

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY RUDOLPH JR.,

Defendant-Appellant.

UNPUBLISHED

April 24, 2007

No. 266778

Wayne Circuit Court

LC No. 05-003193-01

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant Timothy Rudolph Jr. was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(h)(ii) (sexual penetration of a physically helpless victim), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(h)(ii) (sexual contact with a physically helpless victim).¹ Defendant was sentenced to concurrent terms of 30 to 50 years' imprisonment for each CSC I conviction and 90 months' to 15 years' imprisonment for the CSC II conviction. He appeals as of right. We affirm defendant's convictions, vacate defendant's CSC I sentences, and remand for resentencing.

I. Facts

Defendant, aged 58, resided in southeastern Michigan with his wife and children before his imprisonment. Defendant received his medical degree in 1978, but lost his license in 2004 for reasons unrelated to this case. In 1983, defendant was convicted of two federal drug offenses. In 2000, defendant began working as a phlebotomist for Detroit Biomedical Laboratory. As part of his job, defendant traveled to area medical facilities, including Camelot Nursing Home in Livonia, to draw blood samples from patients for analysis. Defendant drew blood from the victim on numerous occasions.

¹ Defendant was acquitted of two additional counts of CSC I, MCL 750.520b(1)(h)(ii), and two counts of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1).

The victim, aged 51 at the time of defendant's trial, suffers from progressive multiple sclerosis (MS), a degenerative disease that limits her ability to move and speak. The victim was diagnosed with MS when she was 30 years old. Her health declined in the following years, eventually necessitating care in a nursing facility. The victim was placed in Camelot Nursing Home in 2001. By this time, the victim was confined to her bed. She required assistance with basic activities, including feeding, bathing, and grooming.

When the victim lived at Camelot, her ability to move and communicate was extremely limited. Notably, the victim could not turn herself in bed. To prevent bedsores, a nurse would come to her room approximately every two hours to reposition her. Further, the victim was unable to speak, and could only communicate by nodding her head.

Records from Detroit Biomedical indicate that defendant was at Camelot to draw blood in the early hours of August 3, 2001. About 2:00 a.m., Amy Williams, a certified nurse's assistant at Camelot, entered the victim's room to reposition her. Williams positioned the victim on her side in the middle of the bed, facing the window. The victim was wearing a short nightgown, and Williams reported that "everything was normal." The side rail of the victim's bed was up.

About 4:00 a.m., Williams again entered the victim's room to reposition her. Williams noticed that the side rail of her bed was down and a washrag was on the floor. The victim was positioned near the edge of the bed, and her nightgown was raised above her waist. When Williams checked the victim's urine pad, she found a used condom between the victim's legs. Williams immediately left the room to locate the head nurse. When Williams and the head nurse returned to the room, Williams noticed that the victim had also had a bowel movement. Feces were smeared on the sheets, inside her thighs, and on her stomach.

At the instruction of her director, Williams cleaned the feces from the victim's body and changed her bedding. The following morning, the Livonia police department was contacted. Officers arrived at Camelot to investigate and arranged to transport the victim to Botsford Hospital for examination. Swabs were obtained from inside the victim's vagina and anus for analysis. Swabs of the inside and outside of the condom were also obtained. Forensic scientists analyzing the swabs found sperm on the rectal swabs, although not on the vaginal swabs. Although DNA samples of potential assailants were compared with DNA samples that were collected on the swabs, no match was found. Apparently, defendant was not a suspect at this time, and a DNA sample was not obtained from him for comparison.

At 7:00 p.m. on June 21, 2004, Jane Martinez, the charge nurse, entered the victim's room and noted that she was lying in bed on her left side and was elevated between 30 and 45 degrees. At about 10:00 p.m., defendant performed a blood draw on a male patient located in the same wing at Camelot as the victim. He was not assigned to perform a blood draw on the victim. Between 10:00 p.m. and 11:00 p.m., Martinez saw defendant leave the victim's room and immediately leave the building.

After consulting the logbook and determining that the victim did not have a scheduled blood draw, Martinez entered the victim's room and found her lying in a fetal position on the edge of the bed. When Martinez removed the victim's blanket, she noticed that the victim's gown was pulled up around her waist and her buttocks were exposed and situated toward the

edge of the bed. Martinez promptly notified the other nurses working that evening. After the nurses arrived, they inspected the victim more closely and noticed a “whitish discharge” on the lower part of her vagina. The Livonia police department was contacted, and an officer arrived at approximately 11:15 p.m.

After observing the scene, the officer contacted an ambulance to transport the victim to St. Mary’s Hospital, where a rape kit was performed. Swabs were obtained from inside the victim’s vagina and anus for analysis. On June 25, 2004, defendant voluntarily went to the Livonia police department, waived his constitutional rights, and gave a written statement to Officer Timothy Larion denying involvement in the sexual assault. Defendant refused to submit a buccal swab. After a search warrant was issued, police obtained a sample of defendant’s blood for analysis.

Forensic scientists at the Michigan State Police Crime Laboratory examined and tested the vaginal and rectal swabs and smears taken from the victim, which revealed the presence of spermatozoa and a mixture of the victim’s deoxyribonucleic acid (DNA) and an unidentified donor’s DNA. Further analysis revealed that defendant’s DNA matched the unidentified donor’s DNA found on both the anal and vaginal swabs. Testimony at trial showed that there was a 1 in 46.4 quadrillion chance that someone in the African-American population other than defendant contributed to the DNA found on the victim’s vaginal and anal swabs and that defendant had a “very rare profile.”² The analysis also excluded another possible suspect as the perpetrator of the sexual assaults. Forensic scientists also found that defendant’s DNA matched the DNA sample of the unidentified assailant in the 2001 sexual assault.³

Based on the serological and DNA test results, a warrant was issued for defendant’s arrest. On March 1, 2005, defendant was arrested, transported to the Livonia police department and placed in an interrogation room. After waiving his rights, defendant initially denied that he sexually assaulted the victim. However, after he was confronted with the DNA test results, defendant admitted that he laid the victim on her side on the edge of the bed and engaged in vaginal intercourse, but denied that he penetrated the victim’s anus. Defendant also admitted that he engaged in vaginal intercourse with the victim in 2001, but not anal intercourse.⁴

² The statistical probability equation is derived from empirical evidence and estimates the probability that a particular profile would be found in a certain ethnic population. This figure indicates the probability that a match for defendant’s DNA would be found in the African-American population. Defendant is an African-American. The chance of finding a match for defendant’s DNA is 1 in 532.7 quadrillion in the Caucasian population and 1 in 492.4 quadrillion in the Hispanic population.

³ The probability of finding a donor other than defendant whose DNA matched that of the unidentified assailant in the 2001 sexual assault is 1 in 609 million in the African-American population, 1 in 26 billion in the Caucasian population, and 1 in 19.4 billion in the Hispanic population.

⁴ Defendant also admitted that he used a condom when he engaged in vaginal intercourse with the victim in 2001, but he did not recall using a condom in 2004.

Afterward, defendant made a signed, written statement. He then read the statement aloud, and Larion tape-recorded defendant's confession.

At trial, defendant denied that he sexually assaulted the victim. He claimed that his incriminating statements were coerced by Larion's repeated threats to defendant's family and that Larion dictated his confession verbatim. The jury convicted defendant of two counts of CSC I and one count of CSC II arising from the 2004 offense, and acquitted him of the charges arising from the 2001 offense. This appeal followed.

II. Effective Assistance of Counsel

Defendant argues that, in four separate instances, he was denied effective assistance of counsel. Defendant was not denied the effective assistance of counsel when defense counsel did not move to suppress his confession, retain an independent DNA expert, or move to adjourn his trial. However, defense counsel was ineffective for failing to challenge the improper scoring of the sentencing guidelines. We find that defendant is entitled to resentencing for his CSC I convictions.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant "failed to move for a new trial or an evidentiary hearing with regard to his claim[s], review is limited to mistakes apparent on the record." *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim of ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To establish prejudice, "defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . .'" *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). A defendant must also overcome the presumption that the challenged action constituted sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

A. Suppression of Defendant's Confession

Defendant first argues that his counsel was ineffective for failing to object to the admission of his prior custodial statements to police officers and to request a *Walker*⁵ hearing challenging whether these statements were voluntary. We disagree.

We apply an objective standard and examine the totality of the circumstances to determine if defendant's confession was knowing, voluntary and intelligent. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). "Such circumstances may include the age,

⁵ *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

education, intelligence level, and experience of the defendant, the duration of the defendant's detention and questioning, the defendant's mental and physical state, and whether the defendant was threatened or abused." *Id.* at 181-182.

Defendant fails to identify any factor at issue during the police interview that would suggest coercion or involuntariness. Further, the information provided in the trial court record does not indicate that defendant's confession was involuntary or that the trial court would have suppressed it had defense counsel moved for its exclusion before or during trial. Instead, the record shows that during two interviews with police, defendant was advised of his constitutional rights, read and signed the advice of rights form, and agreed to voluntarily give a written statement. On each occasion, the interviewing officer noted that defendant was 56 years old, had a college and postgraduate education, could read and write, and was not under the influence of alcohol or narcotics. Each interview lasted approximately two hours and defendant was allowed to use the restroom and make telephone calls. Notwithstanding defendant's assertions at trial, the interviewing officer testified that defendant was not forced or coerced to make the inculpatory statements. Because the record evidence indicates that defendant's statements were admissible, defense counsel was not ineffective for failing to raise a futile or meritless objection to their admission or request a *Walker* hearing.⁶ See *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Defendant was not denied the effective assistance of counsel when his counsel failed to object to the admission of his confession.

B. Independent DNA Expert

Next, defendant argues that his counsel was ineffective for failing to retain an independent expert to review the DNA evidence and testify at trial on his behalf. We disagree. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "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 Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Failure to call a witness or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant has not shown that his counsel was ineffective for failing to retain and present an independent DNA expert. Defendant's claim that additional analysis of the victim's anal and vaginal swabs would have exonerated him is speculative.⁷ Furthermore, defense counsel adequately cross-examined each of the prosecution's expert DNA witnesses regarding their

⁶ Regardless, defendant fails to establish prejudice because, even if his confession had been excluded, the prosecution still presented sufficient evidence, notably Martinez's eyewitness testimony and the DNA evidence, to convict him of the instant offenses.

⁷ Although not required to establish his claim of ineffective assistance of counsel, defendant failed to provide this Court with evidence showing that independent DNA testing was performed on the anal and vaginal swabs and that such testing refuted the prosecution expert's testimony. See *People v Mitchell*, 454 Mich 145, 163 & n 19; 560 NW2d 600 (1997).

qualifications, proper DNA testing procedures, the possibility of contamination of the samples during collection, their failure to properly test evidence procured during the alleged 2001 sexual assault, and their failure to conclusively eliminate other suspects. Notwithstanding the DNA evidence implicating defendant in the 2001 sexual assault, the jury acquitted defendant on all three counts relating to the 2001 offenses. Finally, we are satisfied that defendant's confession and the eyewitness testimony, together with the prosecution's DNA evidence, even if rebutted by an independent DNA expert, provided overwhelming evidence of guilt, and that the outcome regarding the 2004 offenses would not have changed, even if counsel had procured an independent expert to rebut the prosecution's expert. Accordingly, defendant fails to establish that he was denied effective assistance of counsel when his attorney failed to retain an independent expert to review the DNA evidence.⁸

C. Motion to Adjourn

Defendant argues that his counsel was ineffective for failing to timely file a motion to adjourn the trial to independently test the DNA evidence. We disagree. As noted *supra*, defense counsel moved to adjourn on July 11, 2005, two days before trial. The trial court denied defendant's first motion. Defense counsel appeared before Wayne Circuit Court Chief Judge Edward Ewell Jr. on the same day to move for an adjournment. The motion was again denied. On July 18, 2005, defense counsel appeared before the Chief Judge for a second time to move to adjourn. This motion was also denied. During each motion, defense counsel argued that to provide defendant with effective assistance of counsel, an adjournment allowing more time for preparation was necessary.

A trial court may, in its discretion, grant an adjournment to promote the cause of justice. MCR 2.503(D)(1). *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). When determining if a trial court properly denied a motion to adjourn, we may consider the following factors: (1) whether defendant asserted a constitutional right, (2) whether defendant had a legitimate reason for asserting the right, (3) whether defendant had been negligent, and (4) whether defendant had requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Furthermore, we will not reverse a trial court's refusal to order additional time for DNA testing in cases in which other significant identification evidence is presented against the defendant or in which the exculpatory theory about the evidence is highly speculative. See *People v Sawyer*, 215 Mich App 183, 192; 545 NW2d 6 (1996). Further, not every restriction on counsel's opportunity to investigate or prepare for trial violates a defendant's Sixth Amendment right to counsel. *People v Mitchell*, 454 Mich 145, 159; 560 NW2d 600 (1997).

⁸ We note that defense counsel attempted to adjourn the proceedings to have time to conduct an independent DNA analysis. Specifically, defense counsel moved to adjourn two days before the start of trial. He argued that it was in the "best interest of justice" to give defendant time to complete an independent analysis of the DNA evidence, and noted that it had not been performed earlier because defendant's family had not provided money to fund the analysis. Further, it is speculative that had counsel requested a court-funded independent expert, that expert would have reached a contrary opinion.

In the present case, defendant failed to show that he was prejudiced by his counsel's failure to file an earlier motion to adjourn. Nothing in the record shows that the result of the proceedings would have been different had the trial been adjourned to give defendant additional time to independently test the DNA evidence. Defendant's claim that additional testing on the DNA evidence presented at trial would have exonerated him of the instant offenses is highly speculative. See *Sawyer, supra* at 192. Further, even if the independent expert had reached conclusions contrary to those of the prosecution's expert, it would simply have presented a credibility question for the jury. The prosecution presented significant independent identification evidence at trial, including Martinez's eyewitness testimony indicating that defendant left the victim's room at the time of the sexual assault and defendant's inculpatory statements. We are satisfied that this testimony together with the prosecution's DNA evidence would have resulted in convictions for the 2004 offenses, even if there had been conflicting independent DNA evidence. Furthermore, defendant failed to show that his counsel would have been successful had the motion to adjourn been filed earlier. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003). The record does not indicate that, based on the circumstances of the present case, the trial court would have granted a motion to adjourn brought earlier in the pretrial period. Defendant's claim of ineffective assistance of counsel predicated on his counsel's failure to file an earlier motion to adjourn is without merit.

D. Scoring of Offense Variable 11 and Offense Variable 12

Finally, defendant argues he was denied the effective assistance of counsel when his counsel failed to object to the trial court's improper scoring of the statutory sentencing guidelines for calculating his minimum sentence. Specifically, defendant contends that his counsel was ineffective for failing to object to the trial court's scoring of offense variable (OV) 11 and OV 12. We agree.⁹

First, defense counsel should have challenged the trial court score of 50 points for OV 11. MCL 777.41 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:

⁹ Initially, we note that the trial court incorrectly calculated defendant's total OV score. Pursuant to MCL 777.16y, CSC I is a class A felony. The trial court calculated defendant's prior record variable (PRV) score at 20 points, level C, and his OV score at 75 points, level IV. However, the trial court erred in adding defendant's total OV score. Defendant was assessed ten points for OV 10, 50 points for OV 11 and 25 points for OV 12, giving him a total OV score of 85 points, level V. MCL 777.62. Yet the trial court erroneously calculated defendant's guidelines range at 108 to 180 months based on a PRV score of 10 to 24 points, level C, and an OV score of 60 to 79 points, level IV. *Id.* Applying a total OV score of 85 points, defendant's guidelines range would have been 126 to 210 months. *Id.* Neither the prosecution nor defendant raised this issue at sentencing.

- (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.

“A score of fifty points for OV 11 correlates with two or more criminal sexual penetrations having occurred during the incident underlying the sentence.” *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). However, “MCL 777.41(2)(c) prevents the court from scoring points ‘for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.’” *People v Johnson*, 474 Mich 96, 102 n 2; 712 NW2d 703 (2006), quoting MCL 777.41(2)(c). The *Johnson* Court noted, “it is clear that each criminal sexual penetration that forms the basis of its own sentencing offense cannot be scored for purposes of that particular sentencing offense.” *Id.* “Accordingly, the evidence must establish at least three sexual penetrations during the incident to support scoring OV 11 at fifty points.” *Matuszak, supra* at 61.

In this case, the trial court noted at sentencing,

Then we go to OV 11, which was the—as far as the particular variable was concerned, OV 11 was for criminal sexual penetrations. Again, it was scored 25 points for one criminal sexual penetration. The jury found one count of genital, one count of anal and one count of sexual contact, CSC 2. So that’s two or more criminal sexual penetrations which would be 50 points.

Because the sentencing offense is CSC I, that offense may not be considered in the scoring of OV 11. See MCL 777.41(2)(c). The evidence presented at trial showed that defendant penetrated the victim’s vagina and anus with his penis during the 2004 sexual assault and that one of these sexual penetrations formed the basis for his sentencing offense. See *People v Cox*, 268 Mich App 440, 456; 709 NW2d 152 (2005) (noting that, when a defendant is convicted of multiple counts of CSC I, the trial court may score points for sexual penetrations forming the basis of the convictions, except for the sexual penetration forming the basis for the CSC I offense being scored). Pursuant to MCL 777.41(2)(c), when scoring each CSC I offense, the trial court was required to exclude the sexual penetration that was the basis for the CSC I conviction being scored, and score 25 points for the additional sexual penetration. See *Johnson, supra* at 102 n 2.

Accordingly, the trial court erred in scoring OV 11 at 50 points. Defense counsel's failure to object to this incorrect score constituted ineffective assistance of counsel.

Second, defense counsel should have challenged the trial court score of 25 points for OV 12. OV 12 scores a defendant's contemporaneous felonious criminal acts. MCL 777.42(1). A felonious criminal act is contemporaneous if "[t]he act occurred within 24 hours of the sentencing offense" and "[t]he act has not and will not result in a separate conviction." MCL 777.42(2)(a)(i), (ii). A defendant may be assessed 25 points under OV 12 when "[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(1)(a). However, conduct scored in OV 11 may not be scored under OV 12. MCL 777.42(c).

At sentencing, the trial court noted,

OV 12, number of contemporaneous felony criminal acts. It was 25 points because there were three separate convictions, and 25 points are assessed where there's [sic] three or more contemporaneous felony criminal acts involving a crime the person committed.

The trial court erred in assessing 25 points for OV 12 based on defendant's convictions of two counts of CSC I and one count of CSC II. The acts providing the basis for defendant's convictions cannot constitute contemporaneous criminal acts because they resulted in separate convictions. MCL 777.42(2)(a)(ii). Moreover, the trial court was precluded from scoring conduct under OV 12 that was scored in OV 11. MCL 777.42(2)(c). Accordingly, defendant should have been assessed zero points for OV 12, and defense counsel was ineffective for failing to object to the trial court's scoring of 25 points for OV 12.

Therefore, defendant was denied effective assistance of counsel when his counsel failed to object to the trial court's scoring of OV 11 and OV 12. Scoring OV 10 at ten points, OV 11 at 25 points and OV 12 at zero points reduces defendant's total OV score to 35 points, level II. MCL 777.62. Based on his corrected total OV score of 35 points and his total PRV score of 20 points, defendant's guidelines range is 51 to 85 months. *Id.* Defendant was prejudiced when the trial court erroneously scored OV 11 and OV 12 and his counsel failed to object to the error, because his erroneous OV score increased his guidelines range. Accordingly, a remand for resentencing on defendant's CSC I convictions is necessary.

III. Sentencing Errors

A. Departure from the Sentencing Guidelines

Defendant argues that the trial court abused its discretion when it exceeded the guidelines range to impose a minimum sentence of 30 years' imprisonment because the articulated reasons for departure were neither substantial nor compelling, were unsupported by the evidence at trial, and were already taken in consideration in the guidelines. Further, defendant argues that his sentence was not proportional to his offense.

Initially, we address whether the trial court's reasons for departing from the sentencing guidelines range is appropriate. Generally, resentencing is not necessary when the trial court has

clearly expressed its view that the sentences imposed in the case were proper without regard to how the offense variables were scored. *People v Mutchie*, 468 Mich 50, 52; 658 NW2d 154 (2003). “Resentencing is also not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range.” *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). The *Francisco* Court noted,

Indeed, appellate correction of an erroneously calculated guidelines range will always present this dilemma, i.e., the defendant will have been given a sentence which stands differently in relationship to the correct guidelines range than may have been the trial court’s intention. Thus, requiring resentencing in such circumstances not only respects the defendant’s right to be sentenced on the basis of the law, but it also respects the trial court’s interest in having defendant serve the sentence that it truly intends. [*Id.* at 91-92 (footnotes omitted).]

Defendant’s sentence does not fall within the appropriate guidelines range. As discussed *supra*, the trial court was working with an erroneous guidelines range of 108 to 180 months when sentencing defendant. Had OV 11 and OV 12 been properly scored, defendant’s guidelines range would have been 51 to 85 months. Further, the trial court did not clearly indicate that it would have imposed the same sentence despite the recommended guidelines range. Therefore, as discussed *supra*, we remand this case for resentencing, permitting the trial court to determine an appropriate sentence for defendant in light of the corrected guidelines.

However, because the issue will likely arise on remand, we address defendant’s challenge to the trial court’s departure from the sentencing guidelines range on its merits. Although we recognize that, by remanding this case for resentencing, the trial court must decide anew whether an upward departure from the guidelines range is appropriate, we note that when originally sentencing defendant, the trial court properly identified substantial and compelling reasons justifying the imposition of a minimum sentence significantly higher than the range identified in the guidelines.

There is no preservation requirement when a trial court departs from the guidelines range at sentencing. *People v Kimble*, 470 Mich 305, 311-312; 684 NW2d 669 (2004). We review the existence of a particular factor supporting a departure from the sentencing guidelines range for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). We review the determination whether the factor is objective and verifiable de novo. *Id.* We review the extent of the departure and whether the reason for the departure is substantial and compelling for an abuse of discretion. *Id.* at 264-265; *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 269.

A trial court must impose a sentence within the sentencing guidelines range, unless a substantial and compelling reason to depart from the guidelines exists. MCL 769.34(2); *People v Johnigan*, 265 Mich App 463, 468; 696 NW2d 724 (2005). The trial court’s reasons for

departing from the guidelines must be objective and verifiable.¹⁰ *Abramski, supra* at 74. Further, “the reasons justifying departure should ‘keenly’ or ‘irresistibly’ grab our attention, and we should recognize them as being ‘of considerable worth’ in deciding the length of a sentence.” *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). The trial court must articulate on the record its reasons for departing from the sentencing guidelines range. MCL 769.34(3). “The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record . . . that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b). However, “[w]e may uphold a sentence that departs from the guidelines where some of the reasons given are substantial and compelling while others are not, provided that we are able to determine that the trial court would have departed to the same extent on the basis of the permissible factors alone.” *Johnigan, supra* at 469.

Even if a departure from the minimum sentencing guidelines is justified, “the trial court must articulate on the record a substantial and compelling reason to justify the particular departure imposed.” *Babcock, supra* at 260.

In determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed. [*Id.* at 262.]

The principle of proportionality requires that a sentence “be proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

In this case, the trial court stated the following in the Sentencing Information Report Departure Evaluation form:

Defendant was convicted of genital and anal penetration of a disabled crippled nursing home patient as well as sexual contact. This violation of a helpless nursing home patient is reprehensible. It is further aggravated by the fact that evidence was presented during trial that Defendant Rudolph was a licensed medical doctor. He violated one of the most sacred relationships that exists (the patient-physician relationship) by raping a patient in a nursing home.

At sentencing, the trial court noted that defendant had one prior conviction in federal court of conspiracy to distribute controlled substances. The trial court also highlighted the fact that the victim had to be “picked up and moved to the edge of the bed” for defendant to effectuate the

¹⁰ The *Abramski* Court noted, “The phrase ‘objective and verifiable’ has been defined to mean that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *Abramski, supra* at 74.

2004 sexual offenses, and that the victim was left unclothed below her waist, exposing her to humiliation when she was found. Further, the trial court noted that the victim defecated on herself during the 2001 sexual assault. Finally, the trial court relied on evidence that defendant was in a position of authority over the victim at the time of both incidents. The trial court did not abuse its discretion in finding that these circumstances constituted substantial and compelling reasons for an upward departure from the sentencing guidelines range.

Contrary to defendant’s argument on appeal, the evidence at trial supported and justified the trial court’s upward departure from the guidelines range. Martinez testified that she observed the victim, who was unable to move independently, on the left side of her bed early in the evening of June 21, 2004. She found the victim lying on the opposite side of the bed in a fetal position with her buttocks unclothed approximately three hours later, soon after she saw defendant leave the victim’s room. Further, evidence presented at trial indicated that defendant anally penetrated the victim in 2001 and that she was found immediately thereafter with feces on her legs and buttocks.

Although a trial court may not make an independent finding of guilt with respect to a crime for which a defendant has been acquitted, and then sentence the defendant on the basis of that finding, the court in fashioning an appropriate sentence may consider the evidence offered at trial, *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997), including other criminal activities established even though the defendant was acquitted of the charges, *People v Coulter (After Remand)*, 205 Mich App 453, 456-457; 517 NW2d 827 (1994), and the effect of the crime on the victim. *People v Girardin*, 165 Mich App 264, 266; 418 NW2d 453 (1987). [*People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).]

Notwithstanding defendant’s acquittal of the charges stemming from the 2001 incident, the record evidence supported the trial court’s finding that the victim defecated on herself when defendant sexually assaulted her in 2001. Accordingly, the trial court based its reasons for departure from the sentencing guidelines range on objective and verifiable factors. See *Abramski, supra* at 74.

Moreover, although defendant’s position of authority and the physical condition of the victim were addressed in the guidelines, the trial court properly concluded that these factors were given inadequate weight. MCL 769.34(3)(b); *Abramski, supra* at 74. OV 10 considers whether a defendant exploited a vulnerable victim when committing the sentencing offense.¹¹

¹¹ MCL 777.40(1) states:

Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 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) Predatory conduct was involved. 15 points

(continued...)

MCL 777.40. The trial court scored ten points for OV 10 because defendant exploited the victim’s physical disability by committing the offense. However, defendant was a physician working as a phlebotomist at the victim’s nursing home at the time of the 2001 and 2004 incidents. The sentencing guidelines do not address the relationship of a medical care provider, whether a physician or a phlebotomist, and a physically incapacitated patient in a nursing home.¹² Further, the sentencing guidelines do not address defendant’s gross violation of the trust inherent in the physician-patient relationship (or in any relationship between a patient and a medical care provider) when he sexually assaulted the victim. Defendant’s acts keenly and irresistibly grabbed the trial court’s attention (and grab our attention) as particularly disgusting and egregious conduct going far beyond the bare requirements of the elements of the offense.¹³

Finally, we find no abuse of discretion in the trial court’s conclusion that the circumstances surrounding the offense justify a substantial upward departure from the guidelines.

[I]n considering whether to depart from the guidelines, the trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range. In other words, if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of his criminal history, the trial court should depart from the guidelines. [*Babcock, supra* at 264.]

(...continued)

- (b) The offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status. 10 points
- (c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious. 5 points
- (d) The offender did not exploit a victim’s vulnerability. 0 points

¹² Admittedly, MCL 777.40 would also permit the trial court to score ten points for OV 10 if it concluded that defendant “abused his . . . authority status.” “Abuse of authority status” means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher.” MCL 777.40(3)(d). Accordingly, OV 10 only allows the sentencing court to consider whether a defendant exploited his relationship with a patient by using fear or coercion to force the victim to submit. However, the evidence available to the sentencing court did not indicate that defendant used his status as a physician and a phlebotomist to coerce the victim to engage in sexual activity, because the victim lacked the physical and communicative capacity to consent or actively engage in sexual activity. Instead, defendant exploited his status as a medical care provider to gain access to a physically helpless, noncommunicative, immobile woman, with whom he could engage in sexual activity without receiving physical or verbal resistance.

¹³ The trial court judge noted that the case was “one of the more disturbing cases that [he’s] ever encountered in [his] 11-year career as a judge.”

Again, substantial and compelling reasons existed in this case to justify an upward departure from the guidelines range. First, the nature of defendant's prior convictions is objective and verifiable. The trial court noted that defendant was convicted in 1983 in federal court of two counts of conspiracy to distribute controlled substances and was sentenced to a term of two years' imprisonment. Contrary to defendant's argument on appeal, lack of an extensive prior record is not sufficient to overcome the presumption of proportionality. *People v Piotrowski*, 211 Mich App 527, 533; 536 NW2d 293 (1995). Moreover, the circumstances surrounding the instant offenses established the serious and reprehensible nature of defendant's crimes. The evidence available to the trial court at sentencing indicated that defendant sexually assaulted the physically disabled victim in her nursing home bed on at least two separate occasions. Accordingly, defendant's prior convictions and the egregious nature of his crimes constitute substantial and compelling reasons to depart upward from the guidelines range to impose a minimum sentence proportionate to the serious nature of defendant's offense.

B. *Blakely* Violation

Defendant argues that the trial court violated his Sixth Amendment right to trial by jury, as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), when it considered facts not established by a jury beyond a reasonable doubt when determining his minimum sentence. We disagree. In *People v Drohan*, 475 Mich 140, 143; 715 NW2d 778 (2006), our Supreme Court concluded that the United States Supreme Court's holding in *Blakely* does not apply to Michigan's indeterminate sentencing scheme. Accordingly, defendant's Sixth and Fourteenth Amendment rights were not violated.¹⁴

C. Sentencing Penalty for Exercising Right to Trial

Defendant argues that the trial court penalized him at sentencing for exercising his constitutional right to trial because he had previously rejected a plea agreement that included a recommended minimum sentence of 108 to 300 months. We disagree. A defendant "has the constitutional right to a trial and should not be penalized for exercising that right." *People v Mosko*, 190 Mich App 204, 211; 475 NW2d 866 (1991), aff'd 441 Mich 496 (1992). However, "[u]nless there is something in the record which indicates the higher sentence was imposed as a penalty for the accused's assertion of his right to trial by jury, the sentence imposed will be sustained." *People v Sickles*, 162 Mich App 344, 365; 412 NW2d 734 (1987). Although defendant argues otherwise, the trial court did not increase his minimum sentence solely because he chose to forgo the plea agreement and proceed to trial. As discussed *supra*, the trial court cited substantial and compelling reasons for departing from the sentencing guidelines. Further, nothing in the record supports defendant's assertion that he was punished for exercising his right to trial. Defendant's argument is without merit.

D. Resentencing

¹⁴ In addition, "[a] sentencing court may consider all record evidence before it when calculating the guidelines," including admissions by the defendant, trial evidence or testimony, and the contents of the presentence investigation report. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

Defendant argues that the trial court erroneously denied his motion for resentencing. Because we concluded *supra* that a remand for resentencing is necessary because defendant's counsel failed to object to the trial court's erroneous calculation of the guidelines range, we need not address this argument further.

Defendant also argues that he is entitled to resentencing by a different circuit court judge. We disagree. This Court uses the following test to determine whether a defendant is entitled to resentencing before a different judge:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997), quoting *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986), quoting *United States v Sears, Roebuck & Co, Inc*, 785 F2d 777, 780 (CA 9, 1986).]

In this case, the trial court's miscalculation of defendant's minimum sentencing range was an error of law, and was not based on the trial court's reliance on improper evidence or findings of fact. Furthermore, the trial court record does not indicate "that the original trial judge would have substantial difficulty in setting aside his previously expressed views." *Hill, supra* at 398. Finally, given the extensive scientific and testimonial evidence offered at trial and the trial court's familiarity with the evidence and defendant's background, reassignment would be wasteful and entail duplication of effort. Defendant's claim that he should be resentenced before a different judge is without merit.

We affirm defendant's convictions, but vacate defendant's CSC I sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Janet T. Neff

/s/ Helene N. White