

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN CORTEZ CRAIG,

Defendant-Appellant.

UNPUBLISHED

February 5, 2008

No. 273052

Wayne Circuit Court

LC No. 06-003489-01

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right following his conviction by a jury of assault with intent to commit criminal sexual conduct in the second degree (CSC II), MCL 750.520g(2). Defendant was sentenced to 40 to 60 months in prison. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm defendant's conviction, but remand this case to the trial court for resentencing.

Defendant's conviction arises from an incident that took place at his home between he and his stepsister's 15-year-old friend. According to the testimony, defendant and the victim were left alone in the basement of his home for a period of time while his stepsister, who also lived at the home, talked on the telephone upstairs. During that time period, defendant allegedly grabbed the victim, pulled her pants down, and placed his penis near her vagina. Defendant's stepsister came back into the room at that point, and defendant released the victim.

On appeal, defendant first contends that he was denied the effective assistance of counsel and that his conviction must be reversed as a result. We disagree.

Whether counsel was ineffective is ultimately a question of law, which we review de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Where, as here, no *Ginther*¹ hearing was held, and no new trial requested, review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). To establish a claim of ineffective assistance of counsel, defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness under current professional norms and that there is a reasonable probability that, but for counsel's error, the result of defendant's trial would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

Defendant asserts that during the direct examination of the defense's only witness, Pavielle Deramus, Ms. Deramus testified that she lied about when the incident between defendant and the victim occurred, deciding with the victim to state that the incident occurred the same weekend that another friend was assaulted. According to defendant, the testimony that defendant allegedly assaulted another female was prejudicial and his counsel was ineffective for failing to object to this statement or address it in a sidebar or separate record.

However, the testimony does not clearly indicate that defendant assaulted Marquenette. Rather, Ms. Deramus testified that she previously stated that the victim was assaulted "the same weekend that Marquenette's assault happened." There is no reference to defendant in connection with Marquenette's assault.

Moreover, the statement offered by Ms. Deramus was not in direct response to the question posed by defense counsel. Counsel simply asked Ms. Deramus why she originally lied to her family about when the incident happened. Ms. Deramus responded that if she and the victim had told the truth about the date, it would have been questioned why the victim kept coming over. She thereafter went on to give the date they agreed to say it happened as the "same weekend that Marquenette's assault happened." Defense counsel then moved on, focusing his questions on the fact that the victim stayed the night at Ms. Deramus's home on at least one other night after the incident occurred. Because there was no clear implication that defendant assaulted Marquenette, defense counsel may well have considered it sound trial strategy to not object to or otherwise address the testimony so as to preclude undue focus on the testimony or to avoid drawing out any further testimony clarifying whether it was defendant who was alleged to have assaulted Marquenette. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant has failed to demonstrate that he was denied the effective assistance of counsel.

Defendant next contends that the trial court imposed an illegal sentence upon him, as the trial court exceeded the sentencing guidelines but did not state that it would be doing so, and had no substantial and compelling reasons to exceed the sentencing guidelines. We agree that resentencing is warranted.

In reviewing a trial court's decision to depart from the sentencing guidelines, this court reviews for clear error the trial court's finding that a particular factor in support of departure exists. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). Whether a factor is objective and verifiable, however, is a question of law that this Court reviews de novo, and this Court reviews for an abuse of discretion the trial court's determination that the objective and verifiable factors in a particular case constitute a substantial and compelling reason to depart from the sentencing guidelines. *Id.*

As a general rule, the trial court must impose a sentence within the sentencing guidelines, unless substantial and compelling reasons exist to depart from the guidelines. MCL 769.34(3). The reason for the departure must be articulated by the trial court on the record. *Id.* To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). To be objective and verifiable, the factors must be actions or occurrences that are external to the mind, and that are capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

A substantial and compelling reason will exist only in exceptional cases. *Young, supra*, at 449-450. A trial court may not base a departure on an offense characteristic or offender characteristic that is already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the record that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Young, supra* at 450.

Here, the sentencing guidelines recommended a minimum term range of 7 to 23 months. The trial court, however, sentenced defendant to 40 to 60 months in prison. In imposing sentence, the trial court stated that defendant took advantage of the circumstances in assaulting the victim and, given that another young lady accused him of a similar assault, it appeared he had a design to molest the two young ladies. The trial court also made clear, however, that it was not using the allegation of a second assault as a basis for the sentencing. The trial court also referred to “how [young persons] may be affected mentally” from being molested and concluded by stating that defendant could probably be a danger to society. The court then sentenced defendant to 40 to 60 months acknowledging that it was exceeding the guidelines “for reasons stated.”

The “reasons stated” for the trial court’s departure are not entirely clear. The only real reasons arguably articulated for the departure were that defendant took advantage of the circumstances to proceed with his assault, and that the victim may have been mentally affected by the assault. To the extent that the “circumstances taken advantage of” were the victim’s youth or her relationship as his stepsister’s friend, that factor was already taken into consideration in the scoring of OV 10 at ten points. The mental effect of the assault was also taken into consideration in the scoring of OV 4 at ten points. As the court did not state that either factor was given inadequate or disproportionate weight, it cannot base its departure from the guidelines on these factors. *Young, supra*. We also do not find that trial court’s general statement that defendant could probably be a danger to society a substantial and compelling reason for an upward departure of nearly twice the guidelines. Because the trial court did not provide a substantial and compelling reason for the departure on the record, a remand for resentencing is necessary.

We affirm defendant’s conviction, but remand this case to the trial court for resentencing. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto