

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT E. HUNT,

Defendant-Appellant.

UNPUBLISHED
October 21, 1997

No. 198215
Recorder's Court
LC No. 95-010639

Before: Corrigan, C.J., Griffin and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right his convictions by jury of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c; MSA 28.788(3). The trial court sentenced defendant to terms of imprisonment of fifty to ninety years for each of his CSC I convictions and to a five to fifteen year term of imprisonment for CSC II. We affirm and remand for preparation of a sentencing guidelines departure form.

Defendant befriended his victim, then thirteen years-old, when the victim responded to defendant's cable television advertisement seeking young men to join him in horseback riding. Defendant subsequently developed a close relationship with the victim's family, buying them gifts, loaning them money, and dining and celebrating holidays with them. Approximately two years later, the victim, a failing student who had trouble living with his stepfather, ran away from home and moved in with defendant for three months. The victim's mother eventually acquiesced in this arrangement, hoping that defendant could help the victim. Instead, defendant engaged in sex acts with the victim.

Defendant first argues that the trial court erred in denying his motion for directed verdict because he did not engage in sex acts with the victim while the victim was a member of his household. We disagree. In reviewing the court's decision regarding a directed verdict, this Court considers the evidence presented up to the time the motion is made in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the offense proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). A person is guilty

of CSC I if he engages in sexual penetration with a

member of the “same household” who is between the ages of thirteen and sixteen. MCL 750.520b(1)(b)(i); MSA 28.788(2)(1)(b)(i). The term “household” is an all inclusive word for a family unit residing under one roof for any time other than a brief or chance visit.” *People v Garrison*, 128 Mich App 640, 646; 341 NW2d 170 (1983). The phrase “same household” “assumes a close and ongoing subordinating relationship that a child experiences with a member of his or her family or with a coercive authority figure.” *Id.* at 646-647.

Here, the victim resided at defendant’s house for three months after he ran away from home. The victim specifically stated that he was living with defendant when they engaged in one the underlying sex acts. The jury could infer from other evidence the victim was living with defendant when they engaged in the other acts of penetration. These acts took place in defendant’s home, between the time the victim dropped out of school and the time he visited his father in California. The victim lived with defendant during this period. The victim’s mother had entrusted the victim to defendant’s care. A rational jury could find from this evidence that defendant and the victim were members of the same household when they engaged in sex acts. Therefore, the trial court properly denied defendant’s motion for directed verdict.

Defendant next argues that the trial court erroneously instructed the jury regarding the “same household” element of CSC I. Because defendant did not object, this Court will review this issue only if relief is necessary to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993). No manifest injustice will result from our failure to review because the court correctly instructed regarding the elements of the offense and explained the “same household” element to the satisfaction of the jurors.

Defendant also contends that he was denied the effective assistance of counsel. We disagree. Because defendant did not raise this issue below, review is foreclosed unless the alleged deficiency is apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To establish ineffective assistance of counsel, defendant must prove that counsel’s performance fell below an objective standard of reasonableness and that the representation prejudiced him. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action is sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Regarding the second requirement, defendant must show a reasonable probability that but for counsel’s errors, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996).

Defendant asserts that trial counsel was ineffective because he did not interview two potential witnesses. Defendant’s claim fails because he has not demonstrated that counsel’s failure to interview witnesses resulted in counsel’s ignorance of valuable evidence that would have benefited the accused. *People v Caballero*, 184 Mich App 636, 641-642; 459 NW2d 80 (1990). Defendant’s next argument, that counsel’s decision not to call two other witnesses constituted ineffective assistance, is also without merit. Counsel’s decision not to call witnesses is a matter of trial strategy. *Daniel, supra* at 58. This Court will not substitute its judgment for that of defense counsel on matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Defendant’s final allegation of

error involving counsel's failure to object to the jury instructions is likewise without merit because the instructions sufficiently protected defendant's rights. Defense counsel is not required to make futile objections. See *Daniel, supra* at 59.

Defendant's remaining allegations of error concern sentencing. Defendant initially asserts that the trial court erroneously scored Offense Variable 12. We are precluded from reviewing this issue because the error is based on the court's alleged misinterpretation of the guidelines and guidelines instructions. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). Defendant also contends that his sentence is disproportionate. We disagree. This Court reviews a sentencing decision for an abuse of discretion. *People v Odendahl*, 200 Mich App 539, 541; 505 NW2d 16 (1993). In this case, the trial court properly departed from the guidelines' range of twenty to forty years or life because the guidelines did not adequately account for the need to protect society and because of defendant's dismal prospects for rehabilitation. *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Defendant, a predatory pedophile with felony convictions dating back to 1977, has a history of parole violations involving impermissible contact with young children. Defendant laid the groundwork for the instant offense over the course of two years. First, he used an advertisement on cable television to solicit his victim. Then, defendant built a relationship of trust with the victim and the victim's family, intending to eventually take advantage of this relationship for his sexual gratification. Defendant carried out his plan when the victim's mother entrusted her son to defendant's care. Under these circumstances, the trial court did not abuse its discretion in sentencing defendant to a term that is proportionate to the seriousness of the offense and the offender. *People v Milbourn*, 435 Mich 630, 667; 461 NW2d 1 (1990). However, although clearly set forth on the record, the court failed to memorialize its reasons for departing from the guidelines' range on the sentencing information report as required by MCR 6.425 (D)(1). *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). Therefore, we remand to the trial court to prepare a sentencing guidelines departure form. *Id.*

Affirmed and remanded. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra