STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 25, 2006
v	No. 261152 Wayne Circuit Court
EDWARD SAMU, JR., Defendant-Appellant.	LC No. 04-008358-01

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his bench-trial convictions for one count of second-degree criminal sexual conduct (CSC II) (person under 13 years of age), MCL 750.520c(1)(a), and one count of disseminating sexually explicit matter to a minor, MCL 722.675. Defendant was sentenced to concurrent terms of 19 months to 15 years, and 1 to 2 years in prison. We affirm, but remand for correction of PSIR.

Defendant first argues that the trial court erred in declining to consider whether his statements to the police were involuntary. At trial, defense counsel affirmatively explained that he was not raising a *Miranda*[1] challenge. When specifically asked whether he had any objections to the introduction into evidence of defendant's statements to the police, defense counsel replied, "None, your Honor." Counsel's affirmative statement that he was not raising a *Miranda* challenge constituted a waiver of this issue on appeal. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Counsel further evidenced the waiver of this issue by failing to object to the admission of defendant's statements upon the trial court's direct prompting. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Because this issue has been waived, there is necessarily "no 'error' to review." *Carter, supra* at 219. We note that in this bench trial, the judge heard all of the facts and circumstances as he was trying the case, and would have had an affirmative duty to raise this issue sua sponte if the facts indicated a valid challenge could be made.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant next contends that the trial court erred in scoring five points for offense variable twelve (OV 12), MCL 777.42. We disagree. "[T]he proper construction or application of statutory sentencing guidelines presents a question of law that is reviewed de novo." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). The sentencing court's scoring of the guidelines is reviewed for an abuse of discretion, and this Court will affirm the trial court's scoring decision if there is any evidence in the record to support a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

The sentencing court may score five points for OV 12 when it finds that a "contemporaneous felonious criminal act involving a crime against a person was committed." MCL 777.42(1)(d). The court, sitting without a jury, determined beyond a reasonable doubt that two separate instances of CSC II had been committed contemporaneously by defendant. However, because CSC II is not a necessarily included lesser offense of CSC I, the trial court set aside the second CSC II conviction, for which defendant had never been charged.[2] Because the second instance of CSC II did not therefore result in a separate conviction, the trial court considered it when scoring OV 12, assigning five points for this contemporaneous felonious act.

Even though the second CSC II conviction was not legally sustainable in this case, the trial court was still entitled to find that the second instance of CSC II had occurred. Because the trial court found that defendant had committed a second, contemporaneous act of CSC II, it did not abuse its discretion in scoring five points under OV 12. *Hornsby, supra* at 468.

Defendant also argues that he was denied the effective assistance of trial counsel when his attorney failed to move to suppress his statements to police and failed to object to the statements' admission into evidence. Defendant failed to preserve this claim by requesting a new trial or moving for a *Ginther*[3] hearing. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Review of unpreserved claims of ineffective assistance of counsel is limited to error apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of counsel." *Id*.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). After reviewing the record, it is not apparent that defendant was deprived of the effective assistance of trial counsel in this case.

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[2] Pursuant to MCL 768.32(1) and *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002), a defendant may be convicted of a necessarily lesser included offense for which he was not charged, but may not be convicted of a cognate lesser included offense for which he was not charged.

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

"Whether a waiver of *Miranda* rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Whether a waiver was voluntary is determined by examining police conduct. *Id.* Defendant voluntarily went to the police station in order to take a polygraph test. Upon arriving, defendant was informed that he was free to leave. Nonetheless, defendant stayed and spoke to the police. Then, after being informed of his *Miranda* rights, defendant proceeded to sign the written confession that was admitted at trial. Although defendant asserts that he remained at the police station for several hours without eating, there is no evidence on the record to indicate that the police actively deprived defendant of the opportunity to eat. Indeed, defendant does not even contend that he ever requested food. Finally, other than the evidence that the police may have told defendant that they would obtain an arrest warrant if he did not cooperate, there is no indication that defendant was actually threatened, coerced, or intimidated while at the police station. In short, there is simply no evidence on the record to show that defendant's *Miranda* waiver was involuntary or otherwise infected by coercive police conduct.[4]

Whether a waiver is knowing and intelligent depends on the totality of the circumstances, including a defendant's intelligence, education, experience, and capacity to understand the given warnings. *People v Daoud*, 462 Mich 621, 633-634; 614 NW2d 152 (2000). The necessary awareness of the defendant is that of his available options; he need not comprehend the ramifications of exercising or waiving his rights. *Id*. at 636-637. It is only necessary that the defendant understood: (1) that he did not have to speak, (2) that he had the right to counsel, and (3) that the state could use his statement against him at a later trial. *Id.* at 637. "[A] very basic understanding is all that is necessary for a valid waiver." *Id.* at 642. Although defendant asserts that he has a limited education and limited experience with the police, there is no evidence on the record indicating that defendant did not minimally understand the *Miranda* warnings as they were given.

It is apparent from the record that defendant waived his right to remain silent when he signed the written confession after being apprised of his *Miranda* rights. Therefore, any

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[4] We note that although defense counsel did not affirmatively challenge the voluntariness of defendant's statements in a pre-trial motion, during this bench trial the trial judge did consider and reject the issue:

> THE COURT: I keep telling you I'm not hearing a motion as to whether things were voluntary or not or whether they were coerced or whatever because you didn't bring a pretrial motion on that. But yet you seem to be challenging the statements that were made by your client in a sort of indirect way to, I guess, to say there weren't voluntarily [sic] or they were coerced or somehow these officers made him say the things he said.
>
> DEFENSE COUNSEL: Yes, your Honor.
>
> THE COURT: Because nothing that I heard so far even comes close to any coercive conduct by the police.

challenge to the admissibility of defendant's statements to the police would have been futile. It is axiomatic that trial counsel is not ineffective for failing to advocate a meritless position or to raise a futile objection. *Snider, supra* at 425; *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). The record before us simply does not support defendant's claim of ineffective assistance of trial counsel. Therefore, defendant "has effectively waived the issue of effective assistance of counsel" in this case. *Sabin, supra* at 659.

Finally, defendant argues that he is entitled to correction of the presentence investigation report (PSIR), and transmission of the corrected PSIR to the department of corrections, and the people concede as much. We agree.

The PSIR should be corrected to reflect the fact that defendant was convicted of only one count of CSC II, and to indicate that defendant's actual minimum sentence range is 19 to 38 months. We remand to the trial court for the limited purposes of correcting the PSIR and transmitting a corrected version of the report to the department of corrections. See *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003).

Defendant argues that on remand, the trial court should completely eliminate the incorrect information from the PSIR, and should not simply cross it out so that it remains legible. We agree and instruct the trial court to send a copy of the corrected PSIR to the department of corrections. MCL 771.14(6). See also *People v Norman*, 148 Mich App 273, 274-275; 384 NW2d 147 (1986).

We affirm defendant's convictions and sentence, but remand for correction of the PSIR consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper