STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COURTNEY GILLEBAUX,

Defendant-Appellant.

UNPUBLISHED
November 8, 1996

No. 182192
LC No. 94-003483

Before: Markman, P.J., and Smolenski and G. S. Buth,* JJ.

PER CURIAM.

Defendant was charged with two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(ii); MSA 28.788(3)(1)(b)(ii), as well as two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). He was convicted of one count of the former following a jury trial and was sentenced to ten to fifteen years in prison. Defendant appeals by right. We affirm.

Defendant first argues that the offenses for which he was originally charged were separate and distinct, having been committed on separate occasions and requiring the admission of separate testimony to support the prosecutor's case-in-chief. Consequently, trial counsel's failure to prevent the consolidation of these unrelated charges created a risk that the jury would hear evidence with relation to one of the charged offenses only and apply and accumulate that evidence to an unrelated charge. Accordingly, defendant argues that he was denied the effective assistance of counsel at trial. We disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1987). A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant. *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988). Counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Moreover, the defendant must overcome the presumption that the challenged act of counsel is sound

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

trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). We will not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

We are limited to a review of the existing record to determine whether defendant received the effective assistance of counsel at trial. *People v Johnson*, 208 Mich App 137; 526 NW2d 617 (1994). The trial record is devoid of any reference regarding counsel's failure to move to sever the offenses charged. Where a defendant has purposefully failed to object to joinder as a trial strategy, we may not conclude that improper joinder is so offensive to the maintenance of a sound judicial system so as to reverse a conviction. *People v Thompson*, 410 Mich 66, 71; 299 NW2d 343 (1980). Moreover, even if trial counsel's failure to object to the misjoinder of offenses was not trial strategy, an unexplained failure to object to misjoinder for trial precludes appellate relief. *Id*. It is presumed that the factfinder is capable of making the necessary distinctions between evidence introduced in support of diverse offenses. Defendant has failed to show that the failure to sever the offenses was not the result of sound trial strategy and has not overcome the presumption of effective assistance of counsel.

Defendant next argues the jury's verdict of guilty was not in accordance with the great weight of the evidence presented at trial and consequently, defendant should be granted a new trial. An objection to the verdict as being against the great weight of the evidence may be raised only by a motion for a new trial before the trial court. *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987); *People v Bush*, 187 Mich App 316, 329; 466 NW2d 736 (1991). Here, defendant failed to move for a new trial on this basis below. Failure to raise this issue by moving for a new trial waives the issue on appeal. *Patterson, supra*, at 514-515; *People v Johnson*, 168 Mich App 581, 585; 425 NW2d 187 (1988). Therefore, we need not review this issue.

Defendant also argues that the trial court posed specific questions to the prosecution's witness in a manner such that her credibility was bolstered before the jury and that this misconduct destroyed the court's balance of impartiality and denied defendant a fair trial. We disagree. We review questions posed by a trial court to a witness to determine whether the court may have unjustifiably aroused suspicion in the mind of the jury as to the credibility of a witness and whether partiality might have influenced the jury to the detriment of defendant's case. *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992). A trial judge has great power and wide discretion in exercising control over a trial, and the conduct of witness and attorneys. *People v Cole*, 349 Mich 175, 199; 84 NW2d 711 (1957). A trial court may question witnesses to clarify or elicit additional relevant testimony. MRE 614(b); *Conyers, supra*, at 404-405. However, the trial court must ensure that its questions are not intimidating, argumentative, prejudicial, unfair or partial. *Conyers, supra*, at 405. The trial court in the instant case exercised its discretion in questioning the complaining witness and in so doing impressed upon her the need to testify truthfully. The court did not intimidate, argue, or show prejudice towards defendant or partiality to the witness or the prosecution. The court did not comment on the witness' veracity nor give an opinion of the witness or her testimony. Consequently, specific prejudice against defendant or partiality in favor of the prosecutor cannot be inferred in any manner from the court's comments.

Defendant finally argues that the sentencing court abused its discretion in rendering a sentence disproportionate to the offense and the offender. We disagree. We review the sentence imposed by a sentencing court for abuse of discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentencing court abuses its discretion in rendering a sentence when it violates the principal of proportionality. A sentence must be proportionate to both the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). The sentencing court may consider the severity and nature of the crime, *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989), the circumstances surrounding the criminal activity and the defendant's criminal history, *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985), as well as the effect of the crime upon the defendant's victim, *People v Girardin*, 165 Mich App 264, 266; 418 NW2d 483 (1987), in fashioning a proportionate sentence. Moreover, a sentence imposed within the sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991).

Defendant was sentenced to ten to fifteen years in prison for second-degree criminal sexual conduct. The sentence imposed is within the sentencing guidelines range of four to ten years and is presumptively proportionate. Defendant has a long criminal history encompassing ten felony and seven misdemeanor offenses, as well as eight prior prison commitments. Given that defendant's sentence falls within the guidelines range and, upon review of defendant's criminal history, viewed together with the severity of the crime and its impact upon defendant's victim, we do not find that the court abused its discretion in sentencing defendant. The sentence was proportionate to both the seriousness of the crime and defendant. *Milbourn, supra,* at 635-636.

Affirmed.

/s/ Stephen J. Markman
/s/ Michael R. Smolenski
/s/ George S. Buth