

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN DALE PENDERGRASS,

Defendant-Appellant.

UNPUBLISHED

July 3, 2007

No. 260633

Berrien Circuit Court

LC No. 03-406886-FC

Before: Zahra, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, of first-degree criminal sexual conduct, MCL 750.520b(1)(a). He was sentenced to 20 to 60 years' imprisonment. This Court granted defendant's motion to file a supplemental brief and, on its own motion, remanded the case to the trial court to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), *People v Pendergrass*, unpublished order of the Court of Appeals, entered August 28, 2006 (Docket No. 260633). We affirm.

I. Basic Facts and Procedure

The victim is the daughter of defendant's former live-in girlfriend. She testified at trial that defendant engaged in sexual intercourse with her on multiple occasions in 1996 and 1997, when she was six or seven years old.¹ The victim testified that the assaults occurred while her mother was at work. On these occasions, defendant took her into a bedroom or into the living room, removed her pants and underwear, took his pants down, held her arms down, and put his penis in her vagina. When she tried to resist, defendant slapped her and told her to "shut up." Defendant told the victim that if she told anyone about the assaults, he would hurt her, her mother, or whomever she told. The victim believed that defendant would carry out this threat because he was often violent toward her mother and was also abusive toward her. The victim testified that defendant often struck her mother and dragged her mother around by her hair. On one occasion, he cut her mother's throat with a butcher knife. Defendant kicked the victim in the chest and shot at her with a BB gun. The victim further recalled an incident, in September 1997,

¹ The victim was born on March 19, 1990.

during which defendant fired shots at various individuals, including the victim, during a physical altercation with the victim's mother. One of these shots nearly struck the victim in the head.

The victim disclosed the sexual assaults for the first time in the summer of 2003 after her father and stepmother accused her of being sexually active. When she denied the accusation, they scheduled a pelvic examination. The victim subsequently sought counsel from her stepmother's godmother, Betty Dodge, advising her that she had been molested. She then told her father and stepmother that defendant sexually assaulted her on multiple occasions. The victim explained that, while she still feared defendant in 2003, she was concerned that her boyfriend would be wrongly blamed for having sex with her, and this concern for her friend overcame her fear of defendant. After the victim's physical examination, inquiry into whether she was sexually active ended.

The victim acknowledged during a forensic interview that she was mad at her father and stepmother for not believing that she was not sexually active. The victim also acknowledged that she disliked defendant because of the violent nature of his relationship with her mother. And, she agreed that, while she originally indicated that the majority of the assaults occurred in Lansing, with fewer occurring in Berrien County, she changed that claim and indicated that more than ten assaults occurred in Berrien County and less than ten occurred in Lansing.

Dodge, who the victim considered to be a grandmother, testified at trial that the victim confided in her, during the summer of 2003, that she had been molested and threatened. The victim did not identify the person responsible. The victim indicated to Dodge that she was afraid that her parents would not believe her, and she asked Dodge for advice. Dodge advised her to tell her parents.

The victim's stepmother, Candi Morgan, testified that, in the summer of 2003, she questioned the victim about rumors that she was sexually active. The victim denied the rumors. When Morgan advised the victim of the date of an appointment for a physical examination by a doctor regarding the matter, the victim told Morgan that defendant had sexually assaulted her. It took the victim three hours to disclose the assaults, and she was crying during that time. The victim's stepmother telephoned the police, who advised her to call Protective Services. The victim was physically examined the following week, and after the victim's parents learned the results of the physical examination, their inquiry into whether the victim was sexually active ended.

The victim's biological mother, Nichole Baumgart, testified that she and defendant were involved in a romantic relationship for approximately seven years and lived together from the end of 1991 or beginning of 1992 through March 1997. During their relationship, defendant physically assaulted her regularly, punching and kicking her. The victim frequently observed these physical altercations, including the September 1997 incident, during which defendant held a knife to Baumgart's throat, dragged her up the stairs by her hair, and fired several shots, including one at the victim. Baumgart also testified that defendant spanked the victim "quite regularly." Baumgart told the court that she was terrified of defendant and that the victim was also afraid of him. Baumgart explained that during 1996, the victim's behavior changed. She became very "moody" and defiant, and she was violent towards adults and other children. At trial, Baumgart acknowledged that, in 1997, she told the police that defendant had not been violent toward her children.

Defendant denied sexually assaulting the victim. He testified that his relationship with Baumgart was tumultuous. There were numerous physical confrontations between them, some of which were witnessed by the children. Defendant acknowledged that there was a physical altercation in 1997 between himself and Baumgart, during which he discharged a gun. However, defendant claimed that the gun discharged twice accidentally, and he only discharged it once intentionally to scare Baumgart's friend. Defendant denied that he held a knife to Baumgart's throat or that he shot at the victim. Nevertheless, defendant agreed that the victim had legitimate reasons to fear him based on the violence she witnessed, but he denied being violent toward the victim.

II. Analysis.

Defendant raises three issues on appeal: Whether the trial court erred in admitting evidence of a prior act; whether he received effective assistance of counsel; and whether his sentence is disproportionate to the circumstances of the offense.

A. Evidence of Prior Act Admissible

Defendant first argues that the trial court abused its discretion by admitting testimony relating to the September 1997 incident, for which defendant was convicted of assault with a dangerous weapon. He asserts that this testimony was not relevant and was extremely prejudicial and inflammatory. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Id.*

MRE 404(b) governs the admissibility of evidence of other crimes, wrongs or acts. It provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), evidence of other acts by the defendant: (1) must be offered for a proper purpose; (2) must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *Lewis v Legrow*, 258 Mich App 175, 208; 670 NW2d 675 (2003). A proper purpose is one other than to establish defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). Evidence is relevant if it has any tendency to make the existence of a fact

that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. Further, as our Supreme Court explained in *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995), "unfair prejudice" does not mean "damaging" because any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists only when there is a tendency for the jury to give evidence undue or preemptive weight, or when it would be inequitable to allow its use. *Id.* at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

Applying these principles, we find that the trial court did not abuse its discretion in admitting evidence relating to the September 1997 incident. First, the evidence was not offered to establish defendant's character to show his propensity to commit the offense. Rather it was offered for the permissible purpose of explaining the victim's delay in reporting. *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). Second, the evidence was relevant to establish that the victim feared defendant and to explain her basis for believing his threats to harm her if she disclosed the assaults. The evidence made the existence of a fact that was of consequence to the determination of the action, specifically whether the victim delayed reporting the assaults out of fear, or alternatively, fabricated the allegations, more probable than it would be without the evidence. Accordingly, the evidence was clearly relevant. MRE 401. And, third, there is no indication on the record that the jury gave the evidence preemptive weight, or that the evidence had any undue tendency to move the jury to decide the instant case on an improper or emotional basis. *Mills, supra* at 75-76. On the facts before us, we conclude that the trial court did not abuse its discretion in admitting the challenged evidence.

B. Defendant Received Effective Assistance of Counsel

Defendant next argues that he was deprived of the effective assistance of trial counsel because his counsel failed to subpoena and call known exculpatory witnesses to testify at trial. Defendant asserts that he informed trial counsel, well in advance of trial, about several witnesses, including his mother, Family Independence Agency caseworkers and other individuals, who were charged with alleged sexual molestation based on accusations by the victim. Defendant argues that, if his counsel called these witnesses, the outcome of his trial would have been different.

At the *Ginther* hearing, defendant's trial counsel testified that defendant provided some information regarding the victims' alleged prior false allegations of sexual abuse; however, defendant's trial counsel stated that he subpoenaed the FIA workers in question but that they stated they had nothing good to say about defendant and that they had no knowledge of any prior false claims made by the victim, so he excused them from the subpoenas. Further, defendant's trial counsel stated that his trial strategy was to convince the jury that the victim was fabricating the story because she wanted to keep her boyfriend out of trouble and because she disliked defendant. Specifically, this exchange occurred between defendant's appellate council and trial council:

Q. In a case of credibility such as the present one, you think the admission of that testimony regarding a prior incident wasn't a big deal?

A. I thought it worked into the benefit of my case because it wasn't sexual in nature, and it gave her a reason to point him (defendant) out as opposed to any

other human being on earth. You got to remember that this incident occurred seven years earlier, that she hadn't had any contact with him in some time, and if she's going to pick a name out of the blue, I think you have a reason for that.

Defendant's trial counsel also testified that defendant's mother did not have any direct evidence about the assault for which her son was charged, would start every conversation she had with defendant's trial counsel with a "tirade," and was less than credible.

Defendant's witness during the *Ginther* hearing, Heather Langham, testified that she did not approach defendant's trial counsel before or during trial to claim that the victim had made false allegations against her. Further, Langham testified that she and defendant share a son, who was conceived when she lived with defendant, a few years prior to defendant's assault on the victim. Langham also testified that she was convicted in 2001 of "attempting to write a check with no account" and in 2002 of retail fraud. She also testified that in 1995 Benton Township police told her the victim had accused her of sexual and physical abuse but that "nothing ever came of" any police investigation.

Defendant testified at the hearing that his trial counsel was ineffective for failing to call several witness who he claimed would give exculpatory testimony. Specifically, defendant testified that Shay Davis and Dana Hacker would testify that defendant could not have assaulted the victim because the two putative witnesses were constantly in defendant's presence. Defendant stated:

[The witnesses] could have testified as to where I was at, who I was with, what I was doing, who I was doing it with, and who I was doing, where I was going, what time I went there, what I was driving, what I was wearing. These people lived with me, rode around with me every day. We didn't work. We hustled on the street. Most of these people lived in my home with me.

At the close of proofs, the trial court took judicial notice of its records, which indicate that Davis and Hacker were incarcerated at different times during 1996 – indicating that they could not, individually,² testify with authority as to defendant's whereabouts for the entire year.

To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms; that, but for his counsel's errors there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish that his counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma, supra* at 302. Decisions

² The court stated that Davis was admitted to the jail on March 26, 1996, and was released on June 24, 1996, for receiving and concealing stolen property greater than \$100. The court stated that Hacker was admitted to the jail on August 29, 1996, and released on October 7, 1996, for attempted breaking and entering with intent to commit larceny.

as to what evidence to present and whether to call particular witnesses are presumed to be matters of trial strategy, and the failure to call a witness or to present other evidence constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant cannot meet his burden of proof because he has not made any offer of proof of any substantial defense. Specifically, none of the witnesses who testified for defendant provided a defense greater in degree or different in kind than the one offered at trial – defendant’s mother and Langham did not offer more than hearsay regarding any prior false allegations made by the victim of her alleged abuse, and the court’s determination of Davis’ and Hacker’s incarceration, in light of defendant’s testimony, rendered their potential testimony inconclusive at best. Additionally, given the witnesses’ relationships to defendant as well as credibility concerns because of prior convictions, we cannot say that trial counsel’s strategy deprived defendant of a substantial defense.

Further, defendant testified at trial that he did not commit the alleged assaults, and defendant’s trial counsel repeatedly asserted throughout trial, in questioning witnesses and arguing to the jury, that the victim was fabricating the allegations to avoid being punished for being sexually active with her boyfriend. Hence, the jury was presented with evidence and argument on defendant’s defense that he did not commit the assaults, but rather that the victim fabricated the allegations. Counsel’s decision not to call the alleged favorable witnesses cannot be said to have deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

C. The Sentence Was Proportional to the Offense

Finally, defendant argues that his sentence is disproportionate to the circumstances of the offense and the offender and therefore, constitutes an abuse of discretion. We disagree.

The offense for which defendant was convicted occurred in 1996. Therefore, defendant was sentenced pursuant to the Supreme Court’s sentencing guidelines. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Those guidelines provided for a minimum sentence of 180 to 360 months. A sentence imposed within an applicable judicial sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Nevertheless, a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990); *People v Hadley*, 199 Mich App 96, 105; 501 NW2d 219 (1993). The principal of proportionality requires that a sentence be proportional to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra* at 635-636.

At sentencing, defendant noted that, since his release from prison following his conviction for assault with a dangerous weapon in connection with the September 1997 incident, he moved to Mississippi, married, compiled a positive work record, and had no further legal difficulties. While we acknowledge these positive attributes, defendant’s employment and lack of criminal history are not unusual circumstances that overcome the presumption that his

sentence, within the guidelines range, is proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Thus, the fact of these circumstances does not render defendant's sentence disproportionate.

Defendant also asserts that, if the instant offense were scored under the legislative sentencing guidelines, MCL 769.31 *et seq.*, his minimum recommended sentence range would be substantially lower, at 126 to 210 months, and therefore that a lesser sentence was warranted. However, the statutory sentencing guidelines do not apply to offenses committed prior to January 1, 1999, and are not to be considered when determining a sentence for such an offense. MCL 769.34(1); *People v Hendrick*, 472 Mich 555, 560; 697 NW2d 511 (2005); *Reynolds*, *supra* at 253-254. And, we reject defendant's claim that, even though his offense occurred in 1996, he is entitled to the ameliorative effect of the statutory guidelines in this case.

In *Reynolds*, *supra* at 253-254, the defendant also argued that he was entitled to resentencing in light of the ameliorative penalty provisions of the legislative sentencing guidelines. This Court rejected that assertion, explaining that,

the statutory language clearly states that the Legislature intended that the statutory sentencing guidelines have prospective, not retroactive effect. MCL 769.34(1) . . . unequivocally states that the "sentencing guidelines promulgated by order of the Michigan supreme court [i.e., the old judicially created sentence guidelines] shall not apply to felonies . . . committed on or after January 1, 1999." Thus, the Legislature intended for the Supreme Court's guidelines to continue to apply to felonies committed before January 1, 1999. The statute further states that the new sentencing guidelines apply to felonies "committed on or after January 1, 1999." MCL 769.34(2) . . . Accordingly there is no basis for defendant's argument that the Legislature intended the new statutory guidelines to apply to crimes committed before January 1, 1999.

Likewise, because defendant committed the instant offense 1996, there was no basis for the trial court to consider those guidelines in determining defendant's sentence.³

³ Defendant relies on *People v Schultz*, 435 Mich 517, 460 NW2d 505 (1990), to support his assertion that he should be entitled to a sentence consistent with the legislative sentencing guidelines. However, as explained by a panel of this Court in *People v Horton*, unpublished opinion per curiam of the Court of Appeals, issued May 8, 2001 (Docket No. 220091), slip op at 6-7 n 3, such reliance is misplaced because the *Schultz* Court recognized that the Legislature has constitutional authority to provide that an ameliorative amendatory act applies prospectively to offenses committed after the act becomes effective and that criminal defendants are to be sentenced under an ameliorative amendatory act only in the absence of a contrary statement of Legislative intent. *Schultz*, *supra* at 525-526. In this case, the Legislature provided a clear statement of legislative intent that the new guidelines were to apply prospectively to offenses committed after the act took effect, while the old guidelines continued to apply to offenses committed before January 1, 1999. Our Supreme Court found no such statement of intent in the sentencing legislation at issue in *Schultz*.

On the record before us, defendant has not presented any unusual circumstances to support that his 20- to 60-year sentence, which is within the applicable guidelines range, is not proportionate given the multiple sexual assaults committed against the then 6-year-old victim. More importantly, that sentence was proportional to the seriousness of the circumstances surrounding the offense and offender. *Milbourn, supra*. Defendant was convicted of first-degree criminal sexual conduct for penetration of a 6-year-old victim. Defendant lived with the victim at the time and, as such, held a position of trust. Moreover, defendant threatened the victim to keep her quiet. Additionally, defendant had a past criminal history, including an assault conviction for acts perpetrated on the victim's mother in the victim's presence.

Affirmed.

/s/ Brian K. Zahra
/s/ Joel P. Hoekstra
/s/ Donald S. Owens