

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 17, 2014

v

STEPHEN MICHAEL STINSON,

Defendant-Appellant.

No. 312929
Calhoun Circuit Court
LC No. 2012-001352-FC

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b)(iii), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). The trial court sentenced him to two terms of 180 to 360 months' imprisonment for CSC I and to two terms of 71 to 180 months' imprisonment for CSC II. We affirm.

This case arose out of defendant's sexual abuse against his girlfriend's daughter and against his girlfriend's younger sister. The victims were approximately 10 and 14, respectively, at the time of the offenses. As part of the evidence at trial, the prosecution introduced a recording of a telephone conversation between the girlfriend and defendant in which defendant admitted to "fondling" the daughter.

Defendant argues that his trial attorney rendered ineffective assistance in several ways. Defendant previously raised this issue in a motion to remand in this Court, and this Court remanded the case for an evidentiary hearing. The trial court conducted the hearing and ultimately ruled that defendant was not entitled to a new trial.¹

To establish ineffective assistance of counsel, a defendant bears the burden of demonstrating (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's

¹ The trial court did find that counsel failed to make adequate efforts to contact certain defense witnesses, but the court concluded that this failing did not affect the outcome of the trial.

unprofessional errors, the result of the proceeding would have been different.” *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011) (internal citation and quotation marks omitted). The defendant must also show that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and “[t]his 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 Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).’

Defendant claims that his trial attorney, Virginia Cairns, improperly failed to investigate the case. He claims that “his attorney did not visit him” in jail, that he could not safely keep his legal papers in his cell, and that he could not adequately discuss his case in the “holding cell” where they met because there were other people present there. He claims that Cairns failed to present the defense that the victims were fabricating the charges in order to obtain money from defendant. At the evidentiary hearing, defendant testified that he asked Cairns to come and visit him but that she never did. The trial court, in denying the motion for a new trial, stated that “[t]rial counsel’s testimony to this Court in the *Ginther*^[2] hearing concerning these issues more than adequately rebuts the defendant’s claims.”

At the hearing, Cairns testified that she specifically asked defendant, in a letter, to “write his version of events and also any possible defenses that I could use to help him.” She testified that defendant informed her that he had spoken to two different attorneys who stated that they could “beat his case,” and, in response, Cairns asked him about the specific defenses they mentioned and indicated that she “would be glad to look into anything they may have suggested.” Cairns wrote another letter in which she stated that defendant needed to provide more detail to her about his proposed witnesses. Cairns stated that she and defendant met in person multiple times and had “legitimate decent conversations,” but defendant “did not have any witness information.” Cairns denied that defendant ever voiced concerns about his ability to keep legal papers in his cell.

The prosecutor specifically asked Cairns about the proposed defense concerning the victims’ allegedly wanting money from defendant. In response, Cairns referred to the recorded telephone conversation, in which the girlfriend stated that “money” was not going to make things “go away.” Cairns also testified that the girlfriend was not financially dependent on defendant. Cairns indicated that the “money” defense was “not a viable defense for [defendant] at trial” because it would eventually come out that money was not in fact the motivation behind the charges and that defendant had serious ongoing “tax problems.”

In light of the testimony,³ defendant has failed to demonstrate that Cairns’s actions fell below an objective standard of reasonableness or that the alleged errors affected the outcome of the trial. *Meissner*, 294 Mich App at 459. Defendant has failed to overcome the presumption of sound trial strategy. *Rockey*, 237 Mich App at 76.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³ We note that the trial court evidently found the pertinent testimony of Cairns to be credible.

Defendant claims that he “wanted to and should have testified” and that “counsel’s advice that he should not testify was plainly wrong” At the evidentiary hearing, defendant stated that initially Cairns thought he should testify but he did not want to do so. Defendant stated that after the telephone recording was entered into evidence, Cairns advised him not to take the stand. Defendant stated that he became “confused” about whether he should testify. In denying the motion for a new trial, the trial court claimed that defendant’s allegations were rebutted by Cairns’s testimony.

Cairns testified that defendant did not in fact display any confusion about testifying and that he “absolutely did not want to testify.” She further testified that the risks involved with his testifying were great because he was “reticent” and had a “certain timidity in his demeanor” and would face “heavy cross-examination.” In addition, he would be impeached with evidence of a prior conviction for the false reporting of a felony. Given Cairns’s testimony, defendant has failed to demonstrate that the trial court erred in denying his motion for a new trial. No ineffective assistance of counsel is apparent.

Defendant claims that if he had testified, he could have explained that during the telephone conversation that was played for the jury, he was at work and it was for that reason that he was speaking in a stunted manner. Firstly, we emphasize once again Cairns’s testimony that defendant “absolutely did not want to testify.” Secondly, the recording itself makes clear that defendant was at work during the conversation. Defendant stated during the recording that he was at work and “[t]hat’s why I can’t say too much.” He later reiterated that he was at work and could not talk much about the situation. Under the circumstances, defendant’s claim does not demonstrate ineffective assistance of counsel.

Defendant additionally claims that no waiver of his right to testify was taken on the record. However, case law makes clear that an on-the-record waiver is not required. *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991).

Defendant next takes issue with his sentences. The guidelines’ range for CSC I was 108-180 months and the guidelines’ range for CSC II was 35-71 months. The trial court sentenced defendant to 180 to 360 months’ imprisonment for CSC I and to 71 to 180 months’ imprisonment for CSC II. Defendant states that he should not have been sentenced at the top of the guidelines’ ranges. However, a sentence that is within the guidelines’ range is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).⁴ There are no allegations involving an error in scoring or reliance on inaccurate information, and thus we affirm the sentences. See, e.g., *People v Jackson*, 487 Mich 483, 791-792; 790 NW2d 340 (2010), and *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002).

Defendant lastly argues that the recording of the telephone conversation should not have been admitted as evidence. We review a trial court’s evidentiary decisions for an abuse of discretion. *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006). Defendant

⁴ We note that in sentencing defendant, the trial court emphasized the great impact of the offenses on the lives of the victims.

contends that the recording was more prejudicial than probative and should have been excluded under MRE 403, in particular because the jury heard a comment on the recording about defendant's being "addicted to porn." We disagree. The recording was extremely probative because, in it, defendant admitted to having "fondled" one of the victims, stated that he did not know when "it started," stated that "[m]y mom done it to me," and stated that he had a "sexual addiction" that he worried was "getting out of control." The high probative value of the recording was not substantially outweighed by the possible prejudicial effect of the reference to a "porn addiction."

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter