

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP JERRY POWELL, JR.,

Defendant-Appellant.

UNPUBLISHED

January 3, 2003

No. 237266

Macomb Circuit Court

LC No. 01-000827-FC

Before: Bandstra, P.J., and Zahra and Meter, J.J.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(c). Defendant was sentenced to 120 to 240 months in prison for his home invasion conviction, 210 months to life for his first-degree criminal sexual conduct convictions, and 120 to 180 months in prison for his second-degree criminal sexual conduct conviction, the sentences to run concurrently. We affirm in part, reverse in part and remand.

I. Facts

On March 1, 2001, the victim, a fifty-seven year old woman, was attacked and sexually assaulted in her home by defendant. The victim had previously met defendant in the summer of 2000, when defendant, then a taxi driver, helped carry her groceries inside her home. Although the victim was visually impaired and only had side vision in her eyes, she recognized defendant's voice. The victim called the police after defendant left the house and reported the crimes. After the incident, the victim sought medical attention and underwent a medical examination. Defendant admitted to going over to the victim's house, however he denied having intercourse with the victim. Defendant, while in the Macomb County Jail, however, bragged about the sexual assaults on the victim to another inmate. The inmate was endorsed as a witness prior to jury selection by the prosecution.

II. Analysis

Defendant argues that the trial court erred in allowing the prosecution a late endorsement of a witness. Defendant further argues that he was deprived the effective assistance of counsel

when the trial court allowed the prosecution to endorse the witness days before trial. We disagree.

The late endorsement of a witness is within the sound discretion of the trial court. *People v Heard*, 178 Mich App 692, 696; 444 NW2d 542 (1989). The prosecution's only burden of production is to produce a list of those witnesses it intends to call, a list that can be amended on good cause shown, at any time. MCL 767.40(a)(4); *People v Burwick*, 450 Mich 281, 292; 537 NW2d 813 (1995). Moreover, to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *Id.*

Good cause was shown for the late endorsement of the witness. As soon as the police were aware that the witness had information regarding defendant's case, the detective met with the witness. Once the prosecution received that information, it was forwarded to defense counsel, and the prosecution filed a motion for leave to amend the witness list. The trial court granted the prosecution's motion and stated the defense would have ample opportunity to impeach the witness as to his credibility. Therefore, we find the trial court did not abuse its discretion in allowing the prosecution a late endorsement of a witness.

Additionally, defense counsel was not ineffective as a result of the trial court's decision to allow the late endorsement of the witness. Defense counsel had the opportunity to question the witness about his criminal history, his credibility, his medications, his drug history, his intentions for testifying, and thoroughly cross-examined him about defendant's statements. Defense counsel also had the opportunity to call another witness to discredit the late endorsed witness' testimony. Therefore, we find defense counsel's performance did not fall below an objective standard of reasonableness.

Defendant further argues that the scoring of offense variables 3, 10, and 13 of the sentencing guidelines was clearly erroneous. Moreover, defendant asserts that he was denied the effective assistance of counsel at sentencing where counsel failed to object to the incorrect scoring of offense variables 3, 10, and 13. We find no reversible error arising from these claims.

The issue of improper scoring was not preserved because defendant failed to raise the issue at or before sentencing. MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002). However, a sentencing guidelines error is subject to reversal if it constituted a plain error which affected the defendant's substantial rights in that prejudice resulted that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 765-766; 597 NW2d 130 (1999). The defendant bears the burden of establishing prejudice, and reversal is not warranted unless the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Kimble*, 252 Mich App 269, 278; 651 NW2d 798 (2002), citing *Carines, supra*, 460 Mich 763. Moreover, defendant failed to seek a new trial or an evidentiary hearing below, therefore, our review of defendant's ineffective assistance of counsel claim is limited to the record. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), lv gtd 467 Mich 868 (2002). To establish a denial of effective assistance of counsel, a defendant must demonstrate that counsel's

performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *Pickens, supra*, 446 Mich 338. Defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *Id.*

An offense committed on or after January 1, 1999, is subject to the legislative sentencing guidelines, MCL 769.31 *et seq.* MCL 769.34(2). Pursuant to MCL 777.33(1), offense variable 3 involves physical injury to a victim. MCL 777.33(1)(d) provides that ten points are to be scored for bodily injury requiring medical treatment. MCL 777.33(3) provides “‘requiring medical treatment’ refers to the necessity for treatment and not the victim’s success in obtaining treatment.” Evidence exists that the victim required medical treatment. After the incident, the victim felt a burning sensation when she urinated. When the victim went for an exam, the nurse noticed dried blood on her upper thigh, an injury to her left arm, and hematoma on her forearm. The nurse also saw small areas of hemorrhage in the vagina, and multiple tears around her rectum. We find offense variable 3 was properly scored. Therefore, counsel was not required to make a meritless objection to the scoring of offense variable 3, and the failure to object was not objectively unreasonable and did not reasonably affect the outcome of the proceedings. *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

MCL 777.40(1)(b) provides that ten points are attributable for offense variable 10, exploitation of a vulnerable victim, if “the offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.” MCL 777.40(3)(c) defines vulnerability as “the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.”

Evidence exists that defendant exploited the victim because she was visually impaired. Defendant knew the victim was visually impaired prior to the incident. Additionally, defendant knew, as a result of the victim’s visual impairment, it would be easier to break into her house and harder for the victim to recognize defendant. Therefore, no error occurred in the scoring of offense variable 10. Additionally, counsel was not required to make a meritless objection to the scoring, and the failure to object was not objectively unreasonable and did not reasonably affect the outcome of the proceedings. *Harmon, supra*, 248 Mich App 531.

Pursuant to MCL 777.43(1), offense variable 13 involves a continuing pattern of criminal behavior. MCL 777.43(1)(a) provides scoring of fifty points if the offense was part of a pattern of felonious criminal activity involving three or more sexual penetrations against a person or persons less than thirteen years of age. On appeal the prosecution admits defendant was incorrectly assessed fifty points for offense variable 13, but contends fifty points should have been assessed for offense variable 11. MCL 777.41(1)(a) provides that, pursuant to offense variable 11, fifty points shall be assessed if two or more criminal sexual penetrations occurred. A penetration scored in OV 11 may not be scored in OV 13. *People v Mutchie*, 251 Mich App 273; 650 NW2d 733 (2002).

Resentencing is only appropriate after a reviewing court concludes the sentence imposed is invalid. *Mutchie, supra*, 251 Mich App 274. The trial court improperly assessed fifty points for offense variable 13. It is undisputed that the victim was fifty-seven years old when the incident occurred. However, although offense variable 13 was incorrectly scored, offense variable 11, MCL 777.41(1)(a), should have been assessed fifty points. Therefore, defendant has not established he was prejudiced because the guidelines range would not have been different.

Carines, supra, 460 Mich 765-766. Furthermore, the record does not show that, but for defense counsel's errors, there was a reasonable probability the result of the proceeding would have been different. *Pickens, supra*, 446 Mich 338. Because the sentencing guidelines range would not have been different, defendant's claim of ineffective assistance of counsel is without merit.

Defendant also argues his sentences of 210 months to life imprisonment for his first-degree criminal sexual conduct convictions violate the indeterminate sentencing statute. We agree. An issue is properly preserved if it is raised before and addressed by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Defendant did not properly preserve this issue in the trial court. A defendant may obtain relief based upon an unpreserved error if the error is plain and affected substantial rights, in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *Carines, supra*, 460 Mich 763-764. Sentencing issues, such as the one presented here, raise questions of law, which are reviewed de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

MCL 769.9(2) provides, in part:

In all cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years. If the sentence imposed by the court is for any term of years, the court shall fix both the minimum and the maximum of that sentence in terms of years or fraction thereof, and sentences so imposed shall be considered indeterminate sentences. The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.

Because the trial court violated this provision, we remand for sentencing solely on the first-degree criminal sexual conduct convictions. *People v Boswell*, 95 Mich App 405, 410-411; 291 NW2d 57 (1980).

Lastly, defendant has filed an in pro per brief to supplement the arguments asserted by his appellate counsel. We find no merit to the issues asserted in this supplemental brief. We reject defendant's numerous claims of ineffective assistance of counsel because we conclude, after careful review of the record, that defendant failed to establish that counsel's errors fell below an objective standard of reasonableness. *Pickens, supra*, 446 Mich 338. Even if we assume error by trial counsel, defendant has not demonstrated that but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Id.* We also find unpersuasive defendant's challenges to his in-court identification by the victim. There is no harm of misidentification since the victim identified defendant as the perpetrator shortly after the crime. Moreover, in court confrontations are generally permissible. *People v Hampton*, 138 Mich App 235; 361 NW2d 3 (1984). Defendant's remaining in pro per claims of error are rejected because they are totally devoid of legal and factual support.

III. Conclusion

In sum, the trial court did not abuse its discretion in allowing the prosecution a late endorsement, nor did defense counsel's performance fall below an objective standard of

reasonableness. The scoring of offense variables 3 and 10 were not erroneous. To the extent that the scoring of offense variable 13 was erroneous, the error did not affect defendant's substantial rights. Moreover, because the sentencing guidelines range would not have been different, defendant was not denied the effective assistance of counsel due to the failure of counsel to object to the scoring. Additionally, defendant's sentences for his first-degree criminal sexual conduct convictions did violate the indeterminate sentencing statute. Therefore, the first-degree criminal sexual conduct convictions must be remanded for re-sentencing. Lastly, the arguments put forth in defendant's in pro per brief on appeal lack merit.

Affirmed in part, reversed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

/s/ Patrick M. Meter