

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE ANGEL RODRIGUEZ, JR.,

Defendant-Appellant.

UNPUBLISHED

September 14, 2004

No. 249413

Ottawa Circuit Court

LC No. 02-026472-FC

Before: Griffin, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree criminal sexual conduct (CSC), MCL 750.520b, and delivery of a controlled substance with the intent to commit CSC, MCL 333.7401a. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 15 to 50 years' imprisonment for the CSC conviction and 10 to 20 years' imprisonment for the delivery of a controlled substance with intent to commit CSC conviction. We affirm.

I. Facts and Procedure

On August 16, 2002, the sixteen-year-old victim went to a gathering at an apartment where she met defendant. Defendant flirted with the victim and told everybody in the apartment that he was going to have sex with her. Defendant, Seth Outcalt, Josue Arevalo, Anthony Cruz, and David Vega made drinks in the kitchen and somebody put GHB (Gamma-Hydroxybutyrate)¹ in the drinks. The testimony conflicts regarding who actually put the GHB in the drinks, but there is no dispute that the GHB belonged to Outcalt.² Either defendant or Outcalt made a drink for the victim, and either defendant or Vega brought the drink to the victim. At one point, Jose

¹ GHB is a sedative with effects similar to alcohol. In low doses, it makes people more outgoing and uninhibited. In high doses, it makes people very sleepy and can put them into a coma.

² Outcalt was charged with delivering GHB with intent to commit CSC, but he testified against defendant in order to get this charge reduced. Outcalt ultimately pleaded guilty to delivery of GHB to a minor and was sentenced to probation.

Sanchez took a sip out of the victim's drink, but defendant told him not to drink out of it, because he had put something into the drink "that gets girls horny and causes them to pass out."

After the victim finished the drink given to her by one of the men, she got up to go to the bathroom, but her legs gave out and she could not walk. Defendant helped her to the bathroom and she remembered being slapped in the face by defendant, but did not remember anything after that point. Defendant then handed out condoms and kept one for himself and announced that he was going to "hit it." Defendant took the victim to the bedroom and closed the door. Witnesses noticed that the victim was stumbling. A short time later, somebody opened the bedroom door, and witnesses saw defendant having sex with the victim while she was unconscious. Cruz, on the other hand, testified that defendant walked out of the room after helping the victim to bed, and never had sex with the victim. Defendant also denied giving the victim a drink with GHB or having sex with the victim. After defendant came out of the bedroom, he told Arevalo that he had had sex with the victim and gave Arevalo a condom. Arevalo then went into the bedroom for about ten minutes. During that time, somebody opened the door, and Sanchez saw Arevalo under the blankets with the victim and it looked like they were having sex. Arevalo testified that he did not have sex with the victim because he could not get an erection, but just "touched her breasts and stuff."³ When Arevalo came out, defendant went into the bedroom again for a time. After defendant came out, Vega went into the bedroom and put on a condom that defendant had given him. Although the condom broke, Vega began to have sex with the victim.⁴ Arevalo and one other man were in the room with Vega and the victim. Meanwhile, Outcalt was watching the bedroom proceedings through the window from outside when a plainclothes police officer approached him. Outcalt ran inside and told everyone to leave. He then went into the bedroom and pulled Vega off of the victim. According to Shelly Navarro, however, Vega was still having sex with the victim when she entered the room, and he only stopped when she began screaming for the men to get out. Once the men left, Navarro inspected the victim and saw that she was unconscious and had semen on her face, in her hair, on her back, and on her buttocks. When Navarro tried to put the victim's pants on, "semen was just gushing out of her vagina." Navarro testified that she later decided to call the police, but Outcalt pushed her against the wall and told her not to call anybody.

At about noon the next day, the victim woke up and saw a condom wrapper and broken condoms on the floor. When she went to the bathroom, she noticed that she was not wearing any underwear and that pieces of broken condom came out of her. She was also wearing a different shirt than she had been wearing when she went to the apartment. Because she believed that she had been raped, she went to a facility to be examined. A forensic scientist found evidence of sperm cells on the victim during the examination, but defendant was later eliminated as being the source of the sperm. A urine sample revealed the presence of marijuana and an unnatural amount of GHB in the victim's system.

³ Arevalo was charged with first-degree CSC for this incident, but he testified against defendant in order to get the charge lowered to second-degree CSC.

⁴ Vega was charged with first-degree CSC for this incident, but he testified against defendant in order to get the charge lowered to second-degree CSC. Vega ultimately pleaded guilty to second-degree CSC and was sentenced to two to fifteen years' imprisonment.

II. Analysis

A. Defendant's Motion for a Mistrial

Defendant argues that the trial court abused its discretion by denying his motion for a mistrial. Defendant asserts that the trial court should have declared a mistrial because Navarro mentioned during direct examination that she knew that defendant was an ex-felon. We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). A trial court should only grant a mistrial when there is "an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995).

Here, the prosecutor was asking Navarro about the victim's condition on direct examination when Navarro mentioned that defendant was an ex-felon. After Navarro made this comment, the prosecutor immediately cautioned her by saying, "[D]on't go there." No further mention of defendant's status as an ex-felon was made during trial or closing arguments, and defense counsel declined the trial court's offer to instruct the jury to disregard Navarro's statement. Although evidence of a prior conviction may be prejudicial, "an unresponsive, volunteered answer to a proper question is not grounds for granting a mistrial." *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Thus, because Navarro's brief mention of defendant's prior conviction was not elicited by the prosecutor's question, but was instead volunteered in response to a proper question, it did not warrant a mistrial. The trial court did not abuse its discretion in denying defendant's motion for a mistrial.

B. Ineffective Assistance of Counsel

Next, defendant argues that his trial counsel was ineffective for failing to move to suppress his statements to police, do criminal record checks on the prosecution's witnesses, present evidence in support of an intoxication or diminished capacity defense, and attempt to discredit or move to strike the inconsistent testimony of several witnesses. In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Where the defendant fails to create a testimonial record in the trial court with regard to his claims of ineffective assistance, appellate review is foreclosed unless the record contains sufficient detail to support his claims. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). "If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of counsel." *Sabin, supra* at 659. Here, defendant failed to move for an evidentiary hearing or a new trial. Therefore, our review is limited to the facts on the existing record. *Id.*

To establish ineffective assistance of counsel, the defendant must first show that the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The reviewing court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and defendant bears the heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The alleged errors must be so

serious that counsel was not functioning as “counsel” guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Second, the defendant must show that the representation was so prejudicial to him that he was denied a fair trial. *Toma, supra* at 302. In order to show prejudice, the defendant must demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Carbin, supra* at 600. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, quoting *Strickland, supra* at 694.

1. Motion to Suppress

Defendant first asserts that defendant’s trial counsel was ineffective for failing to file a pretrial motion to suppress statements that defendant made to the police without having first been read his *Miranda*⁵ rights. We disagree. Defense counsel objected to the admission of this evidence on the ground that the police did not read defendant his *Miranda* rights before he made the statements. The trial court overruled the objection. There is no indication that the trial court’s ruling would have been different if defense counsel had objected to the admission of the statements before trial rather than at trial. Therefore, defendant had not shown prejudice.

Additionally, defendant has not shown that his statements to police should have been suppressed or excluded. “An officer’s obligation to give *Miranda* warnings to a person attaches only when the person is in custody, meaning that the person has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with a formal arrest.” *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000), quoting *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997). Whether a person is in custody depends on whether, considering the totality of the circumstances, that person reasonably believed that he was not free to leave. *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998). Here, the officer testified that defendant contacted him, indicated that he wished to speak to the police, and then voluntarily came to the police station for an interview. The officer explained to defendant that he was not in custody and was free to leave. The officer explained to defendant that, because he was not in custody, the officer was not required to give him *Miranda* warnings. There is no evidence to dispute the officer’s testimony or to show that defendant reasonably believed that he was not free to leave. Because there was no error in admitting defendant’s statements to police, defense counsel was not required to make a meritless pretrial motion to challenge the admission of the statements in order to provide the effective assistance of counsel. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

2. Criminal Record Checks

Next, defendant asserts that his trial counsel was ineffective for failing to conduct criminal record checks on Outcalt and Arevallo for impeachment purposes at trial. We disagree. There is no evidence in the record showing that Outcalt or Arevallo actually possess criminal records or that, if they do, their previous convictions are of such a nature that evidence of them would be admissible for impeachment purposes under MRE 609. Therefore, defendant has

⁵ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

failed to carry his burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

3. Intoxication or Diminished Capacity Defense

Defendant next asserts that, assuming that the defense theory at trial was intoxication or diminished capacity, his trial counsel was ineffective for failing to develop and present evidence to support these theories. However, despite defendant's assumption, the record reveals that defendant's trial counsel did not use intoxication or diminished capacity as a defense. Instead, the defense theory put forth by defendant's trial counsel was that defendant neither engaged in sexual intercourse with the victim nor knowingly or intentionally provided her with the GHB. Defendant presents no argument as to why his trial counsel's choice of defense was not sound trial strategy. Further, defendant has not presented any law outlining the intoxication and diminished capacity defenses, nor has he cited any facts in the record to establish that these defenses apply in the present case. That defense counsel's trial strategy was unsuccessful does not in and of itself not constitute ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

3. Inconsistent Witness Testimony

Defendant also appears to assert that his trial counsel was ineffective for failing to move to have the inconsistent testimony of several prosecution witnesses stricken from the record. In the alternative, defendant argues that defense counsel should have attacked the witnesses' credibility by pointing out their inconsistent statements. Defendant cites no authority to support his assertion that inconsistent testimony must be stricken from the record. In regard to attacking the witnesses' credibility, decisions regarding whether to question witnesses are presumed to be matters of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Defense counsel attacked the credibility of the prosecution witnesses in his closing argument, pointing out the inconsistencies in their testimony. Thus, defendant has failed to establish that his trial counsel was ineffective.

4. Appellate Counsel

Next, defendant, acting in propria persona, argues that his appellate counsel is ineffective for failing to raise the issues that he himself raises in his supplemental briefs. We review whether a defendant's appellate counsel was ineffective under the same test as that for trial counsel. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Here, defendant's argument fails because he cannot possibly show any prejudice. Defendant himself raises all of the arguments that he asserts his appellate counsel was ineffective for failing to raise. Thus, the issues were presented to this Court, and appellate counsel's failure to raise the issues is insignificant. *Id.* at 430-431.

C. Reasonable Doubt Instruction

Defendant next asserts that the trial court did not adequately instruct the jury on reasonable doubt. The record reveals that the trial court's instruction concerning reasonable doubt was an almost verbatim reading of CJI2d 3.2. But defendant argues that "CJI2d 3.2 defines reasonable doubt so expansively that reasonable jurors are precluded from obtaining an

ascertainable standard for determining reasonable doubt” We review this unpreserved issue for plain error affecting defendant’s substantial rights. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003). In *Hill*, *supra* at 152, this Court held that CJI2d 3.2 “has repeatedly been held to adequately convey the concepts of reasonable doubt, the presumption of innocence, and the burden of proof.” Therefore, defendant has not shown a plain error.

D. Prosecutorial Misconduct

Next, defendant alleges various instances of prosecutorial misconduct. “The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted). Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context.” *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003) (citations omitted).

1. The Victim’s Impact Statement

Defendant first asserts that the prosecution engaged in misconduct by failing to disclose evidence that the victim contracted a sexually transmitted disease from the sexual conduct that took place the morning of the crimes. Defendant argues that such evidence would have been exculpatory because he does not have, and never has had, a sexually transmitted disease. This claim of prosecutorial misconduct was not preserved for appeal, so it is reviewed for plain error affecting defendant’s substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

MCR 6.201(B)(1) requires that the prosecutor, upon request, provide each defendant with “any exculpatory information or evidence known to the prosecuting attorney.” Furthermore, our Supreme Court has recognized that a defendant has a due process right to obtain material exculpatory evidence that is in the possession of the prosecution, regardless of whether the defendant requests it. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). “Evidence is material only if there is a reasonable probability that the trial result would have been different, had the evidence been disclosed.” *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). “A reasonable probability of a different result exists where suppression of the evidence undermines confidence in the outcome of the trial.” *Id.* One claiming a violation of due process must show that the evidence favorable to the defendant “could reasonably be taken to put the whole case in such a different light so as to undermine the confidence in the verdict.” *Id.*

Here, the victim stated in her victim’s impact statement, which she completed before trial, that she had contracted a sexually transmitted disease. Assuming that the victim did, in fact, contract a sexually transmitted disease,⁶ we conclude that the victim’s impact statement was not material evidence. There is no evidence in the record proving that defendant does not have,

⁶ According to defense counsel, there was nothing in the victim’s medical records indicating that she had contracted a sexually transmitted disease.

and has never had a sexually transmitted disease.⁷ Further, defendant was not the only person to have sex with the victim; there is evidence that both Arevallo and Vega also had sex with the victim. The victim could have contracted the disease from either of these two men. Thus, evidence that the victim contracted a sexually transmitted disease does not prove that defendant did not have sex with the victim. There is not a reasonable probability that the trial result would have been different had the prosecution turned over the victim's impact statement. The prosecution did not engage in misconduct by failing to turn this evidence over to defendant before trial.

2. Failure to Test DNA

Defendant also asserts that the prosecution violated the rules of discovery by failing to require Arevallo and Vega to submit DNA samples to be tested for comparison with an unidentified sperm sample that was found with a rape kit during the victim's medical examination. Defendant is essentially asserting that the prosecution was required to have its DNA expert prepare a report rather than simply provide one that already existed. We review this unpreserved issue for plain error affecting defendant's substantial rights. *McLaughlin, supra* at 645. The court rules, in pertinent part, only require the prosecution, upon request, to turn over any report produced by an expert witness whom the prosecution intends to call at trial. MCR 6.201(A)(3). Due process only requires the prosecution to provide the defendant with exculpatory evidence in its possession. *Stanaway, supra* at 666. Although Arevallo and Vega were both charged with first-degree CSC as a result of the incident, there is no indication in the record that the prosecution possessed either DNA samples from those individuals or reports indicating that they had been compared to the DNA samples collected from the rape kit. MCR 6.201(A)(3) only requires a party to disclose reports that already exist and does not compel creation of a report from the prosecution's expert witness where no report exists. *People v Phillips*, 468 Mich 583, 589-591; 663 NW2d 463 (2003). Further, such reports would not have been exculpatory and would have been immaterial, because there was already evidence at trial supporting the prosecution's position that Arevallo and Vega, along with defendant, had sex with the victim. Proving that the sperm sample belonged to Arevallo or Vega would not have harmed the prosecution's position or proven that defendant did not have sex with the victim. The prosecution did not engage in misconduct by failing to compare Arevallo and Vega's DNA to the sperm sample found with the rape kit.

3. Leading Questions

Defendant also asserts that the prosecutor engaged in misconduct by leading witnesses. However, defendant cites no instances in the record where he believes that the prosecutor improperly led witnesses. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120

⁷ The record reveals that defendant was ordered to undergo testing and counseling for sexually transmitted diseases on March 31, 2003, but the results of that testing are not contained in the lower court file.

(2001), quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Therefore, defendant has abandoned this issue on appeal.

E. Sufficiency of the Evidence

Defendant has asserted in several places throughout his supplemental briefs that the evidence introduced at his trial was not sufficient to support his convictions. However, defendant neither raised this issue in his statement of questions presented as required by MCR 7.212(C)(5) or cited any authority in support of his position. Therefore, this issue is not properly presented for appeal. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999); *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

F. Sentencing

1. Prior Convictions in PSIR

Defendant next argues that the trial court erred by relying on the prior convictions listed in his presentence investigation report (PSIR) in imposing his sentence. According to the PSIR, defendant was convicted of six felony offenses before being convicted of the two current offenses. Defendant asserts that he could not have been convicted of four of those offenses because he was in the United States Navy when the offenses were committed. Defendant's alleged naval service is reflected in the PSIR. Defendant asserts that the trial court should have held an evidentiary hearing to determine the accuracy of the prior convictions listed in the PSIR. A defendant is entitled to the use of accurate information during his sentencing, and a trial court must respond to a defendant's allegations that a presentence investigation report contains inaccuracies. *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000), remanded in part on other grounds 465 Mich 884 (2001). "We review the sentencing court's response to a claim of inaccuracies in defendant's PSIR for an abuse of discretion." *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). But we review for clear error the trial court's factual findings at sentencing. MCR 2.613(C); *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004).

The existence of a defendant's prior convictions for purposes of sentencing under the habitual offender provisions⁸ must be determined by the court at sentencing or a scheduled hearing. MCL 769.13(5). The existence of a prior conviction may be established by any relevant evidence, including information contained in the PSIR. MCL 769.13(5)(c). A PSIR is presumed to be accurate and a trial court is entitled to rely upon factual information therein unless it is effectively challenged by the defendant. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). The court must also resolve any challenges to the accuracy of a prior conviction at sentencing or a separate hearing. MCL 769.13(6).

The defendant shall bear the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid. If the defendant establishes a prima facie showing that information or evidence is

⁸ MCL 769.10, MCL 769.11, and MCL 769.12.

inaccurate, the prosecuting attorney shall bear the burden of proving, by a preponderance of the evidence, that the information or evidence is accurate. [MCL 769.13(6).]

At sentencing, defendant contested the accuracy of the prior convictions listed in his PSIR by stating that he could not have committed four of the crimes listed because he was in the navy from 1987 to 1991. Defendant pointed out that the PSIR confirmed his navy service. But defendant did not present to the court either a copy of his service records or a copy of his discharge papers to show that he actually was in the navy and was honorably discharged. In response to defendant's challenge, the prosecution informed the trial court that the prior convictions listed in defendant's PSIR were taken directly from the federal probation department,⁹ which contained no record of defendant ever being enlisted in the navy.

The trial court decided to rely on the information in the PSIR listing defendant's prior convictions, determining that it was correct because defendant was on federal probation at the time of sentencing, and the prior convictions listed in defendant's PSIR were based on information received from federal records. We conclude that this finding was not clearly erroneous. The trial court did not abuse its discretion in declining to conduct an evidentiary hearing and in accepting for sentencing purposes the prior convictions listed in the PSIR.¹⁰

2. Cruel and Unusual Punishment

Defendant next argues that the trial court's imposition of a sentence of fifteen to fifty years' imprisonment for his first-degree CSC conviction violates defendant's rights under the United States and Michigan Constitutions not to be subjected to cruel or unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16. We review such constitutional issues de novo. *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003).

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). "Under MCL 769.34(10), this Court may not consider challenges to a sentence based exclusively on proportionality if the sentence falls within the guidelines." *Pratt, supra* at 429-430.; see also *People v Babcock*, 469 Mich 247, 261-264; 666

⁹ At the time of sentencing in this case, defendant was on probation for a federal conviction for conspiracy to distribute heroin.

¹⁰ Moreover, even if the trial court erroneously relied on the defendant's prior convictions that occurred when defendant was allegedly in the navy, such error was harmless. "Remand for resentencing is required only when the guidelines have been misscored or when inaccurate information results in the sentence imposed falling outside the appropriate guidelines range" *Houston, supra* at 473. Here, defendant argues that, without consideration of the inaccurate prior convictions, his Prior Record Level (PRL) would have dropped from PRL F to PRL E, and his proper guidelines minimum sentence range should have been 10½ to 35 years' imprisonment. Because defendant was sentenced within this range, any error in considering the prior convictions in the PSIR was harmless.

NW2d 231 (2003). A sentence that is considered proportionate is not cruel or unusual. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). Here, defendant's sentence is within the appropriate guidelines range, so defendant's sentence is proportionate and thus, not cruel or unusual, and must be affirmed.¹¹

3. *Blakely v Washington*

Finally, defendant argues that his sentence must be vacated because the facts supporting his sentence were not admitted by him or found by a jury beyond a reasonable doubt under *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). *Blakely* does not apply to Michigan's indeterminate sentencing system. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Affirmed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

¹¹ Additionally, this Court has specifically concluded that the Michigan statutes authorizing enhanced sentences for habitual offenders are not cruel and unusual because they are an appropriate exercise of the state's right to protect its citizens from individuals that continually engage in criminal activities, and because convictions under the habitual offender statutes "are based upon additional, particular criminal acts and not upon the individual's status as an habitual criminal." *People v Curry*, 142 Mich App 724, 732; 371 NW2d 854 (1985); see also *People v Potts*, 55 Mich App 622, 634-639; 223 NW2d 96 (1974).