

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK WARREN,

Defendant-Appellant.

UNPUBLISHED

June 22, 2001

No. 221284

Wayne Circuit Court

LC No. 98-007193

Before: K. F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion¹, two counts of first-degree criminal sexual conduct (CSC I)², armed robbery³, and possession of a firearm during the commission of a felony⁴. He was sentenced to ten to twenty years on first degree home invasion, forty to sixty years for each count of CSC I, twenty-five to forty years for the armed robbery, and a consecutive two-year term for the felony-firearm conviction. We affirm.

First, defendant contends that the trial court erred by denying his motion for directed verdict. Defendant asserts that there was insufficient evidence presented on the issue of identification from which a rational trier of fact could conclude that he was the perpetrator of the offenses charged⁵. We disagree.

¹MCL 750.110a(2).

²Defendant was originally charged with four counts of CSC I based upon two penetrations. He was charged under alternate theories that alleged each penetration occurred during either the commission of a felony or while a weapon was being used. He was found guilty on one count of MCL 750.520b(1)(c) (during commission of a felony), and one count of MCL 750.520b(1)(e) (weapon used).

³ MCL 750.529.

⁴ MCL 750.227b.

⁵ Defendant concedes that there was sufficient evidence presented on each of the other elements of the offenses.

When determining whether sufficient evidence has been presented, this Court must view the evidence in a light most favorable to the prosecution to determine whether there was sufficient evidence to justify a rational trier of fact's conclusion that the defendant was guilty beyond a reasonable doubt on each of the essential elements of the crime. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). The identity of the defendant as the perpetrator of a charged offense is an essential element of the offense that the prosecutor must establish beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Identification may be established by either direct testimony or circumstantial evidence. *Kern, supra* at 409-410, citing *People v Sullivan*, 290 Mich 414, 418-419; 287 NW 567 (1939); *People v Stewart*, 163 Mich 1, 8; 127 NW 816 (1910). Additionally, identity may also be established beyond a reasonable doubt by circumstances that point toward one person. *Stewart, supra* at 8.

In this case, the victim testified that the person who attacked her had an unusual voice and spoke to her throughout the attack which lasted approximately one hour. The victim immediately identified defendant in a pre-trial lineup because she recognized his distinctive voice. The DNA evidence presented at trial established: (1) defendant's DNA profile was consistent with the evidence collected from the victim's body; (2) defendant's DNA matched the DNA collected from the victim's body on all seven DNA reference cites; and (3) defendant's DNA profile would only be found in one in 375,000 African-Americans, one in three billion Caucasians, and one in 840 million Hispanics. Furthermore, authorities discovered the victim's cell phone during a search of defendant's home. Telephone calls made on the victim's cell phone following the attack were linked to defendant. This evidence, along with all reasonable inferences drawn therefrom, was sufficient to demonstrate, beyond a reasonable doubt, that defendant was the perpetrator of the offenses for which he stood convicted. *People v Godbold*, 230 Mich App 508, 522-523; 585 NW2d 13 (1998). The trial court did not err by denying defendant's motion for directed verdict.

Defendant next contends that he was denied the effective assistance of counsel because his trial counsel failed to request the appointment of a defense expert in DNA. We disagree. Whether defendant was denied the effective assistance of counsel is a constitutional question that this Court reviews de novo. *People v Pennington*, 240 Mich App 188, 191; 610 NW2d 608 (2000).

Pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), claims for ineffective assistance of counsel should be raised by a motion for a new trial or evidentiary hearing. Since defendant did not procure a ruling by the trial court on this issue, defendant's claim for the ineffective assistance of counsel is forfeited for a review of the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000.) To set forth a viable claim for ineffective assistance of counsel, defendant must establish deficient performance by counsel and a reasonable probability that but for the deficiency, the result would have been different. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (citations omitted.)

Defendant has failed to satisfy his burden to rebut the presumption of effective assistance of counsel. In this case, defendant's trial counsel adequately and thoroughly challenged the prosecution's DNA expert's qualifications and the validity of the results of the expert's statistical

analysis, emphasizing the discrepancy in numbers across ethnic populations. On review of the entire record, defendant did not overcome the presumption of effective assistance of counsel, or otherwise establish by a “reasonable probability” that but for the alleged deficiencies, defendant would have been acquitted. *People v Hoag, supra* at 6. The record does not demonstrate any error requiring reversal or otherwise require a remand for an evidentiary hearing on defendant’s claim for ineffective assistance of counsel.

Defendant next contends that the trial court’s consideration of improper factors, in conjunction with two scoring errors, rendered his sentences disproportionate. We disagree. This Court reviews sentencing decisions for an abuse of discretion. *People v Coles*, 417 Mich 523, 537; 339 NW2d 440 (1983); *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d (1998). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). When a defendant’s challenge to the scoring of an offense variable is directed to the trial court’s discretionary interpretation of unchallenged facts, as opposed to the factual basis of the sentence, such a challenge “does not state a cognizable claim for relief.” *People v Mitchell*, 454 Mich 145; 560 NW 2d 600 (1997), *habeas corpus gtd sub nom Mitchell v Mason*, 60 F Supp 2d 655 (ED Mich, 1999). Since defendant’s objections to the scoring relate to the trial court’s discretionary interpretation of unchallenged facts and do not otherwise implicate the factual bases of his sentences, defendant’s challenge does not state a cognizable claim for relief and our review is limited to considering the proportionality of defendant’s sentences.

Here, defendant was sentenced within the guidelines’ recommended range⁶. Accordingly, defendant’s sentence is presumptively proportionate. *People v Broden*, 428 Mich 343, 350; 408 NW2d 789 (1987). In addition, the evidence established that defendant broke into the victim’s house in the middle of the night, repeatedly raped her at gunpoint, humiliated her, and further absconded with her money, jewelry, and cell phone. The evidence also demonstrated that defendant’s actions had a severe and profound impact on the victim’s mental health and well being. Moreover, defendant had prior convictions for attempted rape, aggravated assault, and voyeurism. The record also indicates that defendant pleaded *nolo contendere* in other cases that appeared to involve sexually assaultive behavior. On this record, we find no abuse of discretion.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Peter D. O’Connell
/s/ Jessica R. Cooper

⁶ The guidelines for CSC I were scored at 240 months to 480 months or life. Defendant was sentenced to 480 to 720 months’ imprisonment on each of the CSC I convictions.