STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY LEE REYNOLDS,

Defendant-Appellant.

UNPUBLISHED
October 18, 1996

No. 177731
LC No. 94-827-FC

Before: White, P.J., and Sawyer, and Pajtas,* JJ.

PER CURIAM.

Defendant was charged with one count of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and with being an habitual offender (third), MCL 769.11; MSA 28.1083. A jury found defendant guilty as charged of CSC-I. Defendant then pleaded guilty to the habitual charge. He was sentenced to thirty to sixty years and now appeals of right. We remand.

I

Defendant was charged with inserting his penis in the mouth of Vonda Roy Cobb, Jr. ("Bud"), a four-year-old mentally impaired boy.

Shelly Mazigian, Bud's guardian, testified that she had cared for Bud and his sister Rhonda since Bud was three months old and that she hoped to adopt the children. Mazigian testified that Bud attends a special education program at Morton School in Benton Harbor and that his teacher is Denise Struble.

Mazigian testified that she worked at a day care center for children of migrant workers, that during the fall of 1992 [from August to October], she took Bud to Diana Stack's home for baby-sitting, that Stack cared for Bud from 6:30 a.m. to 8:30 a.m., when Bud was picked up for his special education classes, and from approximately 12:00 noon until 4:00, when Mazigian or her husband would pick Bud up. According to Mazigian, defendant, Stack's boyfriend, was often at Stack's house during these times. Mazigian testified that after approximately one month, the children complained that they did

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

not wish to go to Stack's house; however, Mazigian continued to take them there because Mazigian could not find another baby-sitter.

Mazigian further testified that during the month of June 1993, Bud and Rhonda returned to the Stack's home for daycare from 6:30 a.m. to 4:00 p.m., Monday through Friday. Mazigian testified that defendant lived with Stack during this time, and that defendant's son, and other children were cared for by Stack. Mazigian testified that she often saw defendant at Stack's house in the morning and again in the afternoon, except when defendant was working, which was not often. Mazigian testified that she stopped taking Bud and Rhonda to Stack's house in June 1993 because they would cry and say that they did not want to go there.

Mazigian testified that in February 1994, Bud told Mazigian that something had happened between him and defendant. Mazigian notified the police, and an investigation ensued.

In preparation for Bud's testimony, the prosecution presented the testimony of Denise Struble, Bud's special education teacher. Struble testified that as a result of Bud's mental impairment, his articulation is poor and he leaves out parts of speech. Nonetheless, Struble testified, she had worked with Bud for three years and understood ninety percent of what he. Struble testified that Bud had difficulty understanding abstract concepts, but that if he experienced something, he would be able to understand and remember it. Struble further testified that Bud knew the difference between the truth and a lie, and understood an obligation to tell the truth.

The court, the prosecutor and defense counsel all agreed that Struble would be permitted to as a facilitator/interpreter in the event Bud's speech was not understandable.

Outside the presence of the jury, the court then conducted an inquiry into Bud's competency to testify pursuant to MCL 600.2163; MSA 27A.2163. At the conclusion of the inquiry, the court announced its satisfaction that Bud has sufficient intelligence and sense of obligation to tell the truth to be competent to testify. Both counsel then stated that they were satisfied.

Bud testified that when his mom [Mazigian] would work, he would go to Stack's house, and that defendant was also there. Bud testified that when he and defendant were alone in Stack's kitchen, when the other children were outside, defendant pulled his pants down and put his "pee-pee" in Bud's mouth. Bud indicated that he then sucked on defendant's penis. Bud did not remember what time of the year this happened, but Rhonda was in school at the time. Bud testified that he did not tell Stack what defendant had done, but that he did tell Mazigian.

Paul Toliver of the Berrien County Sheriff's Department testified that he was dispatched to Bud's home on February 17, 1994. Toliver testified that he spoke with defendant regarding Bud's allegations, and defendant denied doing anything to Bud. Defendant gave a written statement in which he stated that Rhonda and Bud did not like him because he made them "mind," and suggested that their dislike for him might explain why Bud would make such an accusation.

Detective JoAnn Danneffel testified that after further investigation, she placed defendant under arrest and advised him of his *Miranda* rights. Danneffel testified that after she read defendant a portion of Bud's statement, defendant admitted that it was true. Specifically, he stated that one day in the summer of 1992 Stack and the other children were outside and Bud was disciplined and ordered to go into Stack's house, where defendant was alone. Defendant admitted to Danneffel that he put his penis in Bud's mouth. Defendant declined to make a written statement. Danneffel testified that defendant telephoned his brother and advised that he had already confessed and that he "wasn't going to fight it."

Defendant testified in his own behalf, and repeatedly denied the accusation. Defendant testified that in the fall of 1992 he was working two jobs, which prevented him from being at Stack's home from 9:00 p.m. until 4:45 p.m. the next day. Defendant testified that he was not involved in Stack's baby-sitting business, and that by the time he got home, all the children were gone. Defendant testified that because he and Stack were fighting in June 1993, he did not live with Stack during that month. Defendant also denied confessing to Detective Danneffel.

Stack testified that Bud was at her house for approximately thirty to forty-five minutes before he was picked up for school, that she did not sit for Bud in the afternoon, that defendant worked two jobs in the fall of 1992, and that Bud and defendant never saw each other. Stack testified that in June 1993, defendant did not live with her and she did not sit for Bud. Stack testified that defendant was not involved with the children.

Kerri Tennison, a friend of Stack's, testified that she saw Stack every few days or so, that defendant was not around the house much in June, 1993, and that defendant and Stack were fighting a lot. She did not recall Bud being at the house in the afternoon.

Defendant's brother and sister-in-law, William and Teresa Reynolds, corroborated defendant's claim that he and Stack were fighting in June 1993. William Reynolds also testified that when defendant called him from the sheriff's department after his arrest, defendant told him that "they" (referring to a detective) were trying to force him to confess, not that he already had confessed. Reynolds also testified that during August through October, 1992, and June 1993, he saw defendant almost every afternoon, between 3:00 p.m. and 5:00 p.m., when defendant was riding his bike to and from work. Teresa Reynolds testified that in June, 1993, Stack was at the Reynolds house ninety-five percent of the time, that she was babysitting for Justin and Jessica, that to Reynolds' knowledge she was not sitting for Bud, and that she never brought Bud with her to Reynolds' house.

II

Defendant first asserts that the court abused its discretion in not ordering a forensic examination pursuant to MCL 330.2020; MSA 14.800(1020) (competency) and MCL 768.20(a); MSA 28.1043 (sanity) after requested by defense counsel.. We agree as to MCL 768.20a.

Defendant filed a "petition for forensic exam for sanity," stating that he suffered a closed head injury in 1984 that left him with mental problems, memory problems and personality disorders, and that it is his belief that as a result of mental illness he lacks a substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. Defendant requested that he be referred for an evaluation at the forensic psychiatric center, and that he be confined not more than sixty days as provided by statute.

Defendant's request comports with the requirements of MCL 768.20a; MSA 28.1043(1), which provides, in relevant part:

> (1) If a defendant in a felony case proposes to offer in his or her defense testimony to establish his or her insanity at the time of an alleged offense, the defendant shall file and serve upon the court and the prosecuting attorney a notice in writing of his or her intention to assert the defense of insanity not less than 30 days before the date set for the trial of the case, or at such other time as the court directs.
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> (2) Upon receipt of a notice of an intention to assert the defense of insanity, a court shall order the defendant to undergo an examination relating to his or her claim of insanity by personnel of the center for forensic psychiatry or by other qualified personnel, as applicable, for a period not to exceed 60 days from the date of the order. . . .

At a hearing held on April 22, 1994, defense counsel stated that he had filed a motion requesting a forensic examination under MCL 330.2020 and MCL 768.20(a), requesting an examination regarding competency and sanity. The prosecutor advised the court that she had no objection to defendant's request. Under questioning by the court, defense counsel then clarified that he was not having a problem communicating with defendant, but that since there was going to be an examination for sanity, a competency exam should be done as well "as a prophylactic measure." The court then announced that it was concerned about inappropriate referrals to the forensic psychiatric center and did not want to send "somebody over for something that's unneccessary." The court stated that it would take defendant's petition under advisement and "ask our staff psychologist, Dr. Mauro, to have a chat with Mr. Reynolds and perhaps get a little more insight into the nature of his alleged problem." The court expressed concern regarding whether defendant's condition would present a valid defense to a general intent crime and stated that "depending on what Dr. Mauro determines is the nature of his problem, if he has a problem, is going to be the determining factor on whether or not it's appropriate to send him over to the forensic center for an evaluation."

On May 6, 1994, a case conference was held at which defendant confirmed that he had met with Dr. Mauro the previous day. The following colloquy then occurred:

> THE COURT: Okay. And I have received a report from him, as I believe have counsel. And it appears that Dr. Mauro at least feels that Mr. Reynolds does not have any pathology that would either interfere with his ability to participate in the trial

process, that is competency, or that would provide the basis of a defense by way of diminished capacity or anything of that nature, because that is not really an issue in a case such as this which is not a specific intent crime.

Mr. White is here today again, of course, with Mr. Reynolds. And I understand, Mr. White, you've had a chance to consult with your client about that matter, and also you've talked, I think, also to Dr. Mauro. What is your position today with reference to your request?

MR. WHITE: **Well, Your Honor, I guess the request remains pending**. I have nothing additional to add. I spoke to Mr. Mauro also -- or Dr. Mauro, and I have -- he asked me if I have any additional input -- and I don't -- in terms of his formulating his opinion. And so I guess we're left with what his opinion is.

THE COURT: Well, I guess what my is [sic], are you satisfied now that you've had a sufficient analysis of Mr. Reynolds' psychiatric situation so that you don't wish to pursue the petition for forensic or do you still -- are you still pursuing that?

MR. WHITE: I have nothing additional.

THE COURT: All right. Mr. Reynolds, you did, of course, talk to Dr. Mauro. Did you feel as though he gave you a fair understanding of your problem and so on and so forth?

THE DEFENDANT: Yes, sir.

THE COURT: You did, okay. Are you at this point satisfied that you're in a position to proceed with this matter as far as trial is concerned and cooperate with counsel and so on and so forth?

THE DEFENDANT: Yes, sir.

THE COURT: You do, okay. That's fine. I think I'm going to deny the petition then, Mr. White on that basis. Mr. Reynolds really apparently is doing okay, and as I said, Dr. Mauro feels that there really has not -- is not enough of an indicator here to make it a viable referral to the forensic center. So I'm going to deny the petition at this time.

This Court has held that MCL 768.20a(2); MSA 28.1043(1)(2) grants a trial court no discretion to deny a psychiatric evaluation by the forensic center when the defendant has asserted an insanity defense. *People v Chapman*, 165 Mich App 215; 418 NW2d 658 (1987). In the instant case, the prosecutor concedes as much, but asserts that defendant, in effect, withdrew his request. We cannot agree. Counsel stated that the request "remains pending," and his subsequent answers can only be regarded as ambiguous. Once defendant made a valid request under the statute, and the court

required a pre-evaluation with Dr. Mauro, the court was obliged to obtain a clear waiver or withdrawal before denying the request.

We conclude, however, that a remand is the appropriate remedy at this time, rather than the new trial requested by defendant. We first observe that at this stage we will not require that defendant make a showing of prejudice before this Court. This is not a situation where no request was made before trial and a defendant seeks to challenge counsel's effectiveness on appeal. Here, defendant made a valid request which was denied by the court. Conversely, we conclude that reversal and remand for new trial is not required at this stage because it is unclear whether defendant would have been able to present an insanity defense had the requisite referral been made.

We therefore remand to the trial court. Defendant shall be referred to the forensic center pursuant to the statute. If defendant makes a request for an independent evaluation, the decision to grant or deny that request is discretionary, *Chapman*, *supra*, although some leeway would be appropriate under the circumstance of this being a delayed evaluation. If there is a triable issue regarding defendant's sanity based on the expert testimony, a new trial shall be held. If not, the conviction shall not be disturbed.

III

Defendant next argues that his minimum sentence of thirty years exceeds the guidelines range by a factor of three and that such a substantial departure is not justified by the facts of this case, in which the victim suffered no psychological trauma or physical injury. Defendant also asserts that the court failed to sufficiently articulate its reasons for deviating from the underlying guidelines. We disagree.

We first observe that defendant's characterization of the extent of the court's departure from the guidelines is incorrect. The minimum guidelines range was ten to twenty-five years. Defendant's minimum sentence of thirty years exceeds the guidelines by only five years. Further, the sentencing guidelines do not apply to habitual offenders and review of habitual sentences is for abuse of discretion. *People v Cervantes*, 448 Mich 620, 622; 532 NW2d 831 (1995). Given the nature of the offense, and defendant's being an habitual offender, we conclude that defendant's thirty-year minimum sentence is not an abuse of discretion.

IV

Defendant next asserts that the trial court did not adequately examine Bud regarding his intelligence and whether he appreciated the obligation to tell the truth, and that the examination process was tainted where the court relied on the testimony of Bud's teacher/interpreter.

Defendant did not object to the procedure used by the court when inquiring into Bud's competency to testify, nor did defendant object to the court's determination that Bud had sufficient intellectual ability and sense of obligation to tell the truth to permit him to testify. Therefore, defendant

has waived any challenge to these matters on appeal. *People v Cobb*, 108 Mich App 573, 575; 310 NW2d 798 (1981).

We further conclude that defendant has suffered no manifest injustice. The court examined Bud on the record. Bud testified that he was five years old, that his birthday was June 2, and that he lived with his "dad" and "mom" and a dog named Tabby. Bud said it was good to tell the truth and bad to tell a lie. He said that the statement that the judge's robe is white is a lie, as is the statement that Struble is a man. He then promised the court that he would tell the truth.

V

Lastly, defendant argues that defense counsel rendered deficient performance by failing to call potential defense witnesses, failing to raise, or request a jury instruction regarding, an insanity or alibi defense, failing to adequately question the prosecution witness, and failing to allow defendant to participate in jury selection.

Defendant did not move for a new trial or an evidentiary hearing as required by *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973)[1]. This Court's review is therefore limited to deficiencies apparent on the record. *People v Johnson (On Rehearing)*, 208 Mich App 137, 142; 526 NW2d 617 (1994).

Counsel is presumed to have provided effective assistance, and a defendant bears a heavy burden to prove otherwise. *People v Wilson*, 180 Mich App 12, 17; 446 NW2d 571 (1989). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant first argues that counsel was ineffective because he failed to call various witnesses for the defense. In support of this claim, defendant refers to various exhibits to his brief. Because these exhibits were never presented to the trial court, this Court must disregard them. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 19; 527 NW2d 13 (1994). Insofar as defendant's claims are not supported by the record before this Court, they cannot serve to overcome the strong presumption that defendant was provided the effective assistance of counsel. *People v Johnson (On Rehearing)*, *supra* 142. The mere failure to call certain witnesses does not establish deficient performance. In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). It appears that Pat Reynolds', Patty Hunter's and Tim McGuire's testimony would have been cumulative.

Defendant next claims that counsel was ineffective because he failed to pursue an alibi or insanity defense. We conclude that any ineffectiveness regarding the insanity defense is addressed by our remand. Further, the record fails to support defendant's assertion that an augmented alibi defense would have been successful. Defendant and his girlfriend Stack both testified that defendant was not living with Stack during June 1993, and other witnesses corroborated that they were fighting. Additionally, the information charged that the offense was committed between August and October, 1992, or in June, 1993, and Bud testified that it happened while Rhonda was in school. Thus, defendant's focus on June, 1993, does not fully address the matter.

Defendant also argues ineffectiveness for failing to "adequately question the prosecution witness." However, defendant fails to advise this Court in what way defense counsel could have cross-examined which witness more effectively. We are therefore unable to review this claim.

Defendant's final challenge to the performance of counsel is that he erroneously prevented defendant from participating in the jury selection process. Again, this claim is not supported by the record before this Court and thus cannot serve as the basis of an ineffective assistance of counsel claim. *Johnson (On Rehearing)*, *supra* at 142.

Remanded with instructions.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Richard M. Pajtas

[1] While defendant's brief on appeal asks for a "remand for further evidentiary hearing regarding ineffective counsel" or for a new trial, no motion for remand was never filed.