

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMMY LEON ELLIS,

Defendant-Appellant.

---

UNPUBLISHED

May 23, 1997

No. 188614

Recorder's Court

LC No. 94-9605-FY

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendant was originally charged with first-degree criminal sexual conduct. Following a jury trial, he was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and was sentenced to two to fifteen years' imprisonment. He appeals as of right. We affirm.

On appeal, defendant first contends that the verdict is against the great weight of the evidence. However, defendant failed to properly preserve the issue by filing a timely motion for a new trial and, therefore, has waived the issue for appellate review. *People v Johnson*, 168 Mich App 581, 585; 425 NW2d 187 (1988).

Defendant next asserts that he was denied the effective assistance of counsel on four occasions. We review a claim of ineffective assistance to determine if counsel's performance was deficient and whether, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Pubrat*, 451 Mich 589; 548 NW2d 595 (1996); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). If a deficiency is shown, we must determine if the deficiency was prejudicial to the defendant. *Id.*

Here, defendant first claims that counsel should have moved to quash the information when the evidence presented at the preliminary examination did not establish penetration sufficient to warrant a first-degree criminal sexual conduct charge. The purpose of a preliminary examination is to determine if there is probable cause to believe that a crime has been committed and that defendant committed it.

*People v Moore*, 180 Mich App 301, 309; 446 NW2d 834 (1989). In establishing probable cause, the prosecution does not have to present proofs beyond a reasonable doubt, but there must be evidence from which the charged crime can be inferred. *Id.*

MCL 750.520a(l); MSA 28.788(1)(l) defines sexual penetration as “any...intrusion, however slight . . . into the genital or anal openings of another person’s body....” The victim in this case, a seven-year-old girl, testified that defendant “tried to stick his private area in my private area,” and that when he did that, he touched her with his “private part.” This evidence was sufficient to infer there was slight penetration; defendant’s bind-over on a first-degree criminal sexual conduct charge was therefore warranted. MCL 750.520a(1); MSA 28.788(1)(1). An attorney is not required to argue a meritless motion, and because the evidence was sufficient to support the first-degree CSC charge, defense counsel’s failure to move to quash the information did not constitute ineffective assistance. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant next claims that he was denied effective assistance when counsel failed to investigate allegations that the victim and her family had filed false charges in the past. However, our review is limited to the existing record, and the record is devoid of any information as to whether defense counsel indeed made an attempt to investigate the existence of prior false allegations or whether the results of the investigation would have been in any way helpful to defendant. Because defendant has not demonstrated that counsel’s performance was deficient or that counsel’s conduct prejudiced him, he cannot establish a claim for ineffective assistance on these bases.

Defendant next contends that counsel’s representation was deficient because he failed to object to the prosecutor’s use of facts not in evidence during closing argument. Aside from making this blanket assertion, defendant does not cite to any specific instance of misstatement by the prosecutor. Without a specific allegation by defendant which we can review, he cannot establish a claim of ineffective assistance on this basis.

Defendant also contends that counsel’s failure to object to a number of mistakes at sentencing led to an incorrect scoring of the sentencing information report, placing defendant in the wrong minimum sentencing range on the sentencing guidelines. Again, aside from the generic contention of “mistakes,” defendant does not cite to specific examples of error. Because defendant has failed to establish how counsel’s performance was deficient or how counsel’s conduct prejudiced him, his ineffective assistance of counsel claim on this basis also fails. Defendant has not demonstrated that counsel’s actions individually or cumulatively provided him ineffective assistance of counsel.

Defendant’s final claim on appeal is that the trial court erred in calculating the sentencing guidelines’ variables. Our Supreme Court has recently ruled in *People v Mitchell*, 454 Mich 145; \_\_\_ NW2d \_\_\_ (1997), that a claim of a miscalculated variable is not in itself a claim of legal error because the guidelines do not have the force of law. The *Mitchell* Court stated:

On postsentence review, guidelines departure is relevant solely for its bearing on the *Milbourn* claim that the sentence is disproportionate. Thus, application of the guidelines

states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. [*Id.*, p 177.]

Defendant has not raised the issue of the guidelines' scoring in relation to a claim of proportionality. Under *Mitchell*, therefore, appellate review is precluded.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Barbara B. MacKenzie

/s/ William B. Murphy