

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY WAYNE ROCKEY,

Defendant-Appellant.

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UNPUBLISHED

June 11, 2002

No. 229929

Crawford Circuit Court

LC No. 95-001333-FC

Before: Bandstra, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), arising from the oral sexual penetration of a seven-year-old girl.<sup>1</sup> The trial court originally sentenced defendant to a term of twenty-five to fifty years' imprisonment. After defendant appealed, this Court affirmed defendant's conviction, but reversed his sentence and remanded for resentencing. Following an evidentiary hearing, the trial court resentenced defendant to a term of twenty-three to fifty years' imprisonment. Defendant now appeals as of right from his resentencing. We affirm.

After filing his brief on appeal in which he argues that his resentencing violated the principle of proportionality, defendant filed a supplemental brief with this Court on April 24, 2001. In his supplemental brief, defendant challenges the trial court's decision to reopen the proofs at the resentencing hearing. Specifically, defendant argues that by hearing testimony from expert witness Barbara Cross, the trial court acted in contravention of the law of the case doctrine, because such action exceeded the trial court's power under this Court's limited remand order. We disagree.

Our review of the resentencing hearing transcript does not reflect that defendant objected to the trial court's decision to hear additional testimony at the resentencing hearing.<sup>2</sup> Indeed, defendant presented testimony from two witnesses on his own behalf at the resentencing hearing.

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<sup>1</sup> During the jury trial the young female victim testified that after her mother left her in defendant's care he "put his private spot to [her] private spot." The victim further recounted that defendant "[p]ut [the victim's] mouth to his private spot."

<sup>2</sup> The trial court did not hear evidence at the original sentencing hearing.

Consequently, because defendant failed to preserve this issue for our review, we must determine whether plain error affecting defendant's substantial rights occurred. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Further, whether the law of the case doctrine is applicable in the instant case is a question of law that we review de novo on appeal. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

This Court rendered its decision in defendant's prior appeal on August 10, 1999. *People v Rockey*, 237 Mich App 74; 601 NW2d 887 (1999) (*Rockey I*). Although this Court affirmed defendant's CSC I conviction, it reversed defendant's sentence of twenty-five to fifty years' imprisonment, and remanded for resentencing. Noting that the sentencing guidelines recommended a minimum sentence in the range of eight to fifteen years' imprisonment, this Court reviewed the trial court's reasoning for departing upward from the recommended guidelines range. Specifically, the trial court had reasoned that a significant upward departure was warranted because defendant was on probation for a very similar offense<sup>3</sup> when he committed the offense giving rise to this appeal. The trial court also concluded that defendant exhibited a "pedophilic" pattern of sexually abusing vulnerable young children and that defendant's behavior presented a substantial risk to society. The trial court went on to observe that on the basis of "the factors contained in the presentence report, the background, the facts of this offense, the previous offense, the age of the offender, the age disparity between the offender and the victim . . . the fact that this is not an isolated incident, and [that] society . . . need[s] to be protected" an upward departure was warranted.

On appeal, this Court determined that the trial court's decision to depart from the guidelines' recommended range amounted to an abuse of discretion, in particular questioning the trial court's reliance on information in the presentence investigation report (PSIR) to fashion defendant's sentence.

The court relied on a presentence investigation report (PSIR) by investigating agent Chester Krupiarz. This report far exceeds the proofs adduced at the jury trial and graphically described acts of cunnilingus and fellatio between defendant and the victim far and away beyond anything charged against defendant or proved at trial.

It is beyond peradventure that the trial court relied on this Department of Corrections recommendation and in response to a challenge by defense counsel stated, 'It is stated as an observation of Mr. Krupiarz who prepared the report, and he's basing that on the investigator's description of the offense and on the defendant's record. So, there is [sic] some grounds to support his observations in here.' Defendant challenged the PSIR statement that there was more than one incident with defendant and the victim. This was the anonymous investigator's opinion relied on by the probation officer, Mr. Krupiarz, that found its way into the trial court's expressed rationale for exceeding the guidelines.

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<sup>3</sup> According to the record, defendant was convicted of engaging in lewd and lascivious behavior. MCL 750.335.

There is nothing in the court's statement, quoted above, that was not factored into the sentence recommended by the guidelines except the age of the defendant. There is no discernable basis for such a Draconian departure except for the unsupported details injected into the investigator's recounting of the events. Unnamed 'investigators' are not witnesses. Therefore, we conclude that the trial court abused its discretion in departing upward from the sentencing guidelines.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction. [*Rockey I, supra* at 80-81 (footnote omitted).]

On appeal after remand, defendant maintains that the trial court exceeded the scope of the remand order by reopening proofs at the resentencing hearing. Defendant specifically bases this argument on an invocation of the law of the case doctrine. "A ruling by this Court binds the trial court on remand, pursuant to the law of the case doctrine." *Sumner v General Motors Corp (On Remand)*, 245 Mich App 653, 661; 633 NW2d 1 (2001). Under the law of the case doctrine, a lower court is not permitted to take action inconsistent with the appellate court's judgment. *Id.* at 662. In the instant case, we are not persuaded that the trial court acted in contravention of the law of the case doctrine in reopening the proofs at the resentencing hearing.

We recognize that where an appellate court remands a case, the proceedings on remand are "limited to the scope of the remand order." *People v Canter*, 197 Mich App 550, 567; 496 NW2d 336 (1992); see also *People v Blue*, 178 Mich App 537, 539; 444 NW2d 226 (1989). However, a review of this Court's earlier decision does not yield any indication that this Court intended to limit the scope of the resentencing proceedings on remand. In other words, this Court did not direct the lower court to resentence defendant without the benefit of additional proofs at the resentencing hearing. As our Supreme Court recognized in *People v Fisher*, 449 Mich 441, 447; 537 NW2d 577 (1995):

the doctrine of the law of the case has no application where a case is remanded without [specific] directions to the lower court; in such a case the lower court would enjoy the same power as if it made the ruling itself. *Lyon v Ingham Circuit Judge*, 37 Mich 377 (1877); *Garwood v Burton*, 274 Mich 219, 222; 264 NW 349 (1936).

A review of this Court's decision in *Rockey I, supra* at 80-81, reflects that the trial court undertook a significant upward departure from the recommended guidelines' range on the basis of an "anonymous investigator's opinion relied on by the probation officer . . . ." As a result, this Court held that "[t]here is no discernable basis for [the trial court's] Draconian departure except for the unsupported details injected into the investigator's recounting of the events. Unnamed 'investigators' are not witnesses." *Id.* at 81. In response to this Court's ruling questioning its reliance on the PSIR in formulating defendant's sentence, on remand the trial court heard the testimony of Barbara Cross, a mental health therapist who counseled the victim following the commission of the offense giving rise to this appeal. Cross testified that during six treatment

sessions, the victim described several incidents of sexual abuse at the hands of defendant.<sup>4</sup> These several incidents included additional “oral penetration [and] genital fondling” and “penile/vaginal contact.” It is clear that the trial court allowed this testimony to provide record support for its finding that the offense giving rise to this appeal was not an isolated incident. “[A] sentencing court is afforded broad discretion in the sources and types of information to be considered when imposing a sentence . . . .” *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994), citing *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1994); see also *People v Curry*, 142 Mich App 724, 730; 371 NW2d 854 (1985) (“When sentencing a defendant, the trial court may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information considered or the source of such information.”). Under the circumstances, we are not persuaded that the trial court’s decision to hear additional testimony at defendant’s resentencing hearing amounted to plain error affecting defendant’s substantial rights.

Defendant next argues that his sentence violates the principle of proportionality. We review a trial court’s imposition of sentence for an abuse of discretion. *People v Moorner*, 246 Mich App 680, 684; 635 NW2d 47 (2001). A trial court’s sentence is an abuse of discretion if it violates the principle of proportionality, which requires that a sentence be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). In the instant case, the trial court departed from the guidelines’ recommended range<sup>5</sup> by imposing a sentence of twenty-three to fifty years’ imprisonment. Although a trial court is permitted to deviate from the guidelines, a trial court’s departure from the guidelines’ recommended range on the basis of factors already accounted for in the guidelines is subject to close scrutiny on appeal. *Rockey I*, *supra* at 79; *Milbourn*, *supra* at 660, n 27. However, under *Milbourn*, “the ‘key test’ of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter.” *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

After a thorough review of the record, we believe that the trial court relied on appropriate factors in deviating from the guidelines’ recommended range. During the resentencing hearing, the trial court indicated that it was departing from the guidelines’ recommended range on the basis of several discrete factors. For example, at the time defendant committed the instant offense, he was on probation for engaging in lewd and lascivious conduct with another young female. The trial court observed that although Prior Record Variable 6 accounted for defendant’s prior relationship with the criminal justice system, it did not account for the significant factual similarity<sup>6</sup> between defendant’s prior misdemeanor conviction and the offense giving rise to this appeal. The trial court also observed that Offense Variable 7 did not adequately account for the disparity in age between defendant, forty-two years of age at the time of this offense, and the young victim. The trial court also considered the fact that defendant

<sup>4</sup> A report detailing the victim’s multiple allegations of sexual abuse against defendant was admitted as an exhibit at the resentencing hearing.

<sup>5</sup> The guidelines recommended a minimum sentence in the range of eight to fifteen years’ imprisonment.

<sup>6</sup> According to the record, the prior conviction arose from defendant’s conduct in inviting a young girl into his home and reaching down and touching her on her vaginal area outside of her clothing.

shared a prior relationship with the victim because he was friends with her parents and would often babysit her. *Milbourn, supra* at 660. Likewise, the trial court found a heightened degree of exploitation of the victim where defendant abused her parents' trust by molesting her after they placed her under his care. *Houston, supra* at 324.

The trial court also indicated its concern with defendant's low prospect for rehabilitation and reformation, along with his failure to express remorse for his despicable actions or to conform his conduct to the requirements of society. *Id.* at 323. Finally, the trial court noted the extreme and severe psychological damage defendant's conduct had on the victim to the extent that she was afraid to attend the resentencing hearing six years after the commission of this offense. *People v Crear*, 242 Mich App 158, 171; 618 NW2d 91 (2000). On the basis of Cross' testimony, the trial court also concluded that Offense Variable 25 did not adequately account for the repeated, "serious, antisocial pedophilic pattern of behavior" defendant exhibited.<sup>7</sup> See, e.g., *People v Brzezinski (After Remand)*, 196 Mich App 253, 255-256; 492 NW2d 781 (1992). Further, the trial court did not err in concluding that the need to protect other young children from defendant is another factor not adequately considered by the guidelines. *People v Miller*, 165 Mich App 32, 51; 418 NW2d 668 (1987), remanded on other grounds 434 Mich 915 (1990).

We are satisfied that the trial court properly articulated the special circumstances surrounding "the offense and the offender" justifying its upward departure from the guidelines' recommended range. *People v Stone*, 195 Mich App 600, 608; 491 NW2d 628 (1992). Under the circumstances, we are not persuaded that the trial court's reliance on these factors to justify an upward departure from the guidelines' recommended range amounted to an abuse of discretion, or that defendant's sentence violated the principle of proportionality.

Affirmed.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell

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<sup>7</sup> As noted, the trial court placed great weight on Cross' testimony that the victim alleged numerous other instances of sexual abuse by defendant. "A sentencing court is allowed to consider the facts underlying uncharged offenses, pending charges, and acquittals." *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).