

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL ANTHONY BURT,

Defendant-Appellant.

UNPUBLISHED

June 21, 1996

No. 178844

LC No. 94-006908-FC

Before: Marilyn Kelly, P.J., and Neff and J. Stempien,* JJ.

PER CURIAM.

Defendant appeals, as of right, his jury convictions for one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant was sentenced to concurrent prison terms of eight to fifteen years on each count. We affirm.

Defendant first contends that the trial court violated MRE 404(b) by admitting evidence of prior bad acts committed by defendant. Specifically, he contends that the evidence was more prejudicial than probative. The decision to admit or exclude evidence is within the trial court's discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). While evidence of other crimes is not admissible to prove the character of the person, such evidence is admissible for other purposes, such as proof of opportunity. MRE 404(b); *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993). The trial court determined that the evidence was admissible to show opportunity. The court also balanced the probative value of the evidence against its prejudicial effect and found it to be more probative than prejudicial. Finally, the court issued a cautionary jury instruction regarding the evidence wherein it informed the jury that the evidence was admissible only for a limited purpose. Because the evidence was admitted for a proper purpose, was more probative than prejudicial, and a cautionary instruction was issued, we find that the trial court did not abuse its discretion in admitting the evidence. *McAlister, supra*, 505.

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

Defendant next contends that the trial court erred in allowing the victim's mother to testify to statements the victim made to the mother regarding this case because the statements were not spontaneous. Because the record shows that the victim voluntarily and spontaneously named defendant as her abuser, we find that the trial court did not abuse its discretion in admitting the testimony. *Id.*

Defendant next claims that he was deprived of the effective assistance of counsel due to trial counsel's failure to object to the prosecutor's elicitation of hearsay testimony. Specifically, he contends that error occurred when a police officer was permitted to testify that the victim had told him that defendant had sexually molested her. To show ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* We conclude that the testimony was elicited for the nonhearsay purpose of demonstrating why the police began their investigation. In any event, we find that defendant failed to show that he was prejudiced by the admission of the complained-of testimony given that the victim and her mother both testified that defendant was the one who assaulted the victim. The officer's testimony was merely cumulative to other evidence adduced at trial and, therefore, any error in its admission was harmless. *Id.*; *Heyler v Dixon*, 160 Mich App 130, 139-140; 408 NW2d 121 (1987).

Defendant also argues that he was deprived of a fair trial by the prosecutor's improper closing argument to the jury. Because defendant failed to object to the alleged error, our review is foreclosed unless the misconduct was so egregious that no curative instruction could have removed the prejudice. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). On our review of the record in this case, we conclude that any error could have been cured by an instruction. Accordingly, reversal is not required. In addition, we conclude that defendant has failed to demonstrate that his counsel rendered ineffective assistance by failing to object to these statements. The statements were brief and surrounded by otherwise proper statements. Thus, we conclude that defendant was not prejudiced by the failure to object, and that his counsel's refusal to object could be considered trial strategy.

Defendant next contends that the trial court erred in assessing five points under OV 13 of the sentencing guidelines. OV 13 provides that five points may be assessed where the defendant's conduct caused serious psychological injury to the victim necessitating professional treatment. Michigan Sentencing Guidelines (2d ed, 1988), p 45. Appellate review of guidelines calculations is very limited, and this Court will uphold scoring decisions for which there is any supporting evidence. *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992). Because the record shows that the victim suffered emotional problems as a result of defendant's conduct and that she has received counseling for these problems, we uphold the court's scoring decision. For these same reasons, we decline to address defendant's contention that he was deprived of the effective assistance of counsel due by his trial counsel's failure to object to the assessed score.

Defendant next contends that the trial court abused its discretion in sentencing him to an eight to fifteen year term of imprisonment. Specifically, he contends that the court failed to take into consideration his lack of prior felony convictions. A given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence within the guidelines range is presumptively proportionate and the defendant must present some unusual circumstance to overcome this presumption of proportionality. *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995).

Here, the sentencing guidelines range was two to eight years of imprisonment and defendant received an eight to fifteen year term of imprisonment, which is within the guidelines range and, thus, presumptively proportionate. *Id.* Defendant has not presented any unusual circumstances to overcome this presumption. While defendant argues that his sentence is disproportionate because of his lack of a felony record, the record shows that defendant does have a prior juvenile CSC-IV conviction. Further, defendant's lack of prior felony convictions was accounted for in scoring the guidelines. Zero points were scored for PRV1 (prior high severity felony convictions) and for PRV2 (prior low severity felony convictions). In addition, the record shows that defendant's conduct caused psychological harm to the victim. Given defendant's failure to overcome the presumption of proportionality and considering the circumstances surrounding the offense and offender, we find that defendant's sentence is proportionate. *Cotton, supra*, 209 Mich 85. Therefore, the trial court did not abuse its discretion in sentencing defendant to concurrent prison terms of eight to fifteen years. *Milbourn, supra*.

Defendant's final contention of error is that the trial court erred in considering good time credits in fashioning defendant's sentence. See *People v Fleming*, 428 Mich 408; 410 NW2d 266 (1987). Our examination of the sentencing transcript leads us to the conclusion that the court did not consider the good time credits when fashioning defendant's sentence. Rather, after sentencing defendant, he merely stated that he did not want the Department of Corrections to afford defendant the credits. The Court noted, however, that the DOC was not required to follow his wish. Thus, we find no error in this aspect of defendant's sentence.

Affirmed.

/s/ Marilyn Kelly

/s/ Janet T. Neff

/s/ Jeanne Stempien