

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MARK DOUGLAS BALL,

Defendant-Appellant.

UNPUBLISHED

March 24, 2011

No. 295851

Kent Circuit Court

LC No. 09-001299-FC

Before: GLEICHER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

A jury convicted defendant of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) (sexual penetration “under circumstances involving the commission of any other felony”). The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to concurrent terms of 40 to 100 years’ imprisonment for each conviction. Defendant appeals as of right, and we affirm.

Defendant stood trial in October 2009 on charges that he sexually assaulted a 13-year-old victim during the course of a May 1998 home invasion. A forensic scientist testified at trial that in 1998 he detected a male deoxyribonucleic acid (DNA) profile on a swab of the victim’s genitals and a portion of the sheet from the bed where the sexual assault took place. The scientist recalled that he had identified a lone male DNA contributor; the scientist developed a more extensive 13 loci DNA profile in 2004 and entered the profile into a DNA profile computer database. In December 2008, the scientist profiled the DNA on an oral swab of defendant, and discovered that defendant’s DNA profile “matched the DNA profile from the exterior genitalia swab male fraction” and “the sheet male fraction.”

Defendant initially challenges on appeal the efficacy of his trial counsel, characterizing trial counsel as ineffective for failing “to have . . . defendant independently evaluated and to raise and preserve properly an insanity or temporary insanity defense.” Whether a defendant has received the effective assistance of counsel comprises a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review for clear error a trial court’s findings of fact, if any, regarding the conduct of defense counsel, while we consider de novo questions of constitutional law. *Id.*

“[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.” *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d

657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689. A defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court may not "substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted).

Michigan law recognizes that a criminal defendant may present at trial an affirmative defense of insanity. MCL 768.20a, MCL 768.21a. The defendant bears the burden "of proving the defense of insanity by a preponderance of the evidence." MCL 768.21a(3). The Legislature defined as follows the scope of insanity for purposes of the affirmative defense:

An individual is legally insane if, as a result of mental illness as defined in section 400a of the mental health code, Act No. 258 of the Public Acts of 1974, being section 330.1400a of the Michigan Compiled Laws, or as a result of being mentally retarded as defined in section 500(h) of the mental health code, Act No. 258 of the Public Acts of 1974, being section 330.1500 of the Michigan Compiled Laws, that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity. [MCL 768.21a(1).]

Our review of the instant record reveals absolutely no evidence tending to substantiate that defendant labored under any mental illness, mental retardation or involuntary intoxication, either at the time of his sexual assault of the victim or at any point in his life. The presentence investigation report (PSIR) in this case documents in summary fashion the contrary: "Defendant Ball reports that he is in good physical health and that he suffers from no known mental or emotional problems." Defendant's appellate counsel repeatedly references defendant's substance abuse history,¹ but "[a]n individual who was under the influence of voluntarily

¹ The PSIR contains defendant's admission "that he used alcoholic beverages on a daily basis from the age of 17 through 2002," and his denial that he had ever used any other controlled substances. The PSIR additionally noted that defendant did "not appear to have been under the influence of controlled substances at the time of the instant offense on 5/17/1998." At trial, the victim remembered thinking that she had "smelled something funny on him, such as alcohol, but I'm not exactly sure that at that age, I knew what alcohol smelled like." Among defendant's

consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances.” MCL 768.21a(2).

In conclusion, defendant’s trial counsel did not perform below an objective standard of reasonableness when he neglected to further investigate or present an insanity defense without foundation in the record. *Solmonson*, 261 Mich App at 663; *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (“Counsel is not ineffective for failing to advocate a meritless position.”) (internal quotation omitted). Moreover, defendant has not demonstrated that any reasonable likelihood exists that the outcome of his trial would have differed if his counsel would have investigated or raised an insanity defense. *Solmonson*, 261 Mich App at 663-664.

Defendant next challenges as disproportionate the trial court’s imposition of 40- to 100-year terms of imprisonment, on the basis that the court “failed and/or refused to establish and take into account all mitigating evidence in sentencing the defendant.”² This Court reviews a trial court’s imposition of sentence for an abuse of discretion, which exists when the court violates the principle of proportionality requiring that the sentence reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Given defendant’s status as a fourth habitual offender, the judicial sentences guidelines do not apply to our review of his terms of imprisonment. *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997); *Payne*, 285 Mich App at 192. “In reviewing sentences imposed for habitual offenders, the reviewing court must determine whether there has been an abuse of discretion.” *Hansford*, 454 Mich at 323-324. “[A] trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender’s underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society.” *Id.* at 326.

The trial court offered the following reasoning for its decision to craft defendant’s 40- to 100-year terms of imprisonment:

All right. Sir, you were found guilty at jury trial of three counts of CSC first. Each carry [sic] a maximum possible sentence of life.

As I summarized this incident before, this happened 11 years ago when a family was asleep at 4:00 a.m. You broke into their house. You went upstairs into this little child’s bedroom. You threatened her with a knife that you would kill her mother or rape her mother. You viciously and violently brutalized her. And when you had finished, you threatened her that you might come back.

numerous prior convictions were one in 1980 for possessing marijuana, two for having alcohol in a motor vehicle (1977 and 1991), and one conviction for driving under the influence of alcohol (1984).

² The current legislative sentencing guidelines do not govern our review of defendant’s sentences because the crimes at issue occurred before January 1, 1999. MCL 769.34(1).

This is clearly one of the most heinous and offensive crimes that I have ever seen in 25 years of being involved in criminal cases.

I hope that you realize the pain that you've caused this child who now is an adult, and this family. If our children can't be safe in our own homes, where can they be safe.

You, sir, are clearly a monster and a coward. You are someone who preys on little children. And you are every family's worst nightmare.

You're 50 years old. Your record is atrocious. You have 10 prior felonies; eight prior misdemeanors. You have already had seven prison sentences imposed.

The Sentencing Guidelines, here, although they don't apply, give us some guidance. There are 240 months to 480 months, or they call for a minimum sentence of anywhere between 20 years and 40 years.

I cannot issue a sentence of life without parole. The laws of the State of Michigan do not allow this for this type of conviction. A life sentence would make you eligible in about 15 or 16 years for parole. And I am designing this sentence, quite frankly, because I don't ever want to see you out of prison again. I would be concerned for society. I'm sentencing here for purposes of punishment and protection of society.

I am sentencing in view of *People v M[i]lbourn[]*, which I believe requires proportionate sentencing to the crime. Quite clearly, sir, I don't want you ever to have a chance of doing this to another child.

It's the sentence of this Court, sir, that you be committed to the Michigan Department of Corrections to serve a minimum of 40 years to a maximum of 100 years. As you were on parole, I cannot give you credit for any of the time that you have had. You're required to register as a sex offender.

The trial court accurately summarized the extensive criminal history documented in the PSIR; notably, seven of defendant's 10 felony convictions involved forms of breaking and entering or home invasion. We conclude that the trial court did not abuse its discretion in calculating defendant's sentences in this case because (1) the court chose sentences within the statutory limits prescribed by the Legislature, MCL 750.520b(2)(a), MCL 769.12; and (2) the record establishing (a) the brutal and menacing nature of defendant's repeated sexual assaults of the 13-year-old victim, and (b) the context of the instant crime within the lengthy list of defendant's other serious convictions, amply proves defendant's "inability to conform his conduct to the laws of society." *Hansford*, 454 Mich at 326.

Defendant invites us to vacate his sentences on the ground that the trial court did not consider a list of "mitigating evidence in sentencing . . . defendant," and thus imposed invalid sentences without "accurate and complete information about . . . defendant." The record belies defendant's first complaint that the court neglected to take into account his age, which the court

expressly did mention in imposing sentence. The sentencing transcript also contradicts defendant's position that the court offered no rationale for the proportionality of the sentence; the above-quoted excerpt of the trial court's pronouncement of sentence reflects that the court highlighted the egregious nature of defendant's multiple sexual assaults of a young child while possessing a knife and threatening violence, together with defendant's wealth of other felony and misdemeanor convictions. The court further acknowledged that the guidelines recommended a minimum sentence range between 20 and 40 years and that the guidelines did not apply given defendant's habitual offender status, yet, despite defendant's fourth habitual offender status, the court imposed minimum terms within the 40-year guideline range.

Defendant insists that the trial court did not take cognizance of his "strong family support" and remorse, both indicia of "rehabilitative potential." The PSIR noted pertinent to family that defendant had a surviving mother and a sister, with whom "[h]e has had little to no contact . . . since" 1993, and that he "is single and has no children." Defendant's appellate brief points to no specific suggestion of family support that the trial court overlooked. Regarding remorse, immediately before the court announced the sentences defendant spoke at length and voiced remorse several times. Although the trial court did not reference these expressions of remorse, the record clearly and reasonably implies that the court discounted their credibility. Even if defendant seriously stated his remorse, his extensive criminal record over a prolonged period, before and after the sexual assaults of the victim in this case, support the trial court's view that little to no likelihood existed that defendant might rehabilitate himself. Defendant urges that the court ignored the evidence implying "that he has a serious mental disease or defect." However, as discussed earlier, the record remains entirely devoid of any medical records, testimony, affidavits or any offer of proof tending to substantiate that defendant suffered from a mental illness or infirmity that may have diminished or precluded his culpability for assaulting the victim. Finally, concerning defendant's argument that the court disregarded its obligation to "review a presentence report before imposing a sentence," the sentencing transcript commences with the trial court's review of multiple defense challenges to the PSIR, which prompted the court to change the report. In summary, the trial court did not ignore any migrating circumstances when sentencing defendant.

Defendant additionally characterizes his terms of imprisonment as "cruel or unusual" punishments barred by Const 1963, art 1, § 16, and "cruel and unusual" punishments according to US Const, Am VIII. We generally review de novo questions of constitutional law, but consider unpreserved constitutional issues only to ascertain whether any plain error affected the defendant's substantial rights. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007).

The concept of "cruel or unusual" punishments in the Michigan Constitution embodies protection against an "unjustifiably disproportionate" or "grossly disproportionate" sentence. *People v Bullock*, 440 Mich 15, 30, 32; 485 NW2d 866 (1992). The Supreme Court in *Bullock*, *id.* at 34 n 17, cautioned "that the *constitutional* concept of 'proportionality' under Const 1963, art 1, § 16 is distinct from the nonconstitutional 'principle of proportionality' discussed in *People v Milbourn*, 435 Mich 630 . . . , although the concepts share common roots." (Emphasis in original). To discern whether a sentence meets the proportionality requirement contained in 1963 Const, art 1, § 16, "we look to the gravity of the offense and the harshness of the penalty, comparing the penalty to those imposed for other crimes in this state as well as the penalty imposed for the same offense by other states and considering the goal of rehabilitation." *People*

v Poole, 218 Mich App 702, 715; 555 NW2d 485 (1996). If a punishment “passes muster under the state constitution, then it necessarily passes muster under the federal constitution.” *People v Nunez*, 242 Mich App 610, 618-619 n 2; 619 NW2d 550 (2000).

This Court has consistently adhered to the view that sentence enhancements premised on MCL 769.10, MCL 769.11, and MCL 769.12 do not amount to cruel and unusual punishment. *People v Curry*, 142 Mich App 724, 732; 371 NW2d 854 (1985); *People v Potts*, 55 Mich App 622, 638-639; 223 NW2d 96 (1985). Moreover, here, as emphasized by the trial court repeatedly during the sentencing hearing, defendant committed a grave offense when he broke into a residence, sexually violated a 13-year-old on multiple occasions, displayed a knife, and physically threatened the victim and her mother. The CSC I statute authorizes “imprisonment for life or for any terms of years” in the circumstances of this case, MCL 750.520b(2)(a), a penalty contemplated in several other Michigan statutes.³ Many sister states similarly subject defendants who commit sexual penetrations of a child, or commit a forcible sexual assault, to potential terms of life imprisonment.⁴ We conclude that the sentences here qualify as neither cruel or unusual punishment under the Michigan Constitution nor cruel and unusual punishment for purposes of the United States Constitution.⁵

³ Some of the other statutes allowing a court to impose life imprisonment include MCL 333.7403(2)(a)(i) (possession of more than 1,000 grams of some controlled substances), MCL 750.83 (assault with intent to commit murder), MCL 750.89 (assault with intent to rob while armed), MCL 750.260 (counterfeiting), MCL 750.316(1) (first-degree murder), MCL 750.317 (second-degree murder), MCL 750.335a(3) (indecent exposure by “a sexually delinquent person”), MCL 750.529 (armed robbery), MCL 750.529a(1) (carjacking), MCL 750.531 (bank robbery), MCL 750.349(3) (kidnapping), and MCL 750.350(1) (carrying away a child).

⁴ See, e.g., Cal Penal Code § 269(b) (authorizing life imprisonment for sexual penetration of a child younger than 14); 11 Del Code Ann § 4205(a)(2) (allowing a sentence of 25 years to life for sexual penetration of a victim younger than 14); Fla Stat § 794.0115(2) (envisioning a prison sentence up to life for “dangerous sexual felony offender[s]”); Ga Code Ann § 16-6-4(c) and (d) (authorizing life imprisonment for aggravated child molestation); Kan Stat Ann § 21-4643(a)(1)(B) (contemplating a term of up to life for rape of a minor younger than 14); La Rev Stat Ann § 14:42(D) (mandating life imprisonment for a defendant convicted of aggravated rape); Md Code Ann, Crim Law, § 3-303(a)(1) and (d)(1) (permitting a term up to life for first-degree rape); Mo St § 566.030(1) and (2) (allowing up to life for forcible rape); Mt Code Ann § 45-5-503(1) and (2) (reflecting a potential life term for sexual intercourse without consent); NC Gen Stat § 14-27.2A (allowing a life term for “egregious aggravation” in the sexual assault of a child younger than 13); Ohio Rev Code Ann § 2971.03(B)(1)(c) (containing a maximum life term for a violent sex offense); Okla Stat, title 21, § 843.5(E) (imposing a maximum sentence of life for willful or malicious child sexual abuse); and Va Code Ann § 18.2-61(B) (authorizing life for a rape conviction).

⁵ With respect to defendant’s arguments that his defense counsel was ineffective for failing to raise constitutional or mitigation-related sentencing objections, defense counsel need not have offered these groundless objections to the sentences. *Mack*, 265 Mich App at 130.

Defendant lastly avers that the trial court improperly denied him credit toward his sentences for the time he spent in jail pending trial and sentencing, as mandated by MCL 769.11b. Section 11b generally dictates that

whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

However, the parties agree that defendant remained incarcerated pending trial in this case because of his “parole status,” and “the jail credit statute does not generally apply to parolees who commit new felonies while on parole.” *People v Idziak*, 484 Mich 549, 562; 773 NW2d 616 (2009). “[C]redit is available only when the defendant is ‘denied or unable to furnish bond’ and . . . when a defendant is held in jail on a parole detainer, bond is neither set nor denied.” *People v Johnson*, 283 Mich App 303, 307; 769 NW2d 905 (2009), quoting *People v Seiders*, 262 Mich App 702, 707; 686 NW2d 821 (2004) (emphasis in original). Given that defendant’s PSIR reflects that he was on a preexisting term of parole between the time the prosecutor filed the instant CSC I charges and his sentencing, he is entitled to no credit for days served applicable to the 40- to 60-year terms of imprisonment.⁶

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ William C. Whitbeck
/s/ Donald S. Owens

⁶ To the extent that defendant challenges his trial counsel’s effectiveness for failing to raise sentence credit claims, we again observe that defense counsel need not have offered these groundless objections. *Mack*, 265 Mich App at 130.