

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROBERT FLYNN,

Defendant-Appellee.

UNPUBLISHED

September 25, 1998

No. 199753

Oakland Circuit Court

LC No. 96-145985 FH

Before: Markman, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Defendant was charged with two counts of engaging in sexual penetration without informing his partner of his positive status for the human immunodeficiency virus (HIV), MCL 333.5210; MSA 14.15(5210). In exchange for the promise of concurrent sentencing and the opportunity to challenge the constitutionality of the statute by which he was convicted, defendant pled no contest to one of the charges, see LC No. 96-145376, and requested a jury trial on the other charge. The jury convicted defendant of the charge against him, and the court sentenced defendant to concurrently serve two terms of thirty-two to forty-eight months in prison. This appeal as of right is from defendant's jury trial conviction. We affirm.

I

Defendant's first issue on appeal concerns the admission of the testimony from a second woman with whom defendant subsequently had sexual intercourse, testimony which defendant argued constituted evidence of bad acts inadmissible pursuant to MRE 404(b). The woman testified at trial that she had sexual intercourse with defendant approximately five days after defendant had last had sex with the complainant in this case. She also testified that defendant had not informed her of his HIV-positive status before they engaged in sexual intercourse and that he had not used a condom during the sexual intercourse. In contrast, defendant alleged that he had informed the witness of his condition, that she nonetheless consented to having sexual intercourse with him, and that he had used a condom.

The decision whether evidence of bad acts is admissible is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich

376, 383; ___ NW2d ___ (1998). The prosecution bears the burden of establishing that the evidence is admissible because it satisfies three criteria: (1) the evidence must be offered for a purpose other than to establish the defendant's character or propensity to commit the offense; (2) the evidence must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice. *Id.* at 385, quoting *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

Here, because defendant conceded that he was HIV-positive and that he had had sexual intercourse with the complainant, the remaining factual dispute at trial was whether defendant intended to have sexual intercourse with the complainant without informing her of his infectious disease. The complainant testified that defendant had not informed her of his HIV-positive status before they engaged in sexual intercourse and that he had not used a condom. In contrast, defendant testified that he informed the complainant of his condition, that she nonetheless consented to having sexual intercourse with him, and that he used a condom during the sexual intercourse.

In deciding to admit the witness' testimony, the trial court accepted the prosecution's argument that the testimony of the witness was properly admissible pursuant to MRE 404(b)(1) because it was relevant to show that defendant intentionally failed to disclose his HIV status as part of a scheme, plan, or system in doing an act. In other words, the prosecution posited that evidence of such a plan and the circumstances surrounding the two instances of sexual intercourse made defendant's alleged failure to disclose more probable than it would be without the evidence. The trial court also found that the probative value of the testimony was not substantially outweighed by its potential for unfair prejudice. Because the three criteria for admissibility were met, see *VanderVliet*, *supra* at 55, 74, we find no abuse of discretion in the trial court's decision to admit the evidence of prior bad acts, see *Crawford*, *supra* at 383.

II

Defendant argues that the trial court incorrectly interpreted the elements of the crime for which defendant was convicted as including a specific intent requirement. However, even assuming that defendant is correct in his assertion, the error of the trial court is harmless to defendant. Indeed, such an error would have benefited defendant because the prosecutor was required to carry a greater burden of proof. See, e.g., *People v Terry*, 224 Mich App 447, 455, n 1; 569 NW2d 641 (1997). Therefore, we decline to review the merits of defendant's argument.

III

Defendant argues that the trial court should have granted his motion for a new trial because of the alleged instances of prosecutorial misconduct that occurred during his trial. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). A defendant's opportunity for a fair trial may be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980).

First, defendant asserts that during cross-examination, the prosecutor improperly asked him whether he made a comment to a third person about intending to infect every woman in Pontiac with HIV and also improperly implied that defendant was homosexual. However, defendant did not object at trial to either of these instances of alleged prosecutorial misconduct. His failure to object precludes our review unless the prejudicial effect of the remarks was so great that it could not have been cured by an appropriate instruction. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). We find that the prosecution had a good faith basis for asking defendant about the veracity of the comment, which defendant denied making. Also, although the prosecution elicited defendant's admission that he was at the hospital with a man, the prosecution's questions focused on a notation in defendant's medical records that defendant and his "significant other" had been counseled against having unprotected sexual intercourse weeks before defendant had sexual intercourse with the complainant in this case.

Thus, even if defendant had objected at trial to the prosecutor's questions, we would hold that the prosecution's inquiries did not constitute misconduct because they merely attempted to point out inconsistencies in the defense theory of the case. See, e.g., *People v Strunk*, 184 Mich App 310, 324; 457 NW2d 149 (1990). Moreover, the trial court in this case instructed the jury that the attorneys' questions were not evidence. See, e.g., *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Therefore, defendant was not denied a fair trial by the prosecutor's questions during cross-examination.

Defendant also asserts that the prosecutor misstated its burden of proof during closing and rebuttal arguments by stating that the jury should focus on defendant's conduct rather than the character of his victims. However, defendant likewise failed to object at trial to these remarks of the prosecutor. No miscarriage of justice will result from our failure to review the prosecutor's remarks because the prosecutor did not convey an improper concept of reasonable doubt to the jury.

Because we find no instances of prosecutorial misconduct that denied defendant a fair trial, we hold that the trial court did not err in denying defendant's motion for a new trial on this basis.

IV

Defendant proffers various constitutional challenges to the statute under which he was convicted, MCL 333.5210; MSA 14.15(5210). We review constitutional issues de novo. *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997). Because statutes are presumed to be constitutional, this Court must make every reasonable presumption in favor of the constitutionality of a statute and construe the statute as constitutional unless its unconstitutionality is clearly apparent. *Id.*

Defendant first argues that the statute is unconstitutionally overbroad because its definition of "sexual penetration" includes the intrusion of "any object into the genital or anal openings of another person's body," which defendant states does not spread the human immunodeficiency virus. In *People v Jensen (On Remand)*, ___ Mich App ___; ___ NW2d ___ (1998), this Court addressed this same constitutional challenges that defendant here makes, although the defendant's argument regarding overbreadth had a different basis than defendant's argument in this case. This Court found that the defendant's conduct in that case, which was engaging in sexual intercourse with the victim without

previously telling him that she was HIV positive, was “clearly encompassed” by the language of the statute. *Id.* at slip op p 3. Accordingly, the Court found that the defendant could not challenge the scope of the statute on the grounds that it “conceivably” may be unconstitutional when applied to others in situations not before the panel. *Id.* at slip op pp 2-3. This case, which does not involve a charge that defendant used an object to commit sexual penetration of the victim, requires the same conclusion. Defendant cannot challenge the scope of MCL 333.5210; MSA 14.15(5210) as overbroad where his charged conduct is encompassed by the language of the statute.

Next, defendant argues that the statute is unconstitutional because it interferes with an HIV carrier’s right to privacy and right to be free from compelled speech. Although we would be justified in deeming defendant’s position abandoned for failure to sufficiently brief its merits, see, e.g., *People v Dilling*, 222 Mich App 44, 51; 564 NW2d 56 (1997), we nonetheless review the arguments and find both to be without merit for the same reasons stated by the panel in *Jensen*. There, this Court found that “despite the constitutional guarantees of liberty that include privacy considerations, defendant’s right to privacy is not absolute, and the state’s overwhelming need to protect its citizens from an incurable, sexually transmissible disease is a compelling state interest.” *Jensen, supra* at slip op p 9. This Court further found that the requirement that infected individuals disclose their status to their potential partners before engaging in sexual penetration was narrowly defined so as to further that compelling interest. *Id.* Similarly, this Court concluded that the state’s interest in “controlling the spread of this currently incurable disease” outweighed the defendant’s right to be free from compelled speech. *Id.* at slip op p 11.

Last, defendant argues that the statute is unconstitutional because it denies an HIV carrier the equal protection of the laws. US Const, Am XIV; Const 1963, art 1, § 2. Even assuming that defendant could substantiate his position, disparate effect alone is insufficient to demonstrate an equal protection violation. See *People v Ford*, 417 Mich 66, 103; 331 NW2d 878 (1982); *Harville v State Plumbing and Heating Inc*, 218 Mich App 302, 318-319; 553 NW2d 377 (1996).

Accordingly, we find that defendant has not overcome the presumption that MCL 333.5210; MSA 14.15(5210) is constitutional.

V

Defendant argues that the trial court should have granted his motion for a new trial because his counsel offered ineffective assistance at trial. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To establish ineffective assistance of counsel, a defendant must show (1) that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *Id.* at 687-688.

Defendant first asserts that his counsel was ineffective in failing to object to two questions of the prosecution during cross-examination of defendant. Upon review, we conclude that the questions were

proper, and therefore defense counsel had no obligation to make such objections. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant's remaining allegations concern his right to effective assistance of counsel at sentencing. A criminal defendant is entitled to effective assistance of counsel at sentencing. *People v Harris*, 185 Mich App 100, 105; 460 NW2d 239 (1990). Defendant asserts that his counsel was ineffective in failing to provide him with a meaningful opportunity to review or discuss the presentence investigation report. See MCL 771.14(4); MSA 28.1144(4); MCR 6.425(B). Defense counsel stated on the record at sentencing that he and defendant had reviewed the report and had no additions or correction to request. Defendant did not object to defense counsel's representation to the sentencing court, nor did he make any contrary statement when the court gave defendant an opportunity to address the court. Similarly, on appeal, defendant fails to show how the alleged deficiencies in his opportunity to review the report prejudiced him or injected unfairness into the sentencing proceeding. Therefore, we hold that by merely making this allegation, defendant has not overcome the presumption that his counsel rendered effective assistance.

Next, defendant asserts that his counsel was ineffective in failing to make a plea for leniency from the sentencing court or inform the court of mitigating factors on defendant's behalf. However, defense counsel stated on the record that defendant continued to maintain his innocence and emphasized that defendant did not intend to infect the victim with HIV. The action defendant now requests would have been inconsistent with his stated position below. Therefore, we hold that counsel was effective in advocating on his client's behalf at sentencing and that his performance was reasonable under prevailing professional norms.

Last, defendant asserts that his counsel was ineffective in failing to inquire about the treatment defendant would receive in a state facility for his HIV-positive status. However, defendant supplied no legal authority to support his contention that an attorney has the duty to ensure his or her client's treatment; therefore, we consider defendant's argument abandoned. See, e.g., *People v DiVietri*, 206 Mich App 61, 65; 520 NW2d 643 (1994). See also MCL 791.267; MSA 28.2327 (procedures of the Department of Corrections following a prisoner's HIV-positive test result).

Because we find that counsel was effective, we hold that the trial court did not err in denying defendant's motion for a new trial on this basis.

VI

Defendant's last issue on appeal is that the trial court should have granted his motion for resentencing. A trial court's authority to resentence a defendant depends on whether the initial sentence was valid. MCR 6.429; *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994). A sentence is invalid when it exceeds statutory limits, is based on constitutionally impermissible grounds, is based on improper assumptions of guilt, is based on a misconception of law, is based on inaccurate information, or conforms to local sentencing policy rather than individualized facts. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

Defendant's motion for resentencing is not made on any of these grounds. Instead, defendant first claims that resentencing is necessary because he was denied the opportunity to read and discuss the presentence report. However, we have already found that defense counsel stated on the record that he and defendant reviewed the report. A sentencing court is not required to verify that a defendant has received or been given the opportunity to review the report prior to sentencing. *People v Shanes*, 155 Mich App 423, 427; 399 NW2d 73 (1986). Moreover, even where a defendant's contention that he was denied access to the report is supported by evidence, the claim of error is insufficient to render the defendant's sentence invalid. *Id.*

Next, defendant claims that resentencing is necessary because the sentencing court did not articulate its reasons for the sentence imposed. It was error for the sentencing court to fail to articulate on the record the criteria considered and the reasons for the sentence imposed. See *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). However, the remedy for a sentencing court's failure to articulate its reasons for a sentence imposed is not resentencing, as defendant requests, but a remand to the lower court for explanation of the sentence. *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989). Remand is unnecessary in this case because the court satisfied this obligation at the hearing on defendant's motion for resentencing. There, the sentencing judge stated that the reasons for the sentence imposed were the heinous nature of defendant's crime and the need to protect society from future similar conduct by defendant. Therefore, defendant was not prejudiced by the original error of the sentencing court.

Last, defendant claims that resentencing is necessary because he was denied his right of allocution. At sentencing, a trial court must on the record give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence. MCR 6.425(D)(2)(c); *People v Westbrook*, 188 Mich App 615, 616; 470 NW2d 495 (1991). The defendant's right of allocution requires strict compliance, and the court must specifically ask the defendant separately if he wishes to address the court. *Id.* at 617. Here, the court heard from defense counsel and also asked defendant whether he wished to say anything, to which defendant replied that he did not. Therefore, defendant was not denied his right of allocution.

Because defendant has not provided a meritorious basis for finding his sentence invalid, we hold that the trial court did not err in denying defendant's motion for resentencing.

Affirmed.

/s/ Stephen J. Markman

/s/ Henry William Saad

/s/ Joel P. Hoekstra