

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN SCOTT HILL,

Defendant-Appellant.

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UNPUBLISHED

November 13, 2003

No. 240591

Eaton Circuit Court

LC No. 01-020051-FH

Before: O’Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a), following a jury trial. The jury found defendant not guilty on a third count of CSC II. The trial court upwardly departed from the sentencing guidelines and concurrently sentenced defendant to 8 to 15 years on each of the first two counts. We affirm defendant’s conviction and sentence.

This case arose when defendant befriended the eleven-year-old victim and employed him to do construction and grounds maintenance at defendant’s house. Defendant admitted that he also wrestled with the victim and occasionally took him golfing. The victim testified that defendant touched his genitals through his clothes while they were wrestling, touched his scrotum while massaging his thigh during a break from their construction work, and touched his penis through his clothes after they returned to defendant’s house following a round of golf. The pre-sentence investigation report and sentencing transcript indicate that defendant similarly molested other children.

Defendant first argues that his trial counsel performed so poorly that he was effectively deprived of his right to counsel. We review de novo a defendant’s ineffective assistance of counsel claim. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001). Effective assistance of counsel is presumed, and a defendant bears the heavy burden of proving that the defense counsel’s conduct was not sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant first asserts ineffective assistance based on his trial counsel’s failure to object to certain testimony. A mother of a close friend of the victim testified about conversations she had with the victim. According to her testimony, the victim first tangentially indicated to her that defendant inappropriately touched him, and she gradually and persistently questioned him

until he told her about all of defendant's inappropriate sexual acts and comments. She also testified about the victim's positive character traits.

While defendant argues that this testimony was patently inadmissible as hearsay, MRE 802, and improper character bolstering, MRE 404(a), the testimony in this case arguably falls under the category of appropriate witness rehabilitation with prior consistent statements, MRE 801(d)(1)(B), and truthful characteristics, MRE 608(b). More importantly, defense counsel used the questionable testimony to argue that the witness implanted the notion of wrongdoing in the victim's mind and then encouraged the victim to embellish his story and fabricate allegations from innocent events. The defense also used the witness's positive report of the victim's character to inquire whether she would think differently if she knew he allowed himself to be molested for the money he earned at defendant's home. While obviously unavailing, this use of the questionable testimony demonstrates that the defense planned to preserve the testimony for its own purposes rather than object to its use by the prosecution. Therefore, defense counsel's failure to object represents trial strategy, not ineffective assistance.

Defendant next claims that his trial counsel erroneously failed to request a jury instruction to disregard a prospective juror's comments about polygraph examinations. The comments referred to the juror's successful completion of a polygraph examination to defeat CSC accusations in an unrelated case. During trial, the jurors never heard any evidence that defendant or the victim took a polygraph examination, so the juror's comments were innocuous. If defendant's trial counsel had requested a cautionary instruction, the entire jury pool might reasonably conclude that defendant had taken a polygraph examination in this case, and presumably failed it. Defendant's counsel strategically refrained from requesting the counterproductive instruction and did not provide ineffective assistance on this basis.

Defendant also argues that his trial counsel should have requested instructions regarding lesser offenses such as CSC IV, attempted CSC II, and assault with intent to commit CSC II. Under the facts of this case, however, the trial court could not properly instruct on any of these lesser offenses. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). So defendant's trial counsel did not provide ineffective assistance by failing to futilely request the instructions. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Next, defendant argues that the trial court erroneously scored offense variable four (OV4) and OV10. We review for abuse of discretion a trial court's assignment of points to offense variables "provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). If the record contains any evidence to support a trial court's score on a variable, we will affirm it. *Id.*

The record contains evidence that the victim suffered severe mental injury, including evidence that the victim sought psychological treatment, no longer participated in sports, altered his demeanor, and feared retaliation from defendant. So the trial court did not abuse its discretion when it gave defendant ten points under OV4. MCL 777.34. The evidence also indicates that, before he made sexual contact with the victim, defendant made sexual overtures to him, showed him child pornography, and coaxed him into submission with progressively sexual comments and contact. Therefore, the trial court correctly found the necessary "predatory conduct" to support a fifteen-point score under OV10. MCL 777.40.

Finally, defendant argues that the trial court improperly departed from the sentencing guidelines when it sentenced defendant to a minimum of eight years' imprisonment. We disagree. The high end of the guidelines range was seventy-one months. According to MCL 769.34(3), a trial court may not depart from the statutory minimum sentence range without reciting on the record its substantial and compelling reasons for the departure. The reasons must first be objective and verifiable to ultimately qualify as substantial and compelling. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). We review de novo whether a trial court relied on objective and verifiable reasons for the departure, but if the reasons are objective and verifiable, we give deference to the trial court's experience and familiarity with the facts when reviewing its holding that the reasons are substantial and compelling. *Id.* at 264-265, 270.

In this case, the trial court upwardly departed from the sentencing guidelines because it found that defendant molested other children, the record contained "considerable evidence of grooming," defendant's actions had an "[o]bvious and serious psychological and emotional impact" on the victim, and the guidelines did not account for the victim's vulnerable age. Accounts at trial and at defendant's sentencing verified each of these reasons. The trial testimony and statements at sentencing also objectively substantiated them. The trial court's most subjective reason was the degree of emotional impact defendant's actions had on the victim. But the prosecutor provided objective evidence of the negative impact through testimony that the victim sought psychological treatment, changed his formerly positive demeanor, withdrew from his favorite activities, and continued to live in fear of defendant's violent retaliation. Under these circumstances, the trial court's reasons were objective and verifiable.

Giving due deference to the trial court's experience, we also conclude that its reasons for the departure were substantial and compelling. The sentencing hearing revealed that one of defendant's victims chose not to participate in a separate criminal proceeding provided he could speak at defendant's sentencing in this case. The young victim emotionally explained that he felt defendant had ruined his life. Also at sentencing, a superintendent at a school that once employed defendant spoke about the impact on the three known victims of defendant's illicit sexual contact. The trial court properly determined that the number of victims, the vulnerable age of the victim, and the impact on his life were all substantial and compelling justifications for departure.

The evidence of "grooming" strongly indicated that defendant not only attempted to coax the victim into accepting the sexual contact charged, but also insidiously prepared him for more intense sexual contact as the relationship continued. Defendant struck on the nature of his conduct below when he repeatedly suggested that the victim took money in exchange for molestation. Defendant, not the victim, engineered and exploited a horrible system of sexual contact, emotional and fiscal reinforcement, embarrassment, confusion, shame, and repeated abuse. The trial court correctly found this factor, as well as the others, a substantial and compelling justification for departing from the guidelines. Therefore, the trial court did not err when it upwardly departed from the sentencing guidelines by twenty-five months.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Kathleen Jansen  
/s/ Kurtis T. Wilder