 205-206. Neither the fact that defendant penetrated the nine-year-old victim with his finger instead of his penis nor his lack of any prior criminal-sexual-conduct history mitigates his offense. We emphasize that the evidence showed that defendant penetrated a nine-year-old with his finger while she was sleeping; the victim was a young, vulnerable child whom defendant exploited with his conduct; this is precisely the type of conduct from which the statute seeks to protect children. See *id*. Defendant's sentence for CSC I is proportionate and does not constitute cruel or unusual punishment. Moreover, his constitutional claim lacks merit because both the doctrine of stare decisis and the Michigan Rules of Court require this Court to adhere to *Benton*'s resolution of the issue. See MCR 7.215(C)(2), (J)(1); see also *People v Waclawski*, 286 Mich App 634, 677; 780 NW2d 321 (2009).

Affirmed.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Jane M. Beckering