STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENTE ALVE MARTINEZ,

Defendant-Appellant.

UNPUBLISHED
June 4, 1996

No. 122948, 183081
LC No. 89-030862

Before: Sawyer, P.J., and Griffin and M. G. Harrison,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of criminal sexual conduct (CSC) in the first degree, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (sexual penetration of a child under thirteen). Defendant was sentenced to twenty-two to fifty years' imprisonment. Defendant appeals as of right. We affirm.

I

On appeal, defendant first contends that he was denied the effective assistance of counsel. We disagree. After a thorough review of the evidentiary hearing on this issue, we conclude that defendant has neither sustained his burden of proving that counsel made a serious error that affected the result of trial nor overcome the presumption that counsel's actions were strategic. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 666, 687-688; 521 NW2d 557 (1994); *People v Northrop*, 213 Mich App 494, 497; 541 NW2d 275 (1995); *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Therefore, we agree with the trial court that defendant received the effective assistance of counsel.

II

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

Next, defendant argues that he was denied a fair trial because his silence was used as substantive evidence when an investigating officer testified that he had not spoken with defendant about the involved allegations. However, defendant failed to object to the admission of this evidence at trial. Therefore, the issue is unpreserved. MRE 103; *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994); *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995). Because we are not persuaded that the involved error, if any, was decisive to the outcome of the case, we conclude that defendant has not established the prejudice necessary to avoid forfeiture of this unpreserved issue. *Grant, supra* at 547, 551, 553. Nevertheless, testimony that an investigating officer never got a chance to speak to defendant can hardly be interpreted as a showing that defendant remained silent in the face of accusation. Compare *Doyle v Ohio*, 426 US 610, 617; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Bigge*, 288 Mich 417; 285 NW2d 5 (1939).

III

Defendant's third argument is that the trial court reversibly erred in failing to properly instruct the jury as to defendant's sole defense. However, defense counsel did not request any such instruction, did not object to the jury instructions, and actually stipulated on the record that he did not want the trial court to instruct the jury on defendant's theory of the case. As the record clearly shows, defense counsel wanted to articulate defendant's theory by himself. Under these circumstances, we consider the issue waived. See MCR 2.514(C); MCR 2.516(C); see also *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). We will not allow a party to harbor error to use as an appellate parachute. *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).

IV

Defendant further contends that resentencing is required. In support of this proposition, defendant claims that the trial court incorrectly calculated his sentencing score, refused to hear and rule on defense counsel's objections at sentencing, and failed to articulate its reasons for imposing a sentence that violates the principle of proportionality and constitutes cruel and unusual punishment. We disagree.

Appellate review of guidelines calculations is very limited. *People v Hernandez*, 443 Mich 1, 16-17; 503 NW2d 629 (1993); *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992). A particular sentencing score will be upheld on appeal so long as there is some evidence to uphold the score. *Hernandez, supra* at 16; *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994). We find sufficient evidence to support defendant's sentencing score. First, a twenty-five point score for OV 2 is consistent with the testimony of an examining physician that the victim suffered damage to her hymen. Second, a five-point score for OV 5 is supported by the fact that defendant has several misdemeanor convictions. Therefore, even if we were to accept defendant's allegation that his California conviction was constitutionally invalid, defendant's three misdemeanor convictions in Michigan provide sufficient evidence to support the five-point score. Further, we find no merit in defendant's unsupported claim that a trial court must automatically disregard information at resentencing

because, at the original sentencing, the court said that it would not consider the information. Third, we find that the twenty-five point score for OV 12 is supported by record evidence. Indeed, not only did the victim testify at trial that defendant "touched" her vaginal area more than once with his penis and finger, but the victim told others that defendant molested her on several occasions. Furthermore, the examining physician testified that the physical evidence was consistent with a conclusion that the victim had been subject to repeated penetrations. Fourth, a five-point score for OV 13 is supported by a doctor's testimony that defendant's conduct caused the victim to require and participate in psychological counseling.

With regard to defendant's claim that the trial court erred in refusing defense counsel the opportunity to comment on the misconduct tickets defendant allegedly received in prison, we regard the error, if any, to be harmless. In sufficiently articulating its reasons for imposing sentence, see *In re Jenkins*, 438 Mich 364, 375; 475 NW2d 279 (1991); *People v Poppa*, 193 Mich App 184, 188; 483 NW2d 667 (1992), the trial court stated that defendant's prison sentence is based on the seriousness of his crime, not on the misconduct he committed while imprisoned. Finally, we note that defendant's sentence is within the sentencing guidelines' range. Therefore, his sentence is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Cutchall*, 200 Mich App 396, 410; 504 NW2d 666 (1993). Defendant has failed to rebut the presumption of proportionality. Indeed, defendant has a long criminal history, a substance abuse problem, and was convicted of raping his six-year-old daughter. Based on our conclusion that defendant's sentence is proportionate to the offense and the offender, we find that defendant's sentence does not constitute cruel and unusual punishment. See *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

V

Next, defendant claims that the trial court erred reversibly in denying the prosecutor's motion to dismiss a juror for cause. Defendant also claims that a different juror should have been dismissed on the ground that she filed a criminal complaint against defendant in an unrelated matter. However, defendant did not object to or challenge either juror and defense counsel expressly stated that he was "satisfied" with the jury panel. Accordingly, defendant has waived the issue whether the jurors should have been excused for cause. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994); see also *People v Buck*, 197 Mich App 404, 423; 496 NW2d 321 (1992). Moreover, the record shows that defendant had not used all of his peremptory challenges. Thus, defendant is unable to meet the standard for showing that he is entitled to a new trial. See *People v Lee*, 212 Mich App 228, 248; 537 NW2d 233 (1995). Additionally, we note that defendant's claim that one witness had filed a complaint against defendant is totally unsupported by the record. See *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992) (ex parte affidavits and other documentary evidence not presented to the trial court will not be considered); *In re Norris Estate*, 151 Mich App 502, 507; 391 NW2d 391 (1986) (same); see also *Harkins v Dep't of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994) (issues not developed below cannot be considered on appeal).

VI

Defendant's sixth contention is that his constitutional rights were violated because the trial court failed to make an express factual finding on the issue whether the victim was sufficiently intelligent to testify and possessed a sense of obligation to testify truthfully. However, this issue is not preserved for review because defendant failed to raise the issue below. *People v Hyland*, 212 Mich App 701, 704; 538 NW2d 465 (1995). Nevertheless, defendant's argument has no merit because the record reflects that the trial court did examine the victim in order to determine whether she could testify truthfully. After a thorough review, we find that the trial court's examination was sufficiently thorough and that the trial court did not abuse its discretion in permitting the child witness to testify. See MCL 600.2163; MSA 27A.2163; *People v Coddington,* 188 Mich App 584, 597; 470 NW2d 478 (1991).

VII

Finally, defendant contends that the trial court abused its discretion in denying defendant's motion for a new trial on the ground that the victim recanted her sworn testimony. We disagree. After a full hearing, the trial court concluded that the victim's recantation was incredulous. In reaching this conclusion, the trial court reasoned that the victim's recantation contradicts her prior testimony, defendant's confession, and the physical evidence admitted at trial. Further, the trial court noted that the victim's recantation was unconvincing and that she was more credible at trial. Cf. *People v Smallwood*, 306 Mich 49, 55; 10 NW2d 303 (1943). After thoroughly reviewing the record, we are not persuaded that the trial court clearly erred in ruling that the recantation was not credible. Therefore, we are not persuaded that the trial court abused its discretion in denying defendant's motion for a new trial. See *Canter, supra* at 560.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael G. Harrison