

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNESTO BENITEZ,

Defendant-Appellant.

UNPUBLISHED

May 17, 1996

No. 161357

LC No. 88-005010

Before: Jansen, P.J., and Hoekstra and D. Langford-Morris,* JJ.

PER CURIAM.

Following a jury trial in the Detroit Recorder's Court, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was originally sentenced to 75 to 150 years' imprisonment for the convictions of first-degree criminal sexual conduct, 2 to 4 years for the conviction of felonious assault, and the mandatory two years for felony-firearm. Defendant appealed to this Court. His convictions were affirmed, but this Court remanded for resentencing, finding that his sentences for first-degree criminal sexual conduct violated *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989). *People v Benitez*, unpublished opinion per curiam of the Court of Appeals, issued 3/28/91 (Docket No. 115210). Our Supreme Court, in lieu of denying leave to appeal, remanded the case to the trial court to conduct an evidentiary hearing regarding defendant's ineffective assistance of counsel claim. *People v Benitez*, 439 Mich 977 (1992).

On remand, the trial court conducted an evidentiary hearing concerning defendant's ineffective assistance of counsel claim. The trial court denied defendant's motion for a new trial based on this claim. The trial court then resentenced defendant to thirty to fifty years' imprisonment for one count of first-degree criminal sexual conduct (penetration), and life imprisonment for the second count of first-degree criminal sexual conduct (fellatio). Defendant again appealed to this Court. After filing his claim

* Circuit judge, sitting on the Court of Appeals by assignment.

of appeal, defendant filed a motion to remand for resentencing, which this Court granted in an order dated May 27, 1994. The trial court denied defendant's motion for resentencing shortly thereafter.

In this appeal, defendant raises three issues. He claims that he was denied the effective assistance of counsel at trial, that PRV 2 was incorrectly scored, and that OV 1 was incorrectly scored. We affirm defendant's convictions, but remand for resentencing on the convictions of first-degree criminal sexual conduct. The prosecutor concedes error regarding the scoring of PRV 2.

With respect to defendant's ineffective assistance of counsel claim, we do not find that defendant was denied the effective assistance of counsel at trial. In order to prove a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Defendant claims that counsel was ineffective for failing to challenge the complainant's credibility and that counsel failed to prepare for trial.

Defense counsel did not challenge the complainant's credibility on cross-examination. Rather, counsel presented evidence from the complainant's foster mother regarding the complainant performing oral sex on her son. Counsel believed that this testimony was more damaging to the complainant's credibility than by directly attacking her credibility on cross-examination. We cannot agree with the trial court that counsel's decision to not impeach the complainant on cross-examination was sound trial strategy because credibility was the key issue in this case, as conceded by counsel at the evidentiary hearing. However, we find that defendant was not prejudiced by counsel's failure to impeach the complainant because there is no reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Pickens, supra*, p 314. The complainant's credibility was attacked indirectly in this case. Further, there was other testimony that defendant sexually assaulted the complainant. Therefore, there is not a probability sufficient to undermine our confidence in the outcome based on counsel's failure to impeach the complainant's credibility on cross-examination. *Id.*

With respect to defendant's claim that defense counsel was unprepared for trial, defendant has failed to show that he was prejudiced by any of counsel's alleged failures to prepare. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Further, much of counsel's decisions appear to have been sound trial strategy, as stated by the trial court. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Accordingly, we do not find that defendant was prejudiced by any of counsel's alleged failures at trial.

Defendant next argues that the trial court erred in scoring ten points for PRV 2 (prior low severity convictions). Ten points are to be scored where there is one prior low severity conviction. The prosecutor concedes error on this issue. The prosecutor agrees that the instant offenses occurred in 1986, while the actions upon which the ten points were scored occurred in 1988. PRV 2 should be scored where there is a *prior* felony conviction. Here, the felony conviction occurred after the instant offenses, accordingly, the trial court erred in scoring ten points for PRV 2.

In reducing PRV 2 to zero points, defendant's sentencing guidelines range is reduced to ten to twenty-five years. Defendant's sentences of thirty to fifty years and life are outside of the guidelines range. Accordingly, defendant is entitled to resentencing in light of the corrected guidelines range.

Defendant also contends that the trial court erred in scoring fifteen points for OV 1 (aggravated use of weapon). Fifteen points are to be scored where a firearm is pointed toward the victim or touching with another weapon. There was record evidence to support this score. The trial transcript reveals that defendant forcefully undressed the complainant and penetrated her vagina. He then forced her to perform oral sex on him. Defendant then instructed the complainant to wash herself. She complied and after finishing, she proceeded up the stairs. Defendant met her with a handgun and pointed it between her eyes. He threatened to kill her if she told anyone. Under these circumstances, the trial court properly scored fifteen points for OV 1 because a firearm was pointed toward the victim. There is nothing in the instructions requiring that the firearm be pointed toward the victim during the immediate commission of the offense for it to be scored, and, in fact, the gun was pointed toward the victim during the entire course of the rapes and assault. Accordingly, we find that OV 1 was properly scored.

Defendant's convictions are affirmed. We remand for resentencing in accordance with this opinion. Jurisdiction is not retained.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Denise Langford-Morris