

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WILLIAM EDWARDS,

Defendant-Appellant.

---

UNPUBLISHED

January 29, 2013

No. 309708

Alpena Circuit Court

LC No. 11-004300-FC

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right<sup>1</sup> his sentence imposed on March 5, 2012 after he pleaded nolo contendere to third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b) (force or coercion). Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to prison for 12 to 22½ years. We affirm because defendant’s sentence is proportionate to the crime he committed, the sentence was not based on inappropriate information, and defense counsel was not constitutionally ineffective.

Defendant pleaded nolo contendere to CSC III in exchange for the prosecutor dropping all other charges. The victim testified that defendant lived with her mother from the time the victim was about four until she was a freshman in high school. She testified that defendant molested her when she was five years old. The trial court and both attorneys agreed there was a factual basis for defendant’s plea and the trial court accepted the plea.

During sentencing, defense counsel indicated that there were no objections to scoring. Counsel did object to information contained in the presentence investigation report (PSIR) because the information had not been proven. The trial court noted, “[I]t’s clear to me that these are allegations only” and asked that the report be corrected to reflect that. Furthermore, both defense counsel and the prosecution noted that when this crime occurred the sentencing

---

<sup>1</sup> As of December 24, 1994, criminal defendants no longer had the right to appeal after entering a plea of guilty or nolo contendere. However, defendant’s offense date is January 1994, which entitles defendant to an appeal by right. See *People v Kaczmarek*, 464 Mich 478; 628 NW2d 484 (2001).

guidelines were discretionary. The trial court sentenced defendant to 12 to 22½ years in prison. This appeal followed.

First, defendant argues that the trial court abused its discretion in imposing a disproportionate sentence. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). The current sentencing guidelines apply only to crimes committed on or after January 1, 1999. MCL 769.34(2). The judicial guidelines are generally applicable to crimes committed before January 1, 1999. *People v Payne*, 285 Mich App 181, 192; 774 NW2d 714 (2009). However, the judicial guidelines do not apply to a defendant being sentenced as a habitual offender. *Id.*; *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997). Instead, the sentence must only be proportional. *Payne*, 285 Mich App at 192.

The key to proportionality is “not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter.” *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997) (quotation marks and citation omitted). A sentence will be proportionate to the seriousness of the matter when the trial court considers all relevant factors to the particular offense and particular offender and imposes a sentence that fits the circumstances. *People v Davis*, 196 Mich App 597, 599; 493 NW2d 467 (1992), overruled on other grounds by *People v Miles*, 454 Mich 90; 559 NW2d 299 (1997). Relevant factors to be considered are “(1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses.” *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). The trial court should state on the record which factors are being considered and the reasons supporting the sentence, but the trial court is not required to expressly address each factor mentioned above. *Id.* at 445-446. When the defendant is a habitual offender, “a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society.” *Hansford*, 454 Mich at 326.

In this case, defendant's sentence was proportional to the severity of the matter. *Lemons*, 454 Mich at 260. There was evidence in defendant's PSIR that defendant had numerous felonies and misdemeanors, and the evidence indicated that defendant's current offense was committed while he was on parole.

Additionally there were incident reports filed that defendant had inappropriately touched two of his own children, as well as allegations that defendant had sexually abused other female children in addition to the victim. Defendant's lengthy criminal history and the fact that he committed this crime while on parole tend to indicate that defendant is incapable of conforming his behavior to the law.

We also note that, although inapplicable, the current sentencing guidelines support finding that defendant's sentence was appropriate. Defendant argues that PRV 7 and OV 6 were

improperly scored.<sup>2</sup> Even accepting these arguments, the current sentencing guidelines would produce a minimum sentence guidelines range of 72 to 150 months. Defendant's minimum sentence was 12 years, or 144 months, which falls within the relevant range. Based on the circumstances of this case, the sentence was proportional to the seriousness of the matter. Therefore, the trial court did not abuse its discretion.

Defendant also argues that his counsel was ineffective for failing to object to the scoring of the guidelines. When raising a claim of ineffective assistance of counsel, the defendant must show: (1) that counsel's performance fell below professional norms, and (2) that but for counsel's ineffectiveness, the ultimate result would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Furthermore, counsel will not be ineffective for failing to make futile objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Regardless of whether there were errors in scoring the guidelines, the guidelines did not apply to defendant's sentence because he was a habitual offender. *Hansford*, 454 Mich at 323. Defendant has not shown that the trial court relied on either the judicial or legislative sentencing guidelines in creating his sentence. Therefore, defendant cannot show that any objection by counsel would have resulted in a different sentence.

In his standard 4 brief, defendant argues that the prosecutor introduced inadmissible hearsay during sentencing and the trial court improperly relied on the information when accepting defendant's plea and when imposing sentence. Generally, a trial court is afforded broad discretion in the "sources and types of information to be considered when imposing a sentence, including relevant information regarding the defendant's life and characteristics." *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994). This is because sentencing is not a criminal trial and "many of the constitutional requirements applicable to criminal trials do not apply at sentencing." *People v Uphaus (On Remand)*, 278 Mich App 174, 183; 748 NW2d 899 (2008). The rules of evidence do not apply during sentencing. *Id.* Therefore, the trial court may rely on information that may not normally be admissible during a criminal trial under the rules of evidence. *Id.* at 184. Instead, the defendant must be allowed to "rebut any matter he believes to be inaccurate." *Id.* (quotation marks and citation omitted). A trial court may consider hearsay evidence during sentencing as long as it has some minimal indicia of reliability. *US v Hamad*, 495 F3d 241, 246 (CA 6, 2007); see also *Uphaus*, 278 Mich App at 184. Additionally, a victim has the right to prepare an impact statement to be presented at sentencing. MCL 780.765. And the victim may designate an individual 18 years old or older to make the statement on the victim's behalf. *Id.*

During allocution, the prosecutor argued that defendant's behavior was habitual. The prosecutor began to discuss past alleged victims and defense counsel objected. The trial court acknowledged that the "hearsay" the prosecutor was discussing during allocution was not evidence, but that it was argument and allowed the prosecutor to continue. The prosecutor also

---

<sup>2</sup> Defendant also argues that PRV 1 was incorrectly scored under the judicial guidelines, but concedes that it was properly scored under the current guidelines.

read portions of a taped conversation between defendant and a witness where defendant made statements about touching young girls.

The trial court properly considered the evidence the prosecutor indicated during allocution because it was based on information contained in the PSIR. Although defendant objected to some of the information, his objection was that there were no convictions from the allegations, not that the allegations were unfounded. Defendant had an opportunity to rebut any inaccurate matters; however defendant did not present any evidence to establish the allegations of other alleged victims were false. *Uphaus*, 278 Mich App at 183. And, on appeal, defendant continues to fail to present any evidence that the allegations were false.

Defendant also argues that the prosecutor erred in reading a letter from the victim. But a victim has the right to prepare an impact statement to be presented at sentencing, either by the victim or an individual designated by the victim. MCL 780.765. The prosecutor indicated that the victim had intended to be present and read the letter herself. However, she was ill at the thought of having to be present, so the prosecutor read the letter instead. Defendant discusses law regarding children's statements about sexual acts, but that is not applicable because the victim may present an impact statement. MCL 780.765. Also, the rules of evidence do not apply to a sentencing proceeding. *Uphaus*, 278 Mich App at 183. The trial court did not abuse its discretion in considering all relevant information about defendant's life and characteristics. *Albert*, 207 Mich App at 74; *Underwood*, 278 Mich App at 337.

Defendant argues that the factual basis of his plea was based on unfounded information. However, the factual basis for defendant's plea was established through testimony of the victim at the preliminary examination. Defendant's assertion that the factual basis was unfounded is meritless. Furthermore, defense counsel expressly accepted that a factual basis had been established.

Affirmed.

/s/ William C. Whitbeck  
/s/ Henry William Saad  
/s/ Douglas B. Shapiro