Order

Michigan Supreme Court
Lansing, Michigan

March 29, 2019

155989

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 155989
COA: 330503
Lenawee CC: 15-017428-FH

RODNEY CORTEZ HALL,
Defendant-Appellant.

_____/

By order of April 4, 2018, the prosecuting attorney was directed to answer the application for leave to appeal the April 25, 2017 judgment of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE that part of the Court of Appeals judgment addressing the scoring of Offense Variable 19 (OV 19), MCL 777.49 (interference with the administration of justice), and we REMAND this case to the Lenawee Circuit Court for the resentencing ordered by the Court of Appeals. On remand, the circuit court shall not assign 10 points for OV 19 without specifically articulating the basis for the assignment of any points. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

We do not retain jurisdiction.

s0326

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 29, 2019

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 25, 2017
v	No. 330503 Lenawee Circuit Court
RODNEY CORTEZ HALL, Defendant-Appellant.	LC No. 15-017428-FH

Before: MURPHY, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct (CSC-III) (sexual penetration with a child who was at least 13 years old but under 16 years old), MCL 750.520d(1)(a). The trial court sentenced defendant to 7 to 15 years' imprisonment for the CSC-III conviction. We affirm defendant's conviction but remand for resentencing.

This case arises out of a sexual assault that occurred on March 10, 2014, in Adrian, Michigan. The victim, EL, was 14 years old at the time. Beginning on Saturday, March 8, 2014, EL and her friend, SH, spent the weekend with defendant, who was 28 years old, and Robert Allen, who was in his thirties. After a night of drinking alcohol and smoking marijuana in Adrian, defendant drove EL, SH, and Allen to Detroit on Sunday, March 9, 2014. While SH and Allen drove defendant's car back to Adrian that day, defendant reserved a motel room and stayed Sunday night with EL in Detroit. The next morning, on the way back from Detroit, defendant stopped at the mall in Adrian and bought EL a pair of shoes. According to EL, they got to the mall around 11:00 a.m., and afterwards, defendant took EL back to his house and they had sexual intercourse. Defendant then took EL home around 1:00 p.m. EL lived with her grandmother. Defendant testified on his own behalf, claiming that after they went to the mall, he took EL back to her grandmother's house and then proceeded home, arriving there at 12:30 p.m. From home, he subsequently took his children to daycare at 2:00 p.m., and then he drove his roommate-coworker to their place of employment, arriving there at about 3:00 p.m. EL's grandmother testified, and she believed that EL was dropped off at her home between 2:00 p.m. and 2:30 p.m. Michigan State Trooper Jessie King testified that EL told her that she had been dropped off at her grandmother's house between 2:30 p.m. and 3:00 p.m.

Defendant argues that he was denied the effective assistance of counsel because his trial attorney failed to investigate and present two documents that would have corroborated his testimony, proving he could not have committed the offense.

Whether counsel was ineffective presents a mixed question of fact and constitutional law, which we review, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin,* 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles governing a claim of ineffective assistance of counsel, observed:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag,* 460 Mich 1, 6; 594 NW2d 57 (1999).

An attorney's performance is deficient if the representation falls below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis,* 250 Mich App 357, 368; 649 NW2d 94 (2002). We cannot insulate, however, the review of counsel's performance by simply calling it trial strategy. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Initially, this Court must determine whether strategic choices were made after less than complete investigation, with any choice being reasonable only to the extent that reasonable professional judgment supported the limitations on investigation. *Id.* "[T]rial counsel is responsible for preparing investigating, and presenting all substantial defenses," and "[a] substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (citation and quotation marks omitted).

Defendant argues that he was denied the effective assistance of counsel because his trial attorney failed to investigate and present documents that would have established a timeline corroborating defendant's version of events on March 10, 2014, and undermined the timeframes given by EL's grandmother and Officer King. In support of defendant's claim of error, he relies on an affidavit provided by his appellate attorney, and a number of documents that were not

introduced in the lower court. One document is a letter from the owner of the daycare center that provided care for defendant's children, stating that defendant's two children were dropped off at 2:00 p.m. on March 10, 2014. Another document is a timecard report from defendant's employer, indicating that defendant clocked in at 2:55 p.m. on March 10, 2014. Defendant also provides a number of maps that indicate the distances and times between defendant's house, the daycare, EL's home, and defendant's work.

Assuming that we can even consider the documentation, which was attached to a rejected motion to remand and defendant's appellate brief,[1] reversal is simply unwarranted. The documents do not disprove EL's version of the case. At trial, EL said that she was dropped off at 1:00 p.m. At the preliminary examination, she claimed that she was dropped off between 1:00 p.m. and 2:00 p.m. While EL's grandmother and Officer King testified that EL was dropped off between 2:00 p.m. and 3:00 p.m., both were unsure of the exact time. In fact, EL's grandmother said, "I wouldn't stake my life on it." Furthermore, the fact remains that defendant has not claimed that there would be any concrete evidence after further investigation that would show what he was doing between 12:30 p.m. and 2:00 p.m., which is approximately the timeframe that the sexual assault had allegedly occurred. The jury could have very well believed defendant's timeline and still convicted him of CSC-III. According to defendant, he got home around 12:30 p.m., dropped his children off at 2:00 p.m. to the daycare only a few minutes away, and then drove to work, punching in by 3:00 p.m. Defendant's roommate-coworker even testified that he never saw EL that morning, yet the jury rendered a guilty verdict based on EL's testimony that defendant drove her to the mall at 11:00 a.m., that they went to defendant's house afterwards, that they engaged in sexual intercourse, and that she was dropped off by 1:00 p.m.

Defendant has failed to establish that the documents would have made a difference in the outcome of the trial. Accordingly, even if counsel's performance was deficient, defendant has not shown the requisite prejudice. Reversal is unwarranted.

Defendant also argues that he may have been denied his due process and equal protection rights when the trial court failed to provide a reasonable mistake-of-age jury instruction. We disagree. Our Supreme Court has held that a reasonable mistake of age is not a defense to a charge of CSC-III. *People v Cash*, 419 Mich 230, 237-246; 351 NW2d 822 (1984). Our Supreme Court stated in *Cash* that the Legislature "intended to omit the defense of a reasonable mistake of age from its definition of third-degree criminal sexual conduct involving a 13- to 16-year old." *Id*. at 240. The *Cash* Court explained that "[i]t is well established that the Legislature may, pursuant to its police powers, define criminal offenses without requiring proof of a specific criminal intent and so provide that the perpetrator proceed at his own peril regardless of his defense of ignorance or an honest mistake of fact." *Id*. at 242. Moreover, the Court held that a "mistake-of-age defense, at least with regard to statutory rape crimes, is not constitutionally mandated." *Id*. at 245.

[1] Pursuant to MCR 7.210(A)(1), the record on appeal consists of "the original papers filed in [the lower] court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced."

Our Supreme Court in *People v Kilgo*, 497 Mich 1025; 863 NW2d 43 (2015), on application for leave to appeal, ordered the parties to submit supplemental briefs on two issues: "(1) whether this Court's decision in . . . *Cash* . . . remains viable; and (2) whether the denial of the ability to assert the defense of reasonable mistake of age or fact violates due process or equal protection principles." This Court had earlier denied an application for leave to appeal in *Kilgo* "for failure to persuade the Court of the need for immediate appellate review." *People v Kilgo*, unpublished order of the Court of Appeals, entered April 7, 2015 (Docket No. 325582). After the Supreme Court entertained oral argument on January 13, 2016, the Court denied the application for leave because it was "not persuaded that the questions presented should be reviewed by this Court." *People v Kilgo*, 499 Mich 873; 876 NW2d 238 (2016). A writ of certiorari to the United States Supreme Court was later denied. *Kilgo v Michigan*, __ US __; 137 S Ct 160; 196 L Ed 2d 122 (2016). Given the current status of the law, which we are bound to follow, we reject defendant's argument that he was or may have been entitled to a mistake-of-age defense or instruction.[2]

Finally, defendant argues that the trial court erred when it assessed 25 points under offense variable (OV) 11, MCL 777.41, and 10 points under OV 19, MCL 777.49. In *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), our Supreme Court clarified the proper review standards, stating:

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.

The prosecution concedes that OV 11 was improperly scored, and we agree, as the only sexual penetration arising out of the sentencing offense "form[ed] the basis of [the] . . . third-degree criminal sexual conduct offense" upon which defendant was convicted. MCL 777.41(2)(a) and (c); *People v Johnson*, 474 Mich 96, 102 n 2; 712 NW2d 703 (2006) (The Court explained that under OV 11, "it is clear that each criminal sexual penetration that forms the basis of its own sentencing offense cannot be scored for purposes of that particular sentencing offense."). The reduction of 25 points with respect to defendant's total OV score alters the minimum guidelines range, entitling him to resentencing. MCL 777.63; *People v Francisco*, 474 Mich 82, 89-91, 89 n 8; 711 NW2d 44 (2006).

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[2] Defendant claims that the Michigan Supreme Court likely entertained the appeal in *Kilgo* due to the recent United States Supreme Court decision in *Elonis v United States*, 575 US ___; 135 S Ct 2001; 192 L Ed 2d 1 (2015). However, defendant declines to make an argument under *Elonis* for purposes of the instant case.

In regard to OV 19, an assessment of 10 points is proper when "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c).[3] "[T]he plain and ordinary meaning of 'interfere with the administration of justice' for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013). Additionally, "OV 19 is generally scored for conduct that constitutes an attempt to avoid being caught and held accountable for the sentencing offense." *People v Smith*, __ Mich App __; __ NW2d __ (2016) (Docket No. 328533); slip op at 2-3 (citation and quotation marks omitted). The interference or attempt to interfere with the administration of justice "encompasses more than just the actual judicial process and can include [c]onduct that occurs before criminal charges are filed, acts that constitute obstruction of justice, and acts that do not necessarily rise to the level of a chargeable offense." *Hershey*, 303 Mich App at 343 (citation and quotation marks omitted; alteration in original).

Defendant argues that the trial court erred when it assessed 10 points for OV 19 because there was no evidence in the record that he interfered with the administration of justice. Presumably, the trial court assessed 10 points under OV 19 because defendant had left the state of Michigan in violation of his probation while knowing that he may be charged for having sexual intercourse with EL. After defendant was charged, Officer King tracked defendant to Mississippi and reached out to an agency there in order to make contact with defendant. Defendant provided a written statement to an officer in Mississippi, which was relayed to King in Michigan. According to defendant's PSIR, defendant "absconded to Mississippi before returning on the current offense. [Defendant] has issues with complying with his terms of probation and decided to take his minor children to his mother before being arrested for the instant offense."

Based on King's testimony at trial and the information in the PSIR, the trial court did not err when it assessed 10 points under OV 19, because there was evidence that defendant hampered, hindered, or obstructed the administration of justice by not only violating his probation, but by leaving the state of Michigan and going to Mississippi. Defendant's flight to Mississippi went beyond a mere probation violation, as was addressed in *Hershey*.

Affirmed with respect to defendant's conviction, but remanded for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Christopher M. Murray
/s/ Michael J. Kelly

[3] We note that the guidelines range would be further altered if OV 19 was improperly scored, so resolution of the issue is pertinent to defendant's resentencing.