

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEONDRE NATHANON COLLINS,

Defendant-Appellant.

UNPUBLISHED

July 19, 2005

No. 249568

Oakland Circuit Court

LC No. 02-187300-FH

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of third-degree criminal sexual conduct (thirteen to fifteen years old), MCL 750.520d(1)(a). Defendant was sentenced to three terms of ten to fifteen years in prison. We affirm.

Defendant first contends that he received ineffective assistance of counsel. We disagree. Whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). A judge must first find the facts and then decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* A trial court's findings of fact are reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.* at 485.

To establish ineffective assistance of counsel, a defendant must show: (1) that the defense counsel's performance was objectively unreasonable in light of prevailing professional norms; and (2) a reasonable probability that, but for the defense counsel's error, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 595-596; 623 NW2d 884 (2001); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Carbin, supra* at 600, quoting *Strickland v Washington*, 466 US 668, 687; 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant's first claim of ineffective assistance is predicated on defense counsel's failure to investigate whether the victim had transferred to a school for problem children. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes

particular investigations unnecessary.” *Grant, supra* at 485, quoting *Strickland, supra* at 690-691. Here, the record does not indicate whether defense counsel investigated the victim’s school situation. Absent any evidence concerning defense counsel’s pretrial investigation, defendant failed to establish the requisite factual predicate for the claim that failure to investigate constituted ineffective assistance of counsel. See *Carbin, supra* at 601. Defense counsel may have known about the special school, but elected to avoid the subject as a matter of trial strategy. If the jury found out that the victim transferred to a school for troubled children after the assault, it may have concluded, to defendant’s detriment, that the sexual assault caused the school change.

Defendant next asserts that counsel was ineffective for failing to assert a jury nullification defense. A defendant is entitled to have his attorney prepare, investigate, and assert all substantial defenses. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A defense attorney’s failure to raise a substantial defense, where there is evidence to support the defense, may amount to ineffective assistance of counsel. *People v Moore*, 131 Mich App 416, 418; 345 NW2d 710 (1984). When a claim of ineffective assistance of counsel is asserted based on the failure to present a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. *Ayres, supra* at 22. A substantial defense is one that may have made a difference in the outcome of the trial. *Id.*

Defendant does not have the right to assert a jury nullification defense. “Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence.” *People v Demers*, 195 Mich App 205, 206; 489 NW2d 173 (1992). While a jury has the power to exercise jury nullification, it does not have the right to do so. *Id.* at 207; see also *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997). In addition, “[a] trial court may exclude from the jury testimony concerning a defense that has not been recognized by the Legislature as a defense to the charged crime.” *Demers, supra* at 207. Because the Legislature does not recognize jury nullification as a defense to third-degree criminal sexual conduct, defendant had no right to assert a jury nullification defense. Thus, counsel was not ineffective for failing to present it. Defendant also failed to show that the defense of jury nullification was substantial. See *Ayres, supra* at 22. On appeal, defendant does not explain how defense counsel might have presented a substantial jury nullification defense. He merely points to his first trial, which ended with a hung jury, and asserts that jury nullification almost worked in the first trial and should have worked in the second. Defendant presents no factual support for this claim.

Defendant asserts he received ineffective assistance of counsel because defense counsel failed to elicit key testimony from Patrick Kelly and allowed Scott Gonte to ramble during his testimony. Defendant fails to explain what testimony defense counsel failed to elicit from Kelly. He also fails to explain what aspect of Gonte’s testimony was harmful, but merely cites to the trial transcript. An appellant may not merely announce his position and leave it to the appellate court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *People v Johnigan*, 265 Mich App 463, 467; 696 NW2d 724 (2005). Therefore, we decline to review this issue.

In any case, defendant failed to show a reasonable probability that the outcome of the trial would have been different if defense counsel had presented evidence about the victim’s

school, argued for jury nullification, elicited damaging testimony from Kelly, or objected to Gonte's narrative testimony. The evidence against defendant was overwhelming. The victim testified that she was fifteen years old when defendant penetrated her mouth and vagina with his penis and put his tongue on her vagina. Lindsay Mijal testified that she saw defendant with his mouth on the victim's vagina. Royal Oak Police Officer Thomas Poff testified that defendant stated under oath that he had placed his penis in the victim's vagina and his mouth on her vagina. Poff also testified that defendant told him that he had placed his tongue on her vagina, his penis in her mouth, and his penis in her vagina.

Defendant's next asserts that the trial court erred when it failed to suppress his statements to the police because he was not given *Miranda*¹ warnings and because he was intoxicated. We disagree. This Court reviews de novo the trial court's ultimate decision on a motion to suppress. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). Although this Court reviews de novo the entire record, it will not disturb a trial court's factual findings with respect to a *Walker*² hearing unless those findings are clearly erroneous. *Id.* at 563-564, citing *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000).

A statement made by an accused during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). *Miranda* warnings are required to be given whenever the accused is subject to custodial interrogation by the police. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). A "custodial interrogation" is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom in any significant way. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). Whether an accused was in custody depends on the totality of the circumstances. *Id.* The key question is whether the accused could reasonably believe that he was not free to leave. *Id.* "The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned." *Id.*

In determining whether a statement was voluntary, courts should examine factors such as the defendant's age, experience, education, background, intelligence, the nature of the questioning, and whether the defendant was injured or intoxicated when he made the statements. *Akins, supra* at 564, quoting *People v Cipirano*, 431 Mich 315, 334; 429 NW2d 781 (1988). No single factor is conclusive, and "[t]he ultimate test is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Akins, supra* at 564-565, quoting *Cipirano, supra* at 334. Because no single factor is determinative, the fact that a person is under the influence of intoxicants does not per se render a statement involuntary. *People v Lumley*, 154 Mich App 618, 624; 398 NW2d 474 (1986). Coercive police activity is a necessary predicate to finding that a confession is not voluntary. See *Colorado v Connelly*, 479 US 157, 167; 107 S Ct 515; 93 L Ed 2d 473 (1986); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 694 (1966).

² *People v Walker*, 374 Mich 331, 338; 132 NW2d 87 (1965).

Here, the totality of the circumstances supports the trial court's ruling that defendant was not in custody when he made the statements and that he made the statements voluntarily. The facts surrounding defendant's statements were brought out at a *Walker* hearing. Officers Poff and Andrew Moreland testified that they were invited into defendant's home; that they spoke to defendant in the kitchen in the presence of his mother; that they told defendant he was a suspect; that defendant agreed to speak with them; and that defendant was free to go. Poff and Moreland also testified that defendant voluntarily went to the police station to make a video recording of his statement. Although the interview room door was closed, it was not locked, and defendant was free to go. Moreover, defendant was released after he made his statements. Poff and Moreland testified that defendant did not appear intoxicated. Thus, defendant was not subject to custodial interrogation, and his statements were not the result of coercive police behavior. The statements were admissible.

Defendant next contends that the sentencing guidelines were scored incorrectly. We disagree. This Court reviews a trial court's decision regarding the points to assess in the sentencing guidelines calculations for whether the court properly exercised its discretion and whether the record adequately supported the particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). The proper construction or application of statutory sentencing guidelines presents a question of law that is reviewed de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

Defendant presents a mixed issue of ineffective assistance of counsel and proper sentencing guidelines scoring. Defendant challenges his score of twenty-five points for OV 13, which provides, in pertinent part:

(1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(b) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.....25 points

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

(b) The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense.

(c) Except for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12. [MCL 777.43.]

Defendant was assessed fifty points in OV 11, which provides:

(1) Offense variable 11 is criminal sexual penetration. Score offense variable 11 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Two or more criminal sexual penetrations occurred.....50 points

(b) One criminal sexual penetration occurred.....25 points

(c) No criminal sexual penetration occurred.....0 points

(2) All of the following apply to scoring offense variable 11:

(a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.

(b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13.

(c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense. [MCL 777.41.]

Defendant contends that the court incorrectly scored conduct under OV 13 that had already been scored in OV 11. This argument has no merit because defendant was scored twenty-five points under OV 13 for aiding and abetting Stokes' three or more felonious penetrations and was assessed fifty points under OV 11 for his own conduct. The record supports the conclusion that defendant aided and abetted Stokes. The victim testified (1) that Stokes told defendant, "I don't think we can do it. She's too conscious"; (2) that Stokes unsuccessfully tried to undo the victim's belt, then defendant tried, and then her pants were off; and (3) that defendant rolled the victim over onto her stomach and defendant and Stokes simultaneously penetrated her.

In addition, OV 13 provides that conduct scored under OV 11 may be scored under OV 13 if it is related to membership in an organized criminal group. MCL 777.43(2)(c). What comprises an "organized criminal group" is not specifically defined, but the Legislature gave some guidance: "The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense." MCL 777.43(2)(b).

Here, the facts allowed the court to reasonably infer that defendant and Stokes acted in concert as an organized criminal group to effectuate a "gang rape." Defendant and Stokes purchased alcohol and gave it to the victim. Stokes expressed concern to defendant that the

victim was “too conscious.” Defendant and Stokes worked together to remove the victim’s pants. They penetrated her simultaneously, and defendant moved the victim to help Stokes penetrate her anally. Thus, the trial court did not err even if it were scoring the same conduct under OV 11 and OV 13. Defense counsel was not ineffective for failing to object to correctly scored guidelines. See *People v Alvin Walker*, 265 Mich App 530, 546; 297 NW2d 159 (2005) (“Counsel is not ineffective for failing to advocate a futile or meritless position.”).

Defendant next argues that the trial court failed to articulate substantial and compelling reasons to depart upwards from the recommended sentencing guidelines range. We disagree. Appellate review of a sentence imposed under the guidelines is limited to determining whether the sentence was imposed within the appropriate guidelines range and, if not, whether the departure from the range was based upon a substantial and compelling reason articulated by the trial court. *People v Babcock*, 469 Mich 247, 272-273; 666 NW2d 231 (2003). In reviewing a departure from the guidelines range, whether a particular factor exists is a factual determination subject to review for clear error. *Id.* at 264. Whether a factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* Whether an objective and verifiable factor constitutes a substantial and compelling reason for departure is reviewed for an abuse of discretion. *Id.* at 264-265. The amount of the departure is reviewed for an abuse of discretion. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

Generally, upon conviction of a felony committed after January 1, 1999, a trial court must impose a sentence within the recommended range of accurately scored sentencing guidelines. *People v Solmonson*, 261 Mich App 657, 668; 683 NW2d 761 (2004). “A trial court may depart from the sentencing guidelines range only ‘if the court has a substantial and compelling reason to do so, and it states on the record the reasons for departure.’” *Solmonson, supra* at 668, quoting MCL 769.34(3). Further, a trial court must articulate on the record a substantial and compelling reason for the particular departure and explain why this reason justified that departure. *Babcock, supra* at 272. In ascertaining whether the departure was proper, this Court must defer to the trial court’s direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

The substantial and compelling reason justifying a guidelines departure must be objective and verifiable, must keenly or irresistibly attract this Court’s attention and must be of considerable worth in deciding the length of a sentence. *Solmonson, supra* at 668, citing *Babcock, supra* at 272. To be objective and verifiable, the factors must be actions or occurrences external to the mind of the judge, defendant, and others involved in making the decision and must be capable of being confirmed. *Abramski, supra* at 74. In determining whether there is a sufficient basis to depart from the statutory sentencing guidelines, a court must ascertain whether departure would result in a sentence more proportionate to the seriousness of the crime and the defendant’s criminal history than would adherence to the guidelines range and determine whether the particular departure is proportionate. MCL 769.34(3); *Babcock, supra* at 262.

Here, the recommended minimum sentence range for defendant’s offenses was fifty-seven to ninety-five months in prison. The court sentenced defendant to a minimum sentence of

ten years (120 months) in prison, thus departing upward from the recommended sentence guidelines range. The trial court articulated three substantial and compelling reasons to depart upward.³ First, the court emphasized the nature of the offense:

This was as far from a consensual act as I've seen in my thirteen years on the bench. . . . This was a gang rape. I don't think any woman, [much less] a girl, is going to consent to two guys going at her, that [sic] she doesn't know, simultaneously, anally, vaginally and orally, while she's virtually unconscious.

The victim testified that defendant and Stokes penetrated her orally, anally, and vaginally without her consent and worked together to get her pants off and to turn her over. The nature of the offense was an objective and verifiable fact. The egregious nature of the sexual assault keenly attracts the attention of this Court and is of considerable worth in deciding the length of the sentence. Therefore, this factor was a substantial and compelling reason to depart from the recommended guidelines range.

Second, the court articulated that defendant's complete lack of remorse as a substantial and compelling reason to depart because it showed that he had serious issues and needed extensive rehabilitation. A trial court may consider evidence of the defendant's lack of remorse in determining his potential for rehabilitation. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). In *People v Fields*, 448 Mich 58, 69, 80; 528 NW2d 176 (1995), the Michigan Supreme Court determined that a defendant's expression of remorse or desire to help others is not an objective and verifiable factor in considering whether a departure is justified. Here, however, the trial court considered defendant's *lack* of remorse.

Defendant's lack of remorse in this case was an objective and verifiable fact existing outside the mind of the defendant. At sentencing, although defendant stated that he was sorry, he maintained that he thought the victim was older than fifteen. In addition, defense counsel argued that the victim was not "an innocent young woman," accused the victim of lying under oath, and suggested that she put herself in a situation where she condoned, requested, and consented to sex. The court stated, "You are going to need extensive counseling so that you can recognize what you did was not only unacceptable, non-consensual, it was a crime." While it is arguable that defendant's lack of remorse does not keenly attract the attention of this Court such that it was of considerable worth in deciding on the sentence, the trial court did not abuse its discretion when it determined that defendant's lack of remorse and need for rehabilitation were substantial and compelling reasons to depart from the guidelines range.

The third reason that the court articulated was defendant's admission that he had threatened a witness at sentencing. Defendant threatened Gonte by telling him, "You'll get yours." He declared that he had threatened Gonte because "I felt like he lied also to get me prosecuted." The trial court stated, "[Defendant] obviously is completely distorted in what is

³ This Court notes that although the trial court did not specifically state that these were "the substantial and compelling reasons to justify departure," no formulaic words are required as long as the court actually articulated substantial and compelling reasons for departure. *People v Babcock*, 469 Mich 247, 259 n 13; 666 NW2d 231 (2003).

acceptable behavior in this society.” Defendant’s threat was objective and verifiable because defendant acknowledged the conduct. Further, threatening a witness is conduct that keenly attracts the attention of this Court and is of considerable worth in deciding the length of the sentence. Thus, this factor also constitutes a substantial and compelling reason to depart upward from the sentencing guidelines range.

This Court must also determine if the departure was proportionate to the seriousness of defendant’s conduct and criminal history. “The trial court must go beyond articulating a substantial and compelling reason for *some* departure. Rather, the trial court can depart from the guidelines range only ‘if the court has a substantial and compelling reason for *that* departure’” *Babcock, supra* at 259, quoting MCL 769.34(3) (emphasis in original). Here, the recommended minimum sentence range was fifty-seven to ninety-five months, and the trial court sentenced defendant to a minimum sentence of 120 months. The egregiousness of the crime, defendant’s lack of remorse and need for rehabilitation, and defendant’s conduct at sentencing were substantial and compelling reasons for the particular departure. The court did not abuse its discretion when it found it had a substantial and compelling for the particular departure.

Finally, defendant argues that the trial court’s scoring of his offense variables violated his right to a jury trial pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court noted in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), that *Blakely* is inapplicable to Michigan’s sentencing scheme. Further, the United States Supreme Court’s subsequent holding in *United States v Booker*, ___ US ___; 125 S Ct 738; 160 L Ed 2d 621 (2005), does not affect Michigan’s sentencing scheme. *Booker* dealt with the federal sentencing scheme, which is a determinate sentencing scheme like the one addressed in *Blakely*, and is different from Michigan’s indeterminate sentencing scheme. Thus, defendant’s argument must fail.

Affirmed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Michael J. Talbot