

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD JAMES PIONTEK,

Defendant-Appellant.

UNPUBLISHED

April 26, 2007

No. 268048

Wayne Circuit Court

LC No. 05-006765-01

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

PER CURIAM.

Defendant Ronald Piontek appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC I under 13),¹ two counts of first-degree criminal sexual conduct (CSC I relation between 13 and 16),² and second-degree criminal sexual conduct (CSC II).³ The trial court sentenced Piontek as a second habitual offender⁴ to 20 to 40 years' imprisonment for each of his four CSC I convictions and 10 to 22 years' imprisonment for his CSC II conviction. We affirm.

I. Basic Facts And Procedural History

This case arises out of allegations that Piontek sexually assaulted the complainant, his niece. Sometime in 1999, when the complainant was nine years old, her cousin sexually abused her. Several months after this occurred, the complainant told Piontek about the incident because she trusted him. A short time after telling Piontek about this abuse, the complainant was spending the night at Piontek's house when he took her to the bathroom in the basement and placed his fingers and tongue into her vagina. The complainant stated that these sexual

¹ MCL 750.520b(1)(a) (sexual penetration with another person under 13 years of age).

² MCL 750.520b(1)(b)(ii) (sexual penetration with a person at least 13 but less than 16 years of age who is a relation).

³ MCL 750.520c(1)(b)(ii) (sexual contact with a person at least 13 but less than 16 years of age who is a relation).

⁴ MCL 769.10.

encounters occurred on at least five different occasions when she would spend the night at Piontek's house.

The complainant also stated that during these encounters, Piontek would unzip his pants and force her to rub his penis with her hands. Moreover, the complainant stated that on another occasion, after accompanying Piontek to work, he tried to have anal sex with her after they returned home, but stopped when she began crying.

In January 2005, the complainant's parents discovered her journals, which contained information about Piontek sexually abusing her. The complainant testified that, in addition to the information about Piontek, the journals contained entries to an imaginary friend to whom the complainant would write about addictions to pain, sex, and drugs.

The complainant's mother confronted her about the information concerning Piontek, and the complainant confirmed how Piontek abused her. The complainant's mother reported Piontek's sexual abuse to the police. The complainant later participated in a forensic interview. However, the complainant admitted that she lied to the forensic interviewer about how often Piontek would abuse her.

The mother stated that nearly three years before learning of Piontek's sexual abuse of the complainant, she had learned of the 1999 sexual abuse involving the cousin during a conversation with the complainant. Although the mother reported this incident to police, she did not seek counseling for the complainant because the complainant did not want to see a counselor. The mother also stated that sometime in 2004, she learned that the complainant had been cutting herself. The complainant explained that during that time, she would often cut her arms in order to "release pain" and that she began seeing a counselor at school because someone had told the counselor about the cuts.

Piontek was convicted and sentenced as noted above and this appeal followed.

II. Discovery Requests And Due Process

A. Standard Of Review

Piontek argues that the trial court erred in failing to review and admit the complainant's counseling records into evidence. This Court reviews a trial court's decision regarding discovery requests for an abuse of discretion.⁵ Piontek also claims that his due process rights were violated. Generally, this Court reviews this issue de novo to the extent it involves due process concerns.⁶ However, the mere fact that Piontek frames this issue as constitutional does not make it so.⁷

⁵ *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998).

⁶ *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001).

⁷ *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

B. Legal Standards

A trial court must conduct an in camera review of privileged records “where a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense[.]”⁸ However, “[o]nly when the trial court finds such evidence, should it be provided to the defendant.”⁹

C. Applying The Standards

Here, the complainant admitted in a forensic interview from a prior case that the only person who had sexually assaulted her was her cousin. Piontek argues that this admission amounted to exculpatory evidence because the complainant admitted this fact during the period she alleges that he was molesting her. On this basis, Piontek claims that the trial court should have reviewed the complainant’s school counseling records because they would have likely contained similar exculpatory evidence. However, the Michigan Supreme Court has expressly rejected this type of need for “negative evidence” because “[s]ilence in this circumstance would not prove that the offense did not occur.”¹⁰

Further, to the extent Piontek sought to use this “negative evidence” to attack the complainant’s credibility, the failure to admit this evidence was harmless because this evidence would have been cumulative.¹¹ Specifically, the complainant admitted during cross-examination that she told her counselor at the time in question that no one else had sexually assaulted her besides her cousin. Given this testimony, the admission of the counseling records would have been merely cumulative. In light of this, it can hardly be said that the failure to admit this evidence was outcome determinative. Therefore, any error was harmless.¹²

Piontek also claims that he was denied his right to due process under *Brady v Maryland*.¹³ This claim also fails. Under principles of due process, the prosecution is required to disclose evidence that is favorable to the defendant and material to the determination of guilt or punishment.¹⁴

⁸ *People v Stanaway*, 446 Mich 643, 649-650; 521 NW2d 557 (1994).

⁹ *Id.* at 650.

¹⁰ *Id.* at 681 n 41.

¹¹ *Id.* at 684 n 49 (the denial of in camera access to evidence may constitute harmless error where that evidence is cumulative).

¹² *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001) (“In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative.”).

¹³ *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

¹⁴ *Id.* at 87.

In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.^[15]

As noted above, Piontek has not only failed to show that the counseling records at issue contained exculpatory evidence, but he also failed to show outcome determinative error. Thus, he has not shown a due process violation. Further, although Piontek claims that he was denied his right to confrontation, he presents no law in support of this argument. Thus, he has abandoned this issue.¹⁶ Regardless, in light of the fact that the “negative evidence” at issue was merely cumulative, it can hardly be said that Piontek was unable to confront the evidence presented against him.

III. Adjournment

A. Standard Of Review

Piontek argues that the trial court erred in denying an adjournment where the police officer who Piontek subpoenaed was unavailable. “This Court reviews the grant or denial of an adjournment for an abuse of discretion.”¹⁷ To warrant reversal, a defendant must show prejudice resulting from the abuse of discretion.¹⁸

B. Legal Standards

MCR 2.503(C)(2) provides that “[a]n adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.” “Evidence is material only if there is a reasonable probability that the trial result would have been different had the evidence been disclosed.”¹⁹ “A ‘reasonable probability’ is ‘a probability sufficient to undermine confidence in the outcome.’”²⁰ Evidence is immaterial if the proffered purpose for presenting the evidence was to prove a proposition not at issue.²¹

¹⁵ *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).

¹⁶ *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

¹⁷ *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000).

¹⁸ *Id.*

¹⁹ *Fink*, *supra* at 454.

²⁰ *Lester*, *supra* at 282, quoting *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985).

²¹ *People v Mills*, 450 Mich 61, 67; 537 NW2d 909, mod 450 Mich 1212 (1995).

C. Applying The Standards

Here, the complainant admitted that, although she initially testified that Piontek had sexually assaulted her in 2002, she indicated to a forensic interviewer at that time that no one had sexually assaulted her besides her cousin. The complainant made this admission after having her recollection refreshed by the police report of the forensic interview. In light of this, any testimony from the police officer on this issue would have been merely cumulative. Thus, it is not reasonably probable that the absence of the officer in question at trial was “sufficient to undermine confidence in the outcome.”²²

Piontek claims the police officer’s testimony was necessary to impeach the complainant’s testimony that he was the first person she had told about her cousin’s abuse. This claim fails. “MRE 608(b) generally prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant, or immaterial matters[.]”²³ Extrinsic evidence is “[e]vidence that is calculated to impeach a witness’s credibility, adduced by means other than cross-examination of the witness.”²⁴ Because Piontek proffered that the officer’s testimony would be offered to impeach the complainant, this testimony was extrinsic evidence. Moreover, given that the complainant’s detailing of the sexual assault with the cousin was not relevant to any substantive issue at trial, this evidence was immaterial.²⁵ Therefore, Piontek has failed to show that the trial court’s failure to adjourn the trial was an abuse of discretion, let alone that this decision prejudiced him.²⁶

Nevertheless, even if the trial court should have adjourned the trial, any error was harmless. Indeed, it cannot be said that the failure to adjourn the trial prejudiced Piontek in light of the complainant’s admissions during cross-examination that contradicted her own previous testimony. Further, as noted above, negative evidence is not exculpatory.²⁷ Therefore, Piontek has failed to show that any error was outcome determinative.²⁸

²² *Lester, supra* at 282, quoting *Bagley, supra* at 682.

²³ *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003).

²⁴ Black’s Law Dictionary (8th ed), p 597.

²⁵ *Mills, supra* at 67.

²⁶ *Snider, supra* at 421.

²⁷ *Stanaway, supra* at 681 n 41.

²⁸ *Whittaker, supra* at 427.

IV. Newly Discovered Evidence

A. Standard Of Review

Piontek argues that this Court should remand this case on account of newly discovered evidence. The Court reviews this unpreserved issue for plain error affecting substantial rights.²⁹

B. Legal Standards

A motion for a new trial based on newly discovered evidence may be granted upon a showing that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial.^[30]

C. Applying The Standards

Piontek specifically argues that remand is warranted because, while preparing for appeal, he consulted with an expert, Dr. Terence W. Campbell, Ph.D., whose testimony would undercut the complainant's credibility. However, "[n]ewly discovered evidence is not ground for a new trial where it would merely be used for impeachment purposes."³¹ Thus, Piontek is not entitled to remand for a new trial on these grounds. Regardless, Piontek makes no showing, nor does the record indicate, whether he could not have produced this evidence with reasonable diligence at trial.³² Therefore, Piontek has failed to show plain error.

Piontek also argues that this Court should grant a new trial pursuant to MCL 770.1. This argument is also without merit. MCL 770.1 provides: "The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs." MCR 6.431(B) provides: "Reasons for Granting. On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes, the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record." "Under [MCL 770.1], as well as [MCR 6.431(B)], the operative principles regarding new trial motions are that the court 'may,' in the 'interest of justice' or to prevent a 'miscarriage of justice,' grant the defendant's motion for a new trial."³³

²⁹ *People v Carines*, 460 Mich 750, 763, 773; 597 NW2d 130 (1999).

³⁰ *Lester*, *supra* at 271.

³¹ *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

³² *Lester*, *supra* at 281.

³³ *People v Lemmon*, 456 Mich 625, 634-635; 576 NW2d 129 (1998).

In arguing that this Court should grant him a new trial, Piontek claims that justice demands a new trial in light of newly discovered evidence that conflicts with the complainant's testimony. In making this assertion, Piontek is essentially arguing about the weight of the newly discovered evidence. However, "'in general, conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial[.]'"³⁴ Moreover, "[a]ny 'real concern' that an innocent person has been convicted would arise 'only if the credible trial evidence weighs more heavily in [the defendant's] favor than against it.'"³⁵

Here, Piontek has not shown that the proffered expert testimony would weigh more heavily in his favor than against it. Rather, the proffered testimony would at most show that, in the expert's opinion, the complainant's testimony regarding this incident was inconsistent with other victims of sexual abuse. Consequently, this testimony could at most undermine the complainant's credibility, but not deprive the complainant's testimony of probative value. Indeed, the complainant's testimony neither contradicted indisputable physical facts nor defied physical realities and was not patently incredible.³⁶ Thus, not only does justice not require a new trial, but also Piontek has failed to show that it is probable this evidence would render a different result on retrial.³⁷

V. Ineffective Assistance Of Counsel

A. Standard Of Review

Piontek argues that this Court should remand this case for a *Ginther* hearing³⁸ so that a record may be developed to determine whether he was denied the effective assistance of counsel. This Court's review is limited to mistakes apparent on the record.³⁹

B. Legal Standards

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel.⁴⁰ "To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant."⁴¹

³⁴ *Id.* at 643, quoting *United States v Garcia*, 978 F2d 746, 748 (CA 1, 1992).

³⁵ *Id.* at 644, quoting *United States v Polin*, 824 F Supp 542, 551 (ED Pa, 1993).

³⁶ *Lemmon, supra* at 643-644.

³⁷ *Lester, supra* at 271.

³⁸ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³⁹ *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

⁴⁰ US Const, Am VI; Const 1963, art 1, § 20.

⁴¹ *Snider, supra* at 423-424.

Although a defense counsel's failure to reasonably investigate a case may constitute ineffective assistance, this Court must afford deference to counsel's strategic judgments.⁴² However, "[s]trategic choices made after an incomplete investigation are reasonable only to the extent that reasonable professional judgments support the limitation on investigation."⁴³ Moreover, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense."⁴⁴ "A defense is substantial if it might have made a difference in the outcome of the trial."⁴⁵

C. Applying The Standards

Piontek essentially claims that he was denied the effective assistance of counsel because of his trial counsel's failure to consult a psychiatric expert concerning problems with the complainant's disclosure and memory of the abuse. In support of this claim, Piontek cites Campbell's report, which analyzes the complainant's testimony in relation to other claims of childhood sexual abuse, a childhood sexual abuse accommodation syndrome (CSAAS) study,⁴⁶ an affidavit by appellate counsel (indicating his opinion that Piontek should have retained a psychiatric expert), and an article about a victim who admitted fabricating allegations of childhood sexual abuse.

At the outset, assuming psychiatric experts would testify consistent with Piontek's arguments, this testimony would be arguably inadmissible under MRE 702. This rule provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.^[47]

Here, Campbell's findings first question the complainant's disclosure of Piontek's abuse, specifically whether the complainant's journal should be read literally and whether the complainant's disclosure during the forensic interview was consistent with other victims'

⁴² *Wiggins v Smith*, 539 US 510, 521; 123 S Ct 2527; 156 L Ed 2d 471 (2003).

⁴³ *Id.*, quoting *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

⁴⁴ *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

⁴⁵ *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac'd in part on other grds 453 Mich 902 (1996).

⁴⁶ CSAAS is "a theoretical model that posits that sexually abused children frequently display secrecy, tentative disclosures, and retractions of abuse statements[.]"

⁴⁷ MRE 702.

disclosure of childhood sexual abuse. However, regarding different victims' disclosure of abuse, Piontek's CSAAS study concludes that "[s]udies are needed to examine potential developmental trends in loyalty to family and peers, reactions to fear, need for privacy, choice of confidants, and then to relate these factors to disclosure patterns in children of various ages."

Here, the complainant testified that she was afraid to disclose Piontek's abuse because she did not want to see the same devastation in her family, which occurred when she disclosed her cousin's abuse, happen to Piontek who had a newborn baby. Also, the complainant said that she waited to disclose Piontek's abuse because she was afraid she would get into trouble with her mother and because Piontek was a "good person" when he was not abusing her. In light of the complainant's testimony, Piontek's own CSAAS study undercuts the reliability of Campbell's findings because the complainant's testimony concerned the very issues that the CSAAS study asserts require additional study.

Therefore, Campbell's findings in this respect would appear inadmissible under MRE 702 because they are not the product of reliable principles and methods given the CSAAS study's conclusion that further study is needed in circumstances presented in cases such as this. Moreover, to the extent Piontek would present his CSAAS study to determine whether the abuse actually occurred, this would also be improper.⁴⁸ In addition, to the extent Campbell's findings attack the complainant's recollection of events (for example., Campbell found that the complainant "should have been able to recall events – in February 2005 – related to the first episode of the abuse alleged"), this would arguably amount to an improper attack on the complainant's credibility.⁴⁹

In light of this, trial counsel's failure to consult with or call psychiatric experts concerning the complainant cannot be said to have risen to a level of deficient performance given that this evidence would be arguably inadmissible. Regardless, this failure was not outcome determinative in light of defense counsel's effective cross-examination of the complainant during which the complainant admitted inconsistencies in her recollection and disclosure of events regarding Piontek's abuse.

Piontek also argues that trial counsel failed to consult or call a psychiatric expert to determine whether Piontek fit the profile of a sexual predator. However, this Court has held that this type of sex offender profiling is inadmissible because it is not sufficiently reliable and would not assist the jury in understanding the evidence or determining facts at issue.⁵⁰ Therefore, defense counsel's failure to consult or call a psychiatric expert in this respect cannot be considered deficient or outcome determinative where this evidence would have been inadmissible.

⁴⁸ See *People v Peterson*, 450 Mich 349, 371; 537 NW2d 857, amended 450 Mich 1212 (1995) (CSAAS evidence is not admissible to show whether sexual abuse actually occurred).

⁴⁹ *Id.* at 369.

⁵⁰ *People v Dobek*, ___ Mich App ___; ___ NW2d ___ (Docket No. 264366, issued January 30, 2007), slip op at 20-22.

Piontek also claims that trial counsel failed to “work up” the case file and criticized trial counsel’s motion for supplemental discovery as inadequate. In support, Piontek offers an affidavit of appellate counsel’s associate indicating her opinion that Piontek’s case file contained “far less work product than average.” Notwithstanding the dubious nature of whether this factual predicate supports Piontek’s claim, the associate’s opinion, without more, fails to show that reasonable professional judgment would not support a limitation of trial counsel’s investigation. Indeed, the very research Piontek alleges trial counsel failed to perform would have yielded inadmissible evidence, as noted above. Therefore, this claims fails.

Piontek also claims that defense counsel failed to object to the entry of the complainant’s journals into evidence. However, Piontek failed to identify grounds supporting such an objection. “It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.”⁵¹ Regardless, the journals merely confirm the complainant’s testimony that Piontek abused her. Thus, any failure to object cannot be considered outcome determinative.

VI. Sentencing Guidelines

A. Standard Of Review

Piontek claims that the trial court misscored his sentencing guidelines. This Court reviews a trial court’s scoring of a sentencing variable to determine whether the trial court abused its discretion and whether the evidence of record supports the score.⁵² “Scoring decisions for which there is any evidence in support will be upheld.”⁵³ Absent an error in the scoring or reliance on inaccurate information in determining the sentence, this Court must affirm a sentence within the applicable guidelines range.⁵⁴

B. Legal Standards

When scoring an offense variable, “[a] sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a PSIR, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial.”⁵⁵

⁵¹ *Kevorkian, supra* at 389.

⁵² *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

⁵³ *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

⁵⁴ MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

⁵⁵ *People v Ratkov*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

C. Applying The Standards

Here, the evidence supported the trial court's scores. Regarding offense variable (OV) 4, there was evidence that the complainant did not receive professional psychological treatment until after Piontek molested her. Thus, it is reasonable to infer that the treatment was related to the complainant's experience of abuse with Piontek. Moreover, as the trial court noted, Piontek molested the complainant after she had confided in him that her cousin had sexually abused her. Given the complainant's testimony that she confided in Piontek because she trusted him most, the trial court's finding that the complainant suffered serious psychological injury in this context was not an abuse of discretion.

Regarding OV 10, there was evidence that Piontek began molesting the complainant when she was only nine years old while she was spending the night at his house. Piontek was the complainant's uncle. Thus, the trial court's finding that Piontek exploited the complainant's youth and exploited his authority status at the time he committed these offenses was not an abuse of discretion.

Regarding OV 11, only the penetration arising out of the sentencing offense (that is, the penetrations that occur at the same, place, under the same circumstances, and during the same course of conduct), may be scored.⁵⁶ Here, Piontek's sentencing offense was his first CSC I conviction. At trial, there was evidence that Piontek engaged in two sexual penetrations during each CSC I offense; that is, he digitally penetrated and engaged in cunnilingus with the complainant.⁵⁷ Therefore, the trial court properly assessed 25 points for OV 11. Consequently, this Court must affirm Piontek's sentence.⁵⁸

Piontek also argues that his sentence scoring under OV 13 violates *Blakely v Washington*.⁵⁹ However, as Piontek admits, the Michigan Supreme Court has found that Michigan's sentencing scheme is unaffected by *Blakely*.⁶⁰ Stare decisis requires this Court to follow decisions of the Supreme Court.⁶¹ Therefore, Piontek's claim fails. In this regard, we note that the United States Supreme Court recently vacated and remanded *People v McCuller*⁶² for reconsideration in light of its decision in *Cunningham v California*.⁶³ However, *McCuller*

⁵⁶ *People v McLaughlin*, 258 Mich App 635, 674-676; 672 NW2d 860 (2003); *People v Mutchie*, 251 Mich App 273, 280-281; 650 NW2d 733 (2002), aff'd 468 Mich 50 (2003).

⁵⁷ Sexual penetration includes cunnilingus. MCL 750.520a(p).

⁵⁸ MCL 769.34(10); *Kimble*, *supra* at 310-311.

⁵⁹ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

⁶⁰ *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

⁶¹ *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002).

⁶² *People v McCuller*, 475 Mich 176; 715 NW2d 798 (2006),

⁶³ *Cunningham v California*, ___ US ___; 127 S Ct 856; 166 L Ed 2d 856 (2007). See *McCuller v Michigan*, ___ US ___; ___ S Ct ___; ___ L Ed 2d ___ (Docket No. 06-6468, issued February 20, 2007).

dealt specifically with the effect of *Blakely* on Michigan's intermediate sanction scheme.⁶⁴ Because no intermediate sanction is at issue in this case, the resolution of this case is not dependent on the Supreme Court's disposition of *McCuller* on remand.

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper

⁶⁴ *McCuller, supra* at 176.