

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE JESUS RODRIGUEZ,

Defendant-Appellant.

UNPUBLISHED

July 28, 2000

No. 208336

Gratiot Circuit Court

LC No. 97-003474-FC

Before: Wilder, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and sentenced to ten to twenty years' imprisonment. Defendant appeals as of right. We affirm.

In two related arguments, defendant contends that he was denied the effective assistance of counsel. We disagree. We review a claim of ineffective assistance of counsel de novo. See, e.g., *People v Northrop*, 213 Mich App 494, 497-498; 541 NW2d 275 (1995).

Effective assistance of counsel is presumed. The defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). In reviewing a defendant's claim of ineffective assistance of counsel, we must determine whether counsel's performance was objectively unreasonable and whether the defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). To satisfy the first prong of the test, the defendant must establish that counsel made errors so serious that the attorney was not functioning as the counsel guaranteed to the defendant by the Sixth Amendment. *Id.* at 164-165. To satisfy the second prong, the defendant must show that but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998).

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Mitchell, supra* at 163. We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the

benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential. *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995). Moreover, a defendant's speculation regarding what a witness' testimony might have been does not establish that reasonable probability existed that, if the witness had been called, the outcome of the proceeding would have been different. See, e.g., *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

While trial counsel may have stipulated to recognizing Dr. Steven Guertin as an expert at trial, we conclude this was a reasonable strategic decision based on counsel's previous experience with this physician and his feeling that he "could not break Dr. Guertin in his findings." Moreover, our review of the record shows that trial counsel discussed Dr. Guertin's medical findings regarding the victim with another pediatrician and determined that Dr. Guertin could not be effectively challenged at trial. We will not second-guess counsel's trial strategy in this case. *Barnett, supra* at 338. Moreover, we are persuaded that the medical studies presented by defendant at his *Ginther*¹ hearing failed to adequately rebut Dr. Guertin's opinion and counsel's failure to use them at trial was neither objectively unreasonable nor prejudicial to defendant in this case.

Although defendant argues he was "plainly entitled to the appointment/presentation of an expert on this complex and controversial subject," the record shows he failed to present any expert testimony at his *Ginther* hearing challenging the medical findings or opinions of Dr. Guertin. Thus, we conclude that defendant can only speculate as to what a defense expert might have testified to at trial. *Avant, supra* at 508. Contrary to defendant's claims that "[t]he doubts surrounding the reliability of pediatric medical evidence has also received pervasive attention in the medical field," Dr. Guertin's testimony was unshaken by the medical studies he was referred to by counsel at defendant's *Ginther* hearing.

Based on our review of the record, whether to call a defense expert or offer contrary evidence to counter the testimony of the prosecution's expert witness could reasonably be considered to be matters of trial strategy. *Mitchell, supra* at 163; *Avant, supra* at 508. We are not convinced that more extensive cross-examination and the testimony of defense experts would have made a difference in the outcome of the trial. See *Plummer, supra* at 307. Merely because trial counsel's strategy did not work in defendant's favor did not render his performance ineffective assistance of counsel. *Stewart, supra* at 42.

Defendant next argues that the trial court erroneously scored Offense Variable (OV) 25 and that his resultant sentence was disproportionate. However, an error in the scoring of the sentencing guidelines is not a basis upon which we will grant relief. *People v Raby*, 456 Mich 487, 499; 572 NW2d 644 (1998); *Mitchell, supra* at 176.

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

We review the trial court's imposition of a sentence for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *Milbourn supra* at 630; *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). The key test of proportionality is not whether the sentence departs from or adheres to the recommended ranges, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). Moreover, sentences falling within the recommended range are presumptively not excessively severe or unfairly disparate because they fall within the sentencing norm for that class of offender. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

Permissible considerations for sentencing include: the nature and severity of the crime, *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989), the defendant's social and personal history, *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985); the effect of the defendant's crime on his victim, *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998), and the defendant's lack of remorse, *Houston, supra* at 323.

With regard to defendant's conviction for CSC I, the sentencing guidelines called for a minimum sentence range between five to ten years. Our review of the record reveals that the effect on the victim and her family was cruel and tragic and that defendant continued to blame the victim and her mother for what happened. Moreover, we do not find any unusual or compelling circumstances that would mitigate in any way the imposition of the sentencing guideline's maximum minimum sentence in this case. Considering legitimate factors, we are convinced that defendant has failed to overcome the presumption of proportionality and conclude that his sentence was proportionate to the offense and the offender. *Houston, supra* at 320; *Milbourn, supra* at 636; *Broden, supra* at 354.

Defendant's final argument is that the trial court erred in permitting the victim's mother to make an oral victim impact statement at sentencing and that the court considered her statements about uncharged offenses in imposing sentence. Defendant failed to object to his wife's statement at sentencing. His argument is therefore not properly preserved for our review. See *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). In any event, defendant's argument is without merit. His wife was entitled to make a victim impact statement under MCL 780.752(1)(i)(i) and (ii); MSA 28.1287(752)(i)(i) and (iii)

Affirmed.

/s/ Kurtis T. Wilder

/s/ Gary R. McDonald

/s/ Martin M. Doctoroff