

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY EARL DOBBS,

Defendant-Appellant.

UNPUBLISHED

November 16, 2006

No. 262549

Wayne Circuit Court

LC No. 04-010392

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY EARL DOBBS,

Defendant-Appellant.

No. 262566

Wayne Circuit Court

LC No. 04-010091

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

In these consolidated appeals, defendant was convicted of 14 counts of first-degree criminal sexual conduct (CSC I) for engaging in sexual penetration with a person under the age of thirteen, MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct (CSC II) for engaging in sexual conduct with a person under the age of thirteen, MCL 750.520c(1)(a). Defendant was sentenced to 25 to 60 years in prison for each of his CSC I convictions, and five to 15 years in prison for each of his CSC II convictions. He appeals as of right. We affirm.

Defendant first argues that the trial court erred when it used the statutory sentencing guidelines to calculate his guidelines range. We find that the trial court erred, but conclude that the error does not amount to plain error affecting defendant's substantial rights.

Defendant failed to properly preserve this issue for appeal by raising it at sentencing or in a motion for resentencing. *People v McLaughlin*, 258 Mich App 635, 669-670; 672 NW2d 860 (2003). We review unpreserved sentencing issues for plain error which affected substantial

rights. *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002), citing *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). A plain error only merits reversal when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 763, 773. A plain error in the calculation of the sentencing guidelines range, which increases the length of the defendant's sentence, constitutes plain error affecting substantial rights. See *People v Brown*, 265 Mich App 60, 66-67; 692 NW2d 717 (2005), rev'd on other grds 474 Mich 876 (2005).

The statutory sentencing guidelines apply only to offenses committed on or after January 1, 1999, and thus, the judicial sentencing guidelines apply to felonies committed before January 1, 1999. MCL 769.34; *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000). Here, defendant's convictions arose out of events that took place between 1992 and 1996. Thus, the trial judge should have used the judicial sentencing guidelines to calculate defendant's guidelines range. *Id.*

Instead, the record indicates that the trial judge used the statutory sentencing guidelines to calculate defendant's guidelines range. Therefore, the trial court erred when it calculated defendant's guidelines range. *Id.* at 254. However, an erroneous scoring of the guidelines range does not require resentencing if the trial court would have imposed the same sentence regardless of the error. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003).

Using the statutory sentencing guidelines, the trial court determined that defendant's minimum sentence guidelines range for his CSC I convictions was 135 to 300 months. The trial court subsequently sentenced defendant to a minimum of 25 years (300 months) in prison for each of the CSC I convictions. Given that the trial court assigned defendant a prior record variable (PRV) score of 20 for having two or more subsequent or concurrent felony convictions, MCL 777.57, it follows that defendant would also have received a PRV score of 20 under the judicial sentencing guidelines for "2 or more subsequent/concurrent felony convictions," Michigan Sentencing Guidelines Manual (2d ed, 1998), p 43. This would have given defendant a prior record level of "B" under the judicial sentencing guidelines. Michigan Sentencing Guidelines Manual (2d ed, 1998), p 43. Furthermore, considering that the trial court scored 50 points for offense variable (OV) 11 (two or more sexual penetrations), MCL 777.41, it follows that defendant would have received an OV 12 score of 50 under the judicial sentencing guidelines for "2 or more criminal sexual penetrations," Michigan Sentencing Guidelines Manual (2d ed, 1998), p 45. Accordingly, defendant's CSC I convictions would have been scored under the highest OV level (i.e., level IV) of the judicial sentencing guidelines, and defendant's minimum sentence guidelines range for his CSC I convictions would have been 120 to 300 months. Michigan Sentencing Guidelines Manual (2d ed, 1998), pp 46-47.

It is evident that defendant's sentence range under the judicial sentencing guidelines would have been very similar to the range determined by the trial court pursuant to the statutory sentencing guidelines. Moreover, the trial judge sentenced defendant at the highest end of the statutory guidelines range, sentencing defendant to a minimum of 300 months in prison. The trial court stated, "To you, [defendant], I really have nothing much to say to you, my sentiments will be reflected in your prison sentence." We have no reason to believe that the trial judge would not have similarly sentenced defendant to the highest end of the judicial guidelines range, which also would have been 300 months. Thus, the trial court's erroneous application of the

statutory sentencing guidelines did not prejudice defendant, and does not amount to plain error affecting his substantial rights. *Mutchie, supra* at 51-52; *Carines, supra* at 763, 774.

Defendant also argues that he was denied his constitutional right to the effective assistance of counsel. We disagree.

Because defendant did not preserve this issue by raising it in a motion for a new trial or a hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302.

Defendant asserts that he was denied the right to effective assistance of counsel when defense counsel failed to object to the trial court's improper use of the statutory sentencing guidelines for calculating defendant's sentence. We reject this argument. Under the statutory sentencing guidelines, a court must impose a sentence in accordance with the appropriate sentence range, and may only depart from the sentencing guidelines range if it has a substantial and compelling reason to do so. MCL 769.34; *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). In contrast, under the judicial sentencing guidelines, a trial judge is authorized to depart from the recommended sentencing range as long as the sentence he imposes adheres to the principles of proportionality. *Id.* at 440; *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); Michigan Sentencing Guidelines Manual (2d ed, 1998), p 7. Thus, had the trial judge wished to exceed the recommended range, it would have been easier for her to do so under the judicial guidelines than under the statutory guidelines.

Based on the fact that upward departure would have been easier under the judicial guidelines than under the statutory guidelines, we are unwilling to conclude that defense counsel's failure to object to the use of the statutory sentencing guidelines was not a strategic decision. Since defendant has done nothing to rebut the strong presumption that defense counsel's actions constituted sound trial strategy, defendant has failed to establish that defense counsel's conduct fell below an objective standard of reasonableness. *Toma, supra* at 302. Thus, defendant has failed to establish that he was denied the effective assistance of counsel. *Id.* at 302-303.

Moreover, as discussed above, it is likely that the trial judge would have imposed the same sentence under the judicial sentencing guidelines. Thus, any objection to the use of the statutory sentencing guidelines would have been futile, and would not have affected the outcome of the proceedings. Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Therefore, even assuming *arguendo* that defense counsel's conduct fell below an objective standard of

reasonableness, defendant has still failed to establish that he was denied the effective assistance of counsel. *Id.*

We similarly reject defendant's argument that he was denied the effective assistance of counsel when defense counsel failed to object to the scoring of OV 9.¹ At sentencing, the trial court scored OV 9 at ten points, finding that two or more people were placed in danger each time defendant committed CSC I. Defendant correctly points out that no evidence was presented to establish that anyone other than the individual complainant involved in each individual charge was present at the time of the commission of any one offense. OV 9 should be scored only with respect to the specific transaction that gave rise to the particular conviction for which a sentence is being imposed. See *People v Chesebro*, 206 Mich App 468, 470; 522 NW2d 677 (1994). Thus, OV 9 should not have been scored at ten points, and defense counsel should have objected to the trial court's scoring of OV 9 in this manner.

However, as already discussed, defendant's CSC I convictions would have been scored at the highest OV level (i.e., level IV) of the judicial sentencing guidelines based on the single fact that 50 points would have been appropriate under OV 12 for "2 or more criminal sexual penetrations." Michigan Sentencing Guidelines Manual (2d ed, 1998), pp 45-46. Thus, even if ten points had not been scored for multiple victims, defendant's properly scored guidelines range would have produced the same minimum sentence. Michigan Sentencing Guidelines Manual (2d ed, 1998), pp 46-47. Consequently, defense counsel's failure to object to the scoring of ten points for multiple victims did not affect the outcome of the proceedings, and defendant was not denied his right to the effective assistance of counsel in this regard. *Toma, supra* at 302-303.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen

¹ Defendant correctly points out that OV 9 of the statutory sentencing guidelines, MCL 777.39, is similar to OV 6 of the judicial sentencing guidelines, Michigan Sentencing Guidelines Manual (2d ed, 1998), p 44. Both provisions allot 10 points for two or more victims.