STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY OWEN SIRBAUGH,

Defendant-Appellant.

UNPUBLISHED
January 24, 1997

No. 185858
Oakland Circuit Court
LC Nos. 94-134435 and
94-134620

Before: McDonald, P.J., and Murphy and M. F. Sapala*, JJ.

PER CURIAM.

Following a consolidated jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct with a person at least thirteen but less than sixteen years of age, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b). Subsequently, defendant pleaded guilty to the charge of habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to twenty to forty years' imprisonment for the habitual offender convictions. Defendant appeals as of right, and we affirm.

I

Defendant first argues that he was denied his due process rights because he was not apprised of specific dates when the alleged sexual abuse occurred. Additionally, defendant argues that he was denied his due process rights by being forced to defendant against crimes which occurred five to six years ago. Defendant failed to object to the information's lack of specific dates and the prosecutor's delay in filing charges. Thus, this issue not preserved for appellate review absent a finding of manifest injustice. *People v Weatherholt*, 209 Mich App 801; 533 NW2d 24 (1995); *People v Cowans*, 14 Mich App 233; 165 NW2d 280 (1968).

Defendant's niece did not testify as to the specific number of sexual abuse incidents, nor did she testify as to the exact dates when the alleged abuse occurred. However, the prosecution need only

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

state the time of an offense "as nearly as the circumstances will permit." MCL 767.51; MSA 28.99. Because children who are subjected to ongoing abuse have difficulty remembering dates, Michigan courts have recognized that an imprecise time allegation is sufficient in sexual offense cases involving minors. *People v Howell*, 396 Mich 16; 238 NW2d 148 (1976); *People v Miller*, 165 Mich App 32; 418 NW2d 668 (1987); *People v Naugle*, 152 Mich App 227; 393 NW2d 592 (1986).

We find that the lack of specific dates in the information did not deprive defendant of a substantial right or result in a miscarriage of justice. MCL 769.26; MSA 28.1096; *People v Owens*, 37 Mich App 633; 195 NW2d 36 (1972). First, time is not an element of a sexual assault offense such that defendant was not deprived of an opportunity to prepare an adequate defense. *Miller, supra*. Second, defendant's niece testified that defendant had sexually abused her as far back as she could remember. Defendant's mother lived next door to his niece, and therefore, defendant received countless opportunities to be alone with her over the years. Consequently, defendant would have difficulty presenting an alibi defense. *Naugle, supra*.

Finally, contrary to defendant's argument, the prosecutor's bringing sexual abuse charges against defendant some five or six years after the alleged abuse occurred was not error. According to MCL 767.24(2); MSA 28.964(2):

> [I]f an alleged victim was under 18 years of age at the time of the commission of the offense, an indictment for an offense under . . . sections . . . 750.520b to 750.520g of the Michigan Compiled Laws, may be found and filed within six years after the commission of the offense or by the alleged victim's twenty-first birthday, whichever is later.

In this case, the informations instituted against defendant alleging sexual misconduct were filed when the victim was nineteen years old. In sum, we hold that the lack of specific dates in the information and the prosecutor's delay in filing charges did not result in a miscarriage of justice.

II

Next, defendant argues that he was denied a fair and impartial trial due the prosecutor's improper comments made during her opening statement and closing arguments. Defendant failed to object to any of the prosecutor's alleged misconduct. Therefore, we find that this issue is not preserved for appellate review. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). Indeed, we believe that any prejudice resultant from the prosecutor's behavior could have been cured by the trial court's issuance of a cautionary instruction had one been requested. See *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996). Furthermore, any unfair prejudice caused by the prosecutor's arguments at trial was cured by the trial court's instruction that the lawyers' statements, arguments, and questions were not evidence. *Id*. Accordingly, we conclude that no manifest injustice will result from our failure to review defendant's claims of prosecutorial misconduct.

III

Next, defendant argues that he must be resentenced because the trial court erroneously scored Offense Variable ("OV") 7, offender exploitation of victim vulnerability, at fifteen points. We disagree. In *People v Gatewood (On Remand)*, 216 Mich App 559; 550 NW2d 265 (1996), this Court announced that appellate review of habitual offender sentences using the sentencing guidelines in any fashion is inappropriate. In *People v Haacke*, 217 Mich App 434; __ NW2d __ (1996), this Court examined essentially the same issue as at bar. In that case, the defendant was sentenced as an habitual offender. *Id*. On appeal, the defendant objected to the scoring of OV 8, continuing pattern of criminal behavior, arguing that he should have been scored zero or five points as opposed to ten points. *Id.* However, this Court found that the trial court had not abused its discretion in scoring OV 8. *Id.* In addition, the defendant also objected to the trial court's scoring of OV 16, aggravated controlled substance offenses. *Id.* With regard to OV 16, the *Haacke* Court found that the trial court had improperly scored the offense variable. *Id.* In its opinion, this Court examined what effect an error in the scoring of the sentencing guidelines had on an habitual offender's sentence. *Id*.

The *Haacke* Court reiterated that, pursuant to *Gatewood*, *supra*, appellate review of habitual offender sentences using the sentencing guidelines is inappropriate. *Haacke, supra*. Thus, the *Haacke* Court held that the trial court did not err in failing to consider the correct guideline range before imposing its sentence on the defendant. *Id*. Additionally, the *Haacke* Court held that even though the defendant had not argued the issue of proportionality, it found that his sentence was not disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

In this case, in light of the ruling in *Haacke, supra*, we conclude that that the trial court did not err in failing to consider the correct guidelines range before imposing its sentence on defendant. The correctness of the scoring OV 7 is not a proper issue to review with regard to defendant's habitual offender sentence. See *Haacke, supra*.

Moreover, although not raised on appeal, we conclude that defendant's sentences did not violate the principle of proportionality under *Milbourn, supra*. Defendant was found to have repeatedly committed sexual acts with his niece since her childhood. According to the habitual offender informations, defendant has been previously convicted of two serious crimes: 1) malicious destruction of personal property over $100; and, 2) felonious assault. Moreover, the trial court noted that in the past, defendant had lied about becoming a prisoner of war in Vietnam to receive VA benefits and had misrepresented a college degree to gain employment. Therefore, in light of defendant's repeated abuse of his niece and his criminal past, we hold that defendant's sentences were proportionate to the offenses and the offender. See *People v Spivey*, 202 Mich App 719, 728-729; 509 NW2d 908 (1993); *People v Malkowski*, 198 Mich App 610, 615; 499 NW2d 450 (1993).

IV

Lastly, defendant argues that defense counsel's failure to object to the imprecise dates in the information and the prosecutor's comments at trial constituted ineffective assistance of counsel. We

disagree. To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel was not functioning as the attorney whose assistance is guaranteed by the Sixth Amendment to the United States Constitution. Further, defendant must show that any deficiency was prejudicial to his case such that counsel's error may have affected the outcome at trial. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Claims of ineffective assistance of counsel based on defense counsel's failure to object or make motions that could not have affected defendant's chances for acquittal are without merit. *People v Lyles*, 148 Mich App 583; 385 NW2d 676 (1986). We hold that because there was ample evidence to support defendant's conviction, counsel's failure to object did not impinge upon defendant's chances of acquittal. As such, counsel's inaction did not constitute ineffective assistance of counsel. See *People v Tommolino*, 187 Mich App 14; 466 NW2d 315 (1991).

Affirmed.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ Michael F. Sapala