

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
February 7, 2013

v

KEITH ALBERT GRAHAM,  
Defendant-Appellant.

No. 308661  
Ottawa Circuit Court  
LC No. 09-033860-FC

---

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of four counts of first-degree criminal sexual conduct, MCL 750.520b(1). On April 19, 2010, the trial court sentenced defendant to 25 to 50 years' imprisonment for each conviction. This Court later vacated defendant's sentences and remanded the case for resentencing because the court incorrectly applied a 25-year minimum sentence to each of defendant's convictions. *People v Graham*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2011 (Docket No. 297830). On February 10, 2012, the trial court resentenced defendant to 9 to 20 years' imprisonment for each conviction. Defendant appeals, and, for the reasons set forth below, we affirm.

I. OFFENSE VARIABLES

Defendant argues that the trial court erred in scoring offense variable (OV) 4, MCL 777.34 (psychological injury to victim), at ten points and in scoring OV 13, MCL 777.43 (continuing pattern of criminal behavior), at 50 points. Defendant failed to preserve his challenges to these alleged scoring errors by raising those issues at sentencing, in a motion for resentencing, or in a motion to remand. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); MCL 769.34(10). We review unpreserved scoring issues for plain error affecting substantial rights. *People v Kimble*, 252 Mich App 269, 275; 651 NW2d 798 (2002).

OV 4 allows the trial court to assign a score of ten points if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). MCL 777.34(2) clarifies that a score of 10 points is appropriate if the psychological injury *may* require professional treatment and "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). The facts elicited at trial and at sentencing showed that defendant's abuse caused the victim fear and anxiety and changed her demeanor and performance at school. These facts were sufficient for the trial court to find that the victim suffered a serious psychological injury that

may require professional treatment. *People v Wilkens*, 267 Mich App 728, 740-741; 705 NW2d 728 (2005); *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).<sup>1</sup> Accordingly, the trial court correctly scored OV 4 at 10 points and defendant has not established plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).<sup>2</sup>

OV 13 allows the trial court to assign a score of 50 points if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age.” MCL 777.43(1)(a). In scoring OV 13, “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). Here, the victim’s testimony established that defendant sexually penetrated her more than ten times over a series of incidents while the victim shared a bunk bed with her sister. These incidents occurred over a period of approximately three years, while the victim was between second and fifth grade in school. Thus, the penetrations occurred when the victim was less than 13 years old. While defendant was only convicted of one incident of abuse from that time period, the remainder of the penetrations may be used to score OV 13. MCL 777.43(2)(a). Accordingly, the trial court’s decision to score OV 13 at 50 points was not plain error. *Carines*, 460 Mich at 763; *Hornsby*, 251 Mich App 468.<sup>3</sup>

## II. PROPORTIONALITY AND THE EIGHTH AMENDMENT

---

<sup>1</sup> Defendant claims that the *Apgar* Court erred in holding that a victim’s fearfulness is sufficient to satisfy OV 4. However, subsequent panels of this Court are bound to follow prior decisions of this Court. MCR 7.215(J); *People v Williams*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 306917, issued October 16, 2012), slip op at 3.

<sup>2</sup> Defendant raised a challenge to the trial court’s scoring of OV 4 in his first appeal. *People v Graham*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2011 (Docket No. 297830), at 5. This Court upheld the trial court’s scoring of OV 4 at ten points. *Id.* However, this Court vacated defendant’s original sentence on unrelated grounds and remanded for resentencing. *Id.* at 6-8. Accordingly, the law of the case doctrine does not apply here. See *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007), holding that an order vacating a defendant’s original sentence and remanding the case for resentencing allows the defendant to object to any part of the new sentence. In any case, for the reasons stated, the trial court again correctly scored OV 4.

<sup>3</sup> Defendant argues that the trial court’s sentencing of defendant violated *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court ruled that facts used to enhance a defendant’s maximum sentence must be either admitted by the defendant or found by a jury beyond a reasonable doubt. *Id.* at 303-304. However, in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), the Michigan Supreme Court held that Michigan’s indeterminate sentencing system was not affected by the holding in *Blakely*. We are bound by our Supreme Court’s decision in *Drohan* under the rule of stare decisis. *People v Watson*, 245 Mich App 572, 597; 629 NW2d 411 (2001).

Defendant argues that his sentence was disproportionate and cruel or unusual punishment. Because defendant failed to raise his specific arguments at sentencing, in a motion for resentencing, or in a motion for remand, his arguments are unpreserved. *Kimble*, 470 Mich at 312; MCL 769.34(10). Generally, unpreserved issues are reviewed for plain error. *Carines*, 460 Mich at 763-764. However, we review for an abuse of discretion whether the sentence imposed by the trial court is proportionate. *People v Armisted*, 295 Mich App 32, 51; 811 NW2d 47 (2011).

The United States Constitution provides that “cruel and unusual punishment” shall not be inflicted. US Const, Am VIII. The Michigan Constitution provides that “cruel or unusual punishment shall not be inflicted.” Const 1963, art 1, § 16. Proportionality requires that a sentence be proportional to the “seriousness of the defendant’s conduct and to the defendant in light of his criminal record.” *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003). A sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel and/or unusual punishment under either the federal and Michigan constitutions. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). “In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate.” *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000). Here, defendant’s sentence is within the guidelines range and is presumptively proportionate. *Powell*, 278 Mich App at 323.

Defendant claims that the trial court was required to consider the mitigating factors that he had strong family support, he was remorseful, and he had a history of alcohol use, clinical depression, anger, and other mental health problems. There is no requirement that the trial court consider mitigating evidence when imposing a sentence. See *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011); *People v Nunez*, 242 Mich App 610, 617-618; 619 NW2d 550 (2000). Accordingly, defendant has failed to show plain error. *Carines*, 460 Mich at 763. Further, defendant’s asserted “unusual circumstances” are unavailing, and defendant has failed to rebut the presumption that his sentence was proportionate. *Lee*, 243 Mich App at 187. Accordingly, the trial court did not abuse its discretion. *Armisted*, 295 Mich App at 51.

Defendant also claims that the trial court erred when it did not state any reasons on the record for why both the minimum and maximum sentences were proportionate to the offense and the offender. “A trial court must articulate its reasons for imposing a sentence on the record at the time of sentencing.” *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006). However, the record indicates that the sentencing guidelines were before the trial court and that the trial court relied on the information within the PSIR, including the sentencing guidelines. Accordingly, the trial court satisfied its articulation requirement at sentencing and defendant fails to show plain error. *Carines*, 460 Mich at 763; *Conley*, 270 Mich App at 313.

Defendant further claims that the trial court erred when it failed to conduct an assessment of defendant’s rehabilitative potential as required under MCR 6.425(A)(5). There currently is no section 6.425(A)(5) within the Michigan Court Rules. The former rule under 6.425(A)(5) is identical to the current MCR 6.425(A)(1)(e), which requires that a PSIR include “the defendant’s medical history, substance abuse history, if any, and if indicated, a current psychological or psychiatric report.” MCR 6.425(A)(1)(e) does not require a trial court to assess a defendant’s

rehabilitative potential. Again, defendant has not demonstrated plain error. *Carines*, 460 Mich at 763.

### III. EX POST FACTO CLAUSE

Defendant claims that the trial court erred in sentencing him to lifetime electronic monitoring under MCL 750.520b(2) because it violates the Ex Post Facto Clause. Defendant failed to raise this issue before the trial court and it is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Unpreserved constitutional issues are reviewed for plain error. *Carines*, 460 Mich at 763-764. Both the United States Constitution and the Michigan Constitution prohibit ex post facto laws. US Const, art 1, § 10; Const 1963, art 1, § 1. The Ex Post Facto Clause prohibits the retroactive application of criminal laws that disadvantage an offender. *People v Slocum*, 213 Mich App 239, 243; 539 NW2d 572 (1995).

MCL 750.520b(2)(d) provides that, as a punishment for first-degree criminal sexual conduct: “[i]n addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n.” MCL 750.520n states that “[a] person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring . . . .” MCL 750.520b(2)(d) was added by 2006 PA 169, and became effective on August 28, 2006. MCL 750.520n was added by 2006 PA 171, and also became effective on August 28, 2006. Here, defendant was convicted of first-degree criminal sexual conduct under MCL 750.520b for an incident of abuse that occurred when the victim was in eighth grade during the 2008-2009 school year. The trial court was required to impose lifetime electronic monitoring on defendant for that offense. *People v Brantley*, 296 Mich App 546, 557-558; 823 NW2d 290. Accordingly, there was no retroactive application of MCL 750.520b(2)(d) and MCL 750.520n, and there was no plain error in the trial court’s application of lifetime electronic monitoring. *Carines*, 460 Mich at 763.

### IV. ASSISTANCE OF COUNSEL

In the alternative, defendant argues that defense counsel was ineffective for failing to object in the trial court on all of the grounds discussed above. Defense counsel was not ineffective for failing to make meritless objections on those grounds. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

### V. NINTH AMENDMENT

Finally, defendant claims that the alleged errors violated his rights under the Ninth Amendment to the United States Constitution. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” US Const, Am IX. However, defendant neither develops this argument, nor cites authority in support of his assertion. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.” *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). “The failure to brief the merits of an allegation of error constitutes an

abandonment of the issue.” *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Because defendant has abandoned this argument, we need not consider it.

Affirmed.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Douglas B. Shapiro