STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD T. CALDWELL,

Defendant-Appellant.

UNPUBLISHED
April 22, 1997

No. 185251
Wayne Circuit Court
LC No. 94-011723

Before: White, P.J., and Cavanagh and J.B. Bruff,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of kidnapping, MCL 750.349; MSA 28.581, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twenty to forty years' imprisonment for the kidnapping conviction, to be served consecutively to a two-year term for the felony-firearm conviction. We affirm defendant's convictions and remand for proceedings consistent with this opinion.

For ease of analysis, we have combined the issues in defendant's brief on appeal and his supplemental brief.

I

Defendant argues that the trial court erred in denying defendant's motion for directed verdict on the charge of kidnapping by secret confinement. When ruling on a trial court's denial of a motion for directed verdict, this Court must consider the evidence presented by the prosecution, in the light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992).

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

Defendant relies on *People v Johnson*, 171 Mich App 801, 807; 430 NW2d 828 (1988). In *Johnson*, this Court stated that "the essential issue is whether other persons were aware that the victim was being confined at defendant's apartment." *Id*. at 806. Defendant argues that there could have been no secret confinement in the instant case because the neighbors knew that defendant took Barbara Owens against her will and at the first opportunity went directly to the house where she was because they knew that defendant had been living there.

After this Court's decision in *Johnson*, the Supreme Court clarified the elements of kidnapping in *People v Jaffray*, 445 Mich 287; 519 NW2d 108 (1994). To be guilty of kidnapping by secret confinement, a defendant must have (1) willfully, maliciously, or without legal authority, (2) secretly confined or imprisoned another person, (3) by force or without consent. *Id*. at 305. The essence of secret confinement is "the deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament." *Id*. at 309. Secret confinement is not predicated solely on the existence or nonexistence of a single factor. Rather, consideration of the totality of the circumstances is required. That others may be suspicious or aware of the confinement is relevant to the determination, but is not always dispositive. *Id*.

Viewing the evidence in the light most favorable to the prosecution, we conclude that the trial court did not err in denying defendant's motion for a directed verdict. Evidence was presented at trial that defendant forced Owens into his van at gunpoint. Defendant then took Owens to a house which had steel bars on the doors and locked her inside. No other person knew that Owens was confined in the house. Defendant disabled the telephone so that Owens could not call for help. Defendant told other people that they would not see Owens again if he did not get to see his children. Under the totality of the circumstances, it is clear that the confinement deprived Owens of the assistance of others. See *id*. The fact that witnesses thought that Owens might have been kidnapped and subsequently found her at the house indicates only that defendant did not choose a good hiding place. Cf. *Johnson*, *supra*.

II

Defendant next maintains that he was denied a fair trial when the trial court allowed the prosecutor to introduce evidence of other bad acts. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Defendant charges that the trial court erred in admitting evidence regarding his relationship with Tricia Williams, including testimony describing assaults on Williams and the theft of her money. While evidence of defendant's estrangement from Williams was relevant to defendant's motive, we agree with defendant that the evidence of the alleged assaults and thefts committed by defendant during the course of the relationship was not relevant, and the trial court therefore abused its discretion in allowing its admission. However, because there was abundant evidence against defendant, including the testimony of both the complainant and eyewitnesses, we find that the actual prejudicial effect of the error on the

factfinder was negligible. Reversal on the basis of this issue is therefore not required. See *People v Mateo*, 453 Mich 203, 221; 551 NW2d 891 (1996).

III

In his next issue, defendant argues that he was denied the effective assistance of counsel by his trial counsel's failure to move to suppress the rifle found in a warrantless police search. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because defendant failed to move for a *Ginther*[1] hearing or a new trial based on ineffective assistance of counsel, this Court's review is limited to errors apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

In support of his contention that his Fourth Amendment rights were violated by the police seizure of the rifle, defendant relies on *United States v Johnson*, 22 F3d 674 (CA 6, 1994), in which the court held that a warrantless seizure of evidence was unjustified. However, we find *Johnson* to be distinguishable. In that case, the police entered the defendant's apartment to free a young girl who was being held against her will. After the girl stated that the defendant had guns in a closet, the guns were seized by the police. *Id*. at 676. However, in the instant case, Officer Thornton testified that the rifle was leaning against the wall by the front door.

Defendant has not demonstrated that the seizure of the rifle constituted a violation of his constitutional rights. Accordingly, defendant has not shown that, in failing to move to suppress the evidence, the performance of his counsel fell below an objective standard of reasonableness under prevailing professional norms. Accordingly, we find that reversal is not required.

IV

Defendant next argues that the trial court erred in scoring the sentencing guidelines when it assessed fifteen points under offense variable (OV) 7 and five points under OV 13. However, the Supreme Court has recently held that "there is no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables." *People v Mitchell*, ___ Mich ___, ___; ___ NW2d ___ (Docket Nos. 98984, 98985, issued 3/25/97), slip op pp 32-33. On appeal, a defendant may only challenge the factual basis on which the trial court calculated the guidelines or the proportionality of the sentence. Appellate courts may not interpret the guidelines or score and rescore the variables for offenses and prior record to determine whether they were correctly applied. *Id*. at 33-34.

V

Defendant also claims that the trial court failed to properly resolve his challenge regarding the accuracy of a statement by Patricia Williams that was contained in the presentence investigation report. The trial court has a duty to respond to challenges to the accuracy of the information in a presentence report. The trial court's method of response to such a challenge is a matter of discretion. See *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991).

Defendant argues that Williams' statement must be completely disregarded because she was not the victim of the crime. We disagree. The policy of individualized sentencing is best served when the presentence report contains a broad range of information so that the sentence can be tailored to fit the circumstances of the individual defendant. *People v Kisielewicz*, 156 Mich App 724, 729; 402 NW2d 497 (1986).

Defendant further contends that the trial court erred in failing to respond to his objection to the substance of Williams' statement. Under MCR 6.425(D)(3), the trial court is required to either make a finding that the defendant's challenge to the information in the presentence report is without merit, or correct or delete the challenged information in the report.

After reviewing the transcript of the sentencing hearing, we find that the trial court failed to exercise its discretion by neglecting to resolve defendant's challenge to the accuracy of the presentence report. See *People v Brownlee*, 116 Mich App 503, 504; 323 NW2d 460 (1982). Consequently, we remand so that the trial court may clarify whether the disputed matters played a role in its sentencing decision. If the court determines that it did, defendant shall be resentenced and the court will resolve the challenge pursuant to MCR 6.425(D)(3). If it is determined that the disputed matter played no part in the sentencing decision, defendant's sentence is affirmed and the trial court need only strike the disputed matter from the presentence report. See *People v Landis*, 197 Mich App 217, 219; 494 NW2d 865 (1992).

Defendant's convictions are affirmed. However, we remand for proceedings consistent with this opinion.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ John B. Bruff

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).