

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

STEVEN E. MORRIS,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

May 6, 2003

No. 232520

Oakland Circuit Court

LC No. 00-170488-FH

Before: Hoekstra, P.J., and Smolenski and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by jury of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a), for which the trial court sentenced him to two concurrent terms of imprisonment for 2 to 15 years. Plaintiff cross-appeals claiming that the trial court erred in scoring the sentencing guidelines' offense variable 11 at zero rather than 25 points. MCL 777.41. We affirm defendant's convictions, but remand for resentencing.

Defendant first argues that he received ineffective assistance of counsel. We disagree. Because defendant failed to preserve this claim by timely filing a motion for new trial or evidentiary hearing in the trial court, our review is limited to the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel, and he must overcome the strong presumption that counsel's performance was sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different and that he was denied a fair trial. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

Before trial, defense counsel moved to suppress two tape-recorded telephone conversations between defendant and the victim on the grounds that the recordings violated the Fourth Amendment and Michigan's eavesdropping statute, MCL 750.539a *et seq.*, and that the recordings were of such poor quality that they were too unreliable to be admitted into evidence. The trial court disagreed, finding that participant monitoring did not violate the Fourth Amendment, relying on *People v Collins*, 438 Mich 8, 11; 475 NW2d 684 (1991). The trial court also rejected defense counsel's statutory eavesdropping claim pursuant to MCL 750.539g(a), which permits "[e]avesdropping or surveillance not otherwise prohibited by law by a peace officer of this state or of the federal government, or the officer's agent, while in the performance of the officer's duties." On appeal, defendant does not contest the trial court's reasoning, but rather claims that counsel erred by not arguing that the recordings should have been suppressed because they were based on deception.

Defendant cites no authority for his underlying argument that his tape-recorded conversations should have been suppressed because they were induced by deception, and thus has abandoned this issue on appeal. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Nonetheless, defendant's claim lacks merit. Police deception inherent in surreptitious police investigations is not sufficient by itself to render evidence inadmissible. *People v Catania*, 427 Mich 447; 398 NW2d 343 (1986). Neither the Federal nor Michigan constitutional protections against unreasonable searches and seizures were violated, *Collins, supra*, and the use of participant monitoring did not violate defendant's right against compelled self-incrimination, See *People v Fox (After Remand)*, 232 Mich App 541, 552-553; 591 NW2d 384 (1998), citing *Illinois v Perkins*, 496 US 292; 110 S Ct 2394; 110 L Ed 2d 243 (1990). Nothing in the record indicates that defendant's tape-recorded statements were the involuntary product of improper police conduct or coercion. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998), citing *Colorado v Connelly*, 479 US 157, 164-165; 107 S Ct 515; 93 L Ed 2d 473 (1986). In sum, review of the totality of circumstances reveals that defendant's will was not overborne nor his capacity for self-determination critically impaired, and therefore his statements were voluntary and properly admitted. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Defense counsel is not ineffective for failing to make a futile argument for suppression. *Rodgers, supra* at 715; *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999).

Defendant's related argument that counsel erred in failing to impeach the victim with regard to her use of the deception that she may be pregnant in an attempt to induce defendant to make incriminating statements must also fail. The victim did not initiate the use of deception, but rather the police investigator, who suggested using the ruse, initiated the deception. Thus, the police-initiated ruse did not logically implicate the victim's credibility, but to any extent it did, it was readily apparent to the jury. Moreover, counsel argued to the jury that the victim's ability to engage in the 45-minute deceptive conversation with defendant bore upon her credibility. Defendant simply has not established that counsel's alleged error was outcome determinative or that as a result of the alleged error, his trial was fundamentally unfair or unreliable. *Toma, supra, Rodgers, supra* at 714.

Defendant also argues that he was denied the effective assistance of counsel because defense counsel erred in presenting defendant's spouse as a witness and in failing to lay a proper foundation for admission of alleged inconsistent statements by the victim. Again, we disagree.

To the extent that defendant argues that his counsel lacked a strategic purpose for calling defendant's spouse as a witness, his argument lacks merit. Whether to present the testimony from a witness is presumed to be a matter of trial strategy. *Rockey, supra* at 76. "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." *Id.* at 76-77. Defendant's argument fails because he has not overcome the strong presumption that counsel's actions were sound trial strategy. *People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002). Moreover, defendant has not identified which prior inconsistencies were precluded and thus has failed to establish the factual predicate for this claim. *Carbin, supra* at 600.

With regard to the argument concerning the failure to lay a proper foundation, the record establishes that the trial court permitted defense counsel to explore alleged inconsistent statements of the victim, and the victim acknowledged inconsistencies in her tape-recorded conversation with defendant. Also, a careful reading of the record suggests that the precluded testimony related to alleged statements concerning other sexual activities by the victim, evidence that defense counsel eventually elicited, and not statements inconsistent with the victim's allegations concerning defendant. Defense counsel was permitted wide latitude to impeach the victim on this collateral and generally inadmissible topic. MCL 750.520j; *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). Thus, even if counsel were unable to elicit all that defendant desired from defendant's spouse, defendant's claim that no strategic purpose was served by presenting her as a witness fails. Further, defendant's spouse's testimony rebutted statements of defendant in his tape-recorded conversation that she doubted his word and that the victim's allegations caused a marital rift. A reasonable trial counsel would have little hope of convincing a jury to accept a defendant's denial of the victim's allegations if it believed the defendant's spouse doubted his denial. The "stand-by-your-man" testimony of defendant's spouse was clearly strategic, and we will not assess counsel's competence with the benefit of hindsight, nor substitute our judgment for that of counsel regarding matters of trial strategy, even if the strategy is unsuccessful, *Rodgers, supra* at 715; *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). In short, defendant has failed to overcome the strong presumption of effective assistance, and that counsel's actions were based on reasonable trial strategy. Moreover, defendant has not established that but for counsel's alleged errors the trial outcome would have been different, or that the alleged error resulted in a fundamentally unfair or unreliable trial. *Toma, supra*.

Next, defendant argues that the evidence was insufficient to support his convictions because the victim's testimony was not credible and no evidence corroborated it. We disagree.

Defendant was convicted of two counts of third-degree criminal sexual conduct pursuant to MCL 750.520d(1)(a), which involves sexual penetration with a person who is at least 13 years of age, but under 16 years of age. At trial, the victim, who was fourteen-years-old at the time in question, testified that defendant engaged in sexual intercourse with her twice. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant engaged in sexual penetration with a fourteen-year-old girl. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Moreover, the uncorroborated testimony of the victim is sufficient to sustain a conviction for criminal sexual conduct. MCL 750.520h; *People v Lemmon*, 456 Mich 625, 642,

n 22; 576 NW2d 129 (1998). Further, credibility is for the jury to resolve. *Lemmon, supra* at 646-647; *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Defendant's argument is without merit.

Finally, defendant argues that the trial court abused its discretion and violated the principle of proportionality when sentencing defendant. We review underlying factual findings of the trial court at sentencing for clear error, MCR 2.613(C); *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000), while the proper application of statutory sentencing guidelines present a question of law reviewed de novo, *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

The legislative sentence guidelines apply to the instant case because the offenses were committed after January 1, 1999. MCL 769.34(1), (2); *Hegwood, supra* at 438; *Babcock, supra* at 72. Appellate relief when a sentence is imposed within the guidelines recommended minimum range is limited. MCL 769.34(10); *Babcock, supra* at 73. Because defendant's sentence was within the guidelines as scored by the trial court, and because defendant does not argue that the trial court erred in its scoring or that the trial court relied on inaccurate information, appellate relief from the sentence imposed is not available to defendant. MCL 769.34(10); *Babcock, supra*; *People v Leverage*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

On cross-appeal, plaintiff takes issue with an aspect of defendant's sentencing, arguing that because defendant was convicted of having committed two instances of third-degree criminal sexual conduct in the same incident that the trial court erred in failing to assess 25 points for offense variable (OV) 11, MCL 777.41. We agree.

Statutory interpretation is a question of law subject to de novo review on appeal, *Babcock, supra* at 72, as is the proper application of statutory sentencing guidelines, *Hegwood, supra* at 436; *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). Here, however, it is unnecessary to engage in extended analysis applying the rules of statutory construction with respect to MCL 777.41 because this Court has already done so in a recent case, *People v Mutchie*, 251 Mich App 273; 650 NW2d 733 (2002).¹

¹ To the extent that defendant argues that *Mutchie, supra*, is non-binding dicta, noting that this Court found the scoring issue was moot because the trial court remarked at the hearing on the defendant's motion to withdraw his plea or for resentencing that it would had found substantial and compelling reasons for departure from the guidelines recommended range even if OV 11 were scored incorrectly, *id.* at 274-275, we disagree.

Despite its finding that the issue in *Mutchie* was moot, this Court proceeded to analyze the alleged error. Generally, an appellate court will not decide moot issues, but may do so when issues of public significance are presented that are likely to recur, *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998); *Hinton v Parole Bd*, 148 Mich App 235, 238-239; 383 NW2d 626 (1986) (moot issues addressed where they were of public importance and likely to recur, yet evade appellate review), and this is clearly what occurred in
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In *Mutchie*, where the defendant pleaded guilty to three counts of first-degree criminal sexual conduct (CSC), this Court first noted that “each of defendant’s three CSC convictions was subject to the legislative sentencing guidelines, MCL 777.21(2), and that OV 11, MCL 777.41, was applicable to each offense because first-degree CSC is categorized as a crime against a person. MCL 777.16y and MCL 777.22(1).” *Mutchie, supra* at 275. The Court first looked to MCL 777.41(2)(a), and after discussing dictionary definitions, which is appropriate where the statute itself does not provide a definition, as well as case law interpreting the phrase “arising out of,” this Court concluded:

Regardless of which definition of "arising out of" we apply in the case at bar, we conclude that the result would be the same. Because all three sexual penetrations perpetrated by defendant against the victim occurred at the same place, under the same set of circumstances, and during the same course of conduct, regardless of which first-degree CSC conviction one deems the “sentencing offense” for purposes of OV 11, the other two sexual penetrations unambiguously fall within the scope of “sexual penetrations of the victim by the offender arising out of the sentencing offense.” [*Mutchie, supra*, 277.]

Having come to this conclusion in light of the language of MCL 777.41(2)(a), this Court next looked to whether MCL 777.41(2)(b) or (c) “bars the use of any of the sexual penetrations for purposes of scoring.” *Mutchie, supra* at 278. With respect to MCL 777.41(2)(b), the *Mutchie* Court concluded that “MCL 777.41(2)(b) provides no impediment to using sexual penetrations to score points for OV 11, but rather acts in harmony with MCL 777.41(2)(a) to permit, but not mandate, the use of sexual penetrations that do not arise out of the sentencing offense to be used to score OV 12 and OV 13.” *Mutchie, supra*. Thereafter, this Court found that MCL 777.41(2)(c) was arguably ambiguous because it does not specify whether the CSC offense that is not scored is also the sentencing offense. *Mutchie, supra* at 279. Summarizing its analysis of this provision, this Court stated that

while the Legislature could have expressed its intent in MCL 777.41(2)(c) more clearly, having considered this question of statutory interpretation *de novo*, *Babcock, supra* at 72, we construe this instruction as indicating legislative intent to bar use of only the one sexual penetration that forms the basis of a first-degree CSC conviction, or third-degree CSC conviction, when that offense is itself the sentencing offense. All other sexual penetrations of the victim and by the offender “arising out of the sentencing offense” may be scored under MCL 777.41(2)(a), regardless of whether the sexual penetrations result in separate convictions. [*Mutchie, supra* at 280-281.]

Here, in light of *Mutchie*, we conclude that the trial court incorrectly scored OV 11 at zero rather than 25 points. As a result, the trial court imposed a sentence outside of the

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Mutchie. Accordingly, we consider this Court’s analysis in *Mutchie* binding precedent; however, even if it were not binding, we find it persuasive, and thus would have utilized it regardless.

appropriate sentence range of the correctly scored legislative guidelines without stating on the record a substantial and compelling reason to depart from the recommended minimum guidelines range. Thus, remand for resentencing is necessary. MCR 6.429(A); MCL 769.34(2), (11); *Hegwood, supra* at 438-440; *People v Miles*, 454 Mich 90, 96-98; 559 NW2d 299 (1997); *Babcock, supra* at 72-74, 80.

On remand, the trial court may review again what sentence is appropriate in this case, and may impose a sentence within the appropriate guidelines range or depart from that range, provided the trial court finds and states on the record a substantial and compelling reason to do so. MCL 769.34(3); *Babcock, supra* at 80.

Defendant's convictions are affirmed, but the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski

/s/ Karen Fort Hood