

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN EUGENE BARHITE, JR., a/k/a
MELVIN EDWARD BURNER, a/k/a WILLIAM
TERRILL JONES,

Defendant-Appellant.

UNPUBLISHED

May 6, 2004

No. 237890

Kent Circuit Court

LC No. 01-002231-FH

Before: Jansen, P.J., and Markey and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a), and two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a). He was sentenced as an habitual offender, MCL 769.11, to 12½ to 30 years' imprisonment for the third-degree CSC convictions and to 1 to 4 years' concurrent imprisonment for the fourth-degree CSC convictions. He appeals by right. We affirm.

The first issue is whether the trial court erred when it denied defendant's motion to dismiss based on a violation of the Interstate Agreement on Detainers (IAD), MCL 780.601. Statutory interpretation is a question of law that we review de novo. *People v Riggs*, 237 Mich App 584, 587; 604 NW2d 68 (1999). We review the trial court's findings of fact for clear error. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997).

Defendant was not denied a speedy trial under the time limitation provided for in the IAD. Although a detainer was placed on defendant on August 11, 2000, defendant never signed a request for final disposition of the charges in Michigan. Under the IAD, a prisoner must serve notice of his place of imprisonment and request final disposition of pending charges in another state in order to activate the 180-day time limit within which a prisoner must be tried. MCL 780.601, art III(a); *People v Gallego*, 199 Mich App 566, 575; 502 NW2d 358 (1993). Defendant never signed the request for final disposition; therefore, he could not invoke the 180-day time limit under MCL 780.601, art III(a).

It was the Kent County Prosecutor, and not defendant, who requested defendant's transfer. Under MCL 780.601, art IV(c), when it is the prosecuting officer who requests the

transfer, a defendant has 120 days from the time he arrives in the receiving state for his trial to commence. In this case, defendant arrived in Michigan on February 19, 2001, and trial began on May 21, 2001, ninety-one days later. Because trial commenced within 120 days of defendant's arrival in Michigan, the trial court correctly denied defendant's IAD challenge.

Defendant next argues that the trial court abused its discretion when it denied his request for new counsel. Reviewing the trial court's decision regarding substitution of counsel for an abuse of discretion, *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), we find no merit to defendant's claim. A defendant must establish "good cause" and show that "substitution will not unreasonably disrupt the judicial process" in order to warrant the appointment of substitute counsel. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Although defendant argued that his trial counsel never contacted him before trial, trial counsel stated on the record that he had met with defendant twice before trial. We will not substitute our judgment for that of the trial court, but will defer to the trial court's resolution of factual issues that involve questions of credibility. MCR 2.613(C); *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). Likewise, although defendant listed several pretrial motions that trial counsel could have filed, we conclude the motions would have been futile. A trial counsel's failure to pursue futile motions or discovery does not establish good cause. *People v Russell*, 254 Mich App 11, 14; 656 NW2d 817 (2002), lv gtd 468 Mich 942 (2003). Furthermore, defendant's failure to provide trial counsel with a witness list limited trial counsel's ability to conduct discovery. We hold that the trial court did not abuse its discretion when it denied defendant's motion to replace counsel.

Defendant also argues that the trial court failed to properly advise him of the dangers involved in self-representation. Reviewing this unpreserved issue for plain error affecting defendant's substantial rights, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), we disagree. While a trial court is charged with determining whether a defendant knowingly, intelligently and voluntarily chooses to give up his right to representation, such a request to dismiss counsel must be unequivocal. *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976). Defendant never requested the unequivocal dismissal of his attorney; therefore, no error occurred.

Defendant further asserts that the trial court erred in denying his motion for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). To establish an ineffective assistance of counsel claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 391 (2001).

Defendant argues that there was no explanation on the record as to why counsel failed to maintain contact with him, why trial counsel failed to file pretrial motions, or why trial counsel did not act. Before the start of trial, trial counsel stated that he had met with defendant twice. Thus, the record indicates that trial counsel did maintain contact with defendant. We defer to the trial court's judgment on matters of credibility. *Cartwright*, *supra* at 555. Furthermore, while defendant identifies several pretrial motions trial counsel could have filed in this case, those

suggested motions lacked merit. Trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

While defendant also argues that trial counsel “did not act,” trial counsel stated on the record that defendant’s failure to provide trial counsel with a list of potential witnesses limited his ability to engage in discovery. As this Court has recognized, the failure to interview witnesses does not alone establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Likewise, as the trial court recognized, trial counsel’s ability to act was further limited by defendant’s decision to act as co-counsel and to conduct his own examinations and cross-examinations of witnesses at trial.

We conclude that the record fails to support an objective claim of unreasonable representation. We further conclude that defendant has failed to show that there are disputed material facts regarding his claim of ineffective assistance of counsel necessary to warrant a *Ginther* hearing. *People v Williams*, 391 Mich 832 (1974). We therefore hold that the trial court did not err when it denied defendant a *Ginther* hearing.

Defendant also argues on appeal that he is entitled to resentencing because the sentencing court relied upon inaccurate information in the report when it sentenced him and because the scoring of the guidelines was incorrect. In cases such as this, where the legislative guidelines apply, appellate review is limited. If a minimum sentence is within the appropriate guidelines sentence range, this Court shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence. MCL 769.34(10).

Here, there is no indication that there was an error in scoring the guidelines. At sentencing, the court reduced defendant’s total prior record variable (PRV) score by five points to take into account the fact that two of defendant’s previous felonies were actually high severity juvenile adjudications. But, this change in defendant’s total PRV score did not change the guidelines range. For class C felonies, the minimum statutory guidelines range for a third felony offender is fifty to 150 months. MCL 777.64; MCL 777.21(3)(b). Defendant’s minimum sentence of 12½ years’ imprisonment falls within the guidelines range.

Defendant further argues that the trial court failed to address several inaccuracies in the presentence investigation report (PSIR). In particular, defendant argues that he did know the ages and addresses of his children, even though that information was recorded as “unknown” under the “Marriage” section of the PSIR. Defendant also points out that his educational level was never verified and that the “Health Evaluation” information references his father not defendant. At sentencing, the court addressed and corrected defendant’s level of education to reflect that defendant had completed two years of college. No other inaccuracies were noted but there is no indication that the court relied upon those inaccuracies when determining defendant’s sentence. Because there was no error in scoring and because the trial court did not rely on any inaccuracies in the presentence report when determining defendant’s sentence, we affirm defendant’s sentence.

Defendant also argues that the trial court abused its discretion when it limited his cross-examination of witnesses at trial and instructed him on the last day of trial that direct

examination would be limited to one hour per witness. Reviewing the court's conduct of trial for an abuse of discretion, *People v Wigfall*, 160 Mich App 765, 773; 408 NW2d 551 (1987), we disagree. See, MCR 6.414(A), and MRE 611(a).

Trial courts have discretion to limit cross-examination where questions are intended to harass, annoy, or humiliate the witness. *People v Sammons*, 191 Mich App 351, 367; 478 NW2d 901 (1991). Moreover, our Supreme Court has held that the right of cross-examination does not include a right to cross-examine a witness on irrelevant issues. *People v Adair*, 452 Mich 473, 488; 550 NW2d 505 (1996). On appeal, defendant challenges the trial court's decision to limit cross-examination testimony establishing that his Ohio neighbor was actually married to her uncle. Because this evidence was irrelevant and because it was elicited for the purpose of humiliating this witness, the trial court did not abuse its discretion when it prohibited introduction of this testimony at trial.

We further find that the trial court correctly excluded irrelevant testimony that one of defendant's previous victims enjoyed visiting defendant's Ohio home and was permitted to do so until defendant asked the victim's foster parents about adoption. Whether one of defendant's previous victims enjoyed going to defendant's Ohio home, or whether that victim's foster parents permitted the victim to go to his home, is not relevant to any issue in the case at bar. Accordingly, the trial court did not abuse its discretion when it excluded irrelevant testimony during cross-examination.

Defendant also challenges the trial court's decision to prevent defendant from reading to the jury a police report not in evidence. The police report is inadmissible hearsay. *People v Herndon*, 246 Mich App 371, 410; 633 NW2d 376 (2001). Because the document had not been admitted into evidence at trial, the court correctly prevented defendant from reading it to the jury.

Defendant also challenges the trial court's decision to limit his direct examination of six witnesses to one hour per witness on the last day of trial. We have previously held that a trial court under the broad power provided by MRE 611 to control the conduct of trial has discretion to limit the time for examining witnesses. *Hartland Twp v Kucykowicz*, 189 Mich App 591, 596; 474 NW2d 306 (1991). MRE 611(a) gives the trial court control over the method of interrogating witnesses and presenting evidence so as to avoid needless consumption of time. In the case at bar, the trial court noted that defendant was recalling witnesses he had already examined during cross-examination and was spending several hours per witness asking irrelevant questions. Under these circumstances, we hold that the trial court did not abuse its discretion when it limited defendant's direct examination of witnesses to one hour per witness on the last day of trial.

We also have reviewed defendant's late, eleven-issue standard 11 brief, filed by leave granted. Defendant argues eight issues related either to the IAD or right to counsel, which we decline to address further. Two other issues are undecipherable; consequently, we are not able to address them. This Court will not endeavor to discover and rationalize claims not clearly presented. *People v Hermiz*, 235 Mich App 248, 258; 597 NW2d 218 (1999). Although defendant's three remaining issues lack merit, we briefly discuss them.

First, defendant argues he was denied a fair trial by being forced to wear prison clothing. The record reflects that defendant wore a light blue shirt and dark blue pants, which the trial court described as not being obvious prison garb but rather appeared to be workman's clothing. Further, it appears defendant chose his own clothing, and defendant's own interrogation of witnesses highlighted he wore the same clothing while incarcerated in Ohio. We conclude defendant has waived any claim of error because it is based on conduct to which he contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46, 597 NW2d 176 (1999).

Next, defendant claims that the trial court erred by not instructing the jury that third-degree CSC required proof of penetration for a "sexual purpose." Defendant waived any claim of error when counsel expressed satisfaction with the trial court's instructions and when the trial court repeated its instructions, counsel affirmed the instructions were accurate. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Moreover, it is settled that third-degree CSC is a general intent crime requiring proof only that defendant committed the proscribed act. *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996).

Defendant also raises several challenges to the use of his prior convictions for enhancement purposes under MCL 750.520f and MCL 769.11. Defendant failed to object at or before sentencing and for that reason alone we may reject his claims. MCR 6.429(C); MCL 769.13(4); MCL 769.34(10); MCL 771.14; *People v Jones*, 83 Mich App 559, 568; 269 NW2d 224 (1978). But defendant's claims also lack substance. No notice of either statute is required in the IAD detainer because the sentence enhancement provisions are not themselves separate criminal charges. See *People v Connor*, 209 Mich App 419, 426; 531 NW2d 734 (1995) and *People v James*, 191 Mich App 480, 482; 479 NW2d 16 (1991). Further, sentence enhancement arises "out of the same transaction" as the detainers, and IAD, art V(d), is not violated. Finally, defendant was convicted in Ohio of attempted gross sexual imposition,¹ which satisfies the definition of a second or subsequent offense under MCL 750.520f(2) because it is a conviction similar to attempted second-degree CSC, MCL 750.520c.

We affirm.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage

¹ See ORC §§ 2907.05, 2923.02; *State v Austin*, 138 Ohio App 3d 547; 741 NE2d 927 (2000); *State v Terra*, 74 Ohio App 3d 189; 598 NE2d 753 (1991).