STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS JAMES MONEHEN,

Defendant-Appellant.

UNPUBLISHED
December 6, 2002

No. 229626
Muskegon Circuit Court
LC No. 99-043313-FH

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Defendant was convicted of one count of second-degree criminal sexual conduct, MCL 750.520c. He was sentenced to 7-1/2 to 15 years' imprisonment. He appeals as of right. We affirm.

Defendant, a middle school math teacher for twenty-nine years, was charged with six counts of second-degree criminal sexual conduct (CSC) involving three female students. All of the alleged conduct took place during school hours and in defendant's classroom. The first student, K.W., testified that she was in defendant's sixth-hour math class during the 1998-1999 school year. On one occasion, she approached defendant's desk to ask for assistance. She stood next to defendant while he pointed to a poster on the wall. When defendant pointed, he touched the side of the victim's breast. She thought it was an accident and moved backward. When defendant withdrew his hand, however, he more firmly touched both breasts. The contact involved her nipples. Defendant was charged with one count of second-degree criminal sexual conduct for his actions toward K.W.

The second student, R.D., testified that defendant was her math teacher in the 1993-1994 school year. Sometimes, defendant rubbed her shoulders. On occasion, he slipped his hand onto her breast, in close proximity to the nipple. He then moved his hand around the area. At other times, defendant knelt next to R.D.'s desk and rubbed the inside of her thigh, up to the point where her legs met. Defendant was charged with one count of second-degree criminal sexual conduct for his actions toward R.D.

The third student, J.T., testified that defendant was her seventh-grade math teacher during the 1998-1999 school year. Defendant often rubbed her shoulders and back. In 1998,

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

shortly before the holidays, defendant slid his hand from J.T.'s shoulder onto her breast, stopping just above the nipple. Defendant engaged in similar conduct on two other occasions in a period of several weeks. Each time, he patted her breast after placing his hand on it. On a fourth occasion, defendant's hand moved all the way down the victim's breast and cupped it. Defendant was charged with four counts of second-degree criminal sexual conduct for his actions with respect to J.T.

Defendant's theory of the case was that the victims fabricated false allegations against him. Defendant denied the charges and questioned whether he would have engaged in the alleged sexual contact in front of other students. The prosecutor's theory of the case was that defendant created an atmosphere wherein he often touched his students. He groomed or conditioned them to think of him as a "touchy feely" or a hands-on teacher. He did this so that he could take advantage of female students when opportunity presented itself and so that he could always argue that his conduct was not sexual but was accidental or inadvertent.

During the investigation in this case, defendant denied any physical contact with his students, stating that he had learned his lesson from a prior, formal reprimand and that he went out of his way to keep his hands away from students. Defendant indicated that he totally refrained from touching students.[1] The jury heard testimony that, in the 1993-1994 school year, defendant was formally reprimanded for inappropriate nonsexual contact, which included rubbing the shoulders and touching the hair of a seventh-grade math student.

The prosecutor presented eleven female student witnesses who testified that they were in defendant's math classes during the 1998-1999 school year. Two of the witnesses testified that they saw defendant touch J.T. on the shoulders on several occasions. Seven of the witnesses testified that defendant touched their shoulders or the shoulders of other girls, that he touched the hair of female students, either twirling it or blowing on it, and that he called some girls by inappropriate names like "big Mama." One witness testified that, on one occasion while defendant was at her desk, he used his red pen to write little red dots on her knuckles. The remaining student witness testified that defendant pulled a stray string or thread off of her shirt and, in the process of doing so, touched her left breast. Defendant subsequently held the string up to his mouth and blew it away. Before the testimony of the witnesses, the trial court issued a cautionary instruction, informing the jury that the witnesses were called to contradict defendant's claim that he never touched students at all and that the testimony could not be used to convict defendant because he was a bad person. The information could be considered, however, with respect to whether defendant had a plan or scheme.

The prosecutor also presented the testimony of four former students. The first, Deanne Kiely, testified that in the mid-1970s she attended the middle school where defendant taught math. Kiely had a social relationship with defendant. She was a cheerleader and he was the boys' basketball coach. Defendant drove Kiely home on occasion. Sometimes they stopped in a church parking lot and talked. Kiely also visited defendant's home. The last

[1] At trial, the jury heard an audiotape of defendant's interview with the police and prosecutor.

time she visited, defendant told her that he liked "kissing little titties." Kiely testified that defendant physically touched her breasts and thighs.

Kari McCamant testified that when defendant was her seventh-grade math teacher in the 1980s, he often put his arm around her shoulders and rubbed her back. Eventually, he started to move his hand from her shoulders to her breast. He cupped her whole breast with his hand. This behavior frequently took place during class.

Kimberly Shoemaker testified that when defendant was her math teacher in the early 1970s, he moved her desk to the front of the classroom, actually touching his desk. When defendant was at his desk, he used his feet to touch her feet. Sometimes defendant pulled her hair away from her face and shoulders. On one occasion defendant offered to give Shoemaker a ride home from school. He first stopped at his own home and asked her inside to see it. Once inside, he touched her shoulders and put his hand on her breast. She left and walked home.

Wendy Rockwell, who was aged thirty-seven at trial, testified that defendant was her lunchroom monitor at the middle school. Defendant often sought Rockwell out for conversation. He stood uncomfortably close and stroked her long hair. When he did, he touched her breasts. He also wrote hall passes to permit her to leave her English class and visit him in the cafeteria study hall that he monitored. Rockwell sat behind defendant's desk in the study hall and he talked to her about her boyfriend. They talked in whispered conversation and defendant's lips occasionally touched Rockwell's earlobes.

The prosecutor also called defendant's former neighbor, Rick Homan, who testified that on a couple of occasions in the late 1970s and early 1980s, defendant confided that he touched the breasts of his students. Defendant boasted that his conduct was not obvious because he touched the students while pretending to brush their hair back or pick a stray hair or thread off of their chest. Defendant once told Homan that "their titties are so fine at that age."

Defendant called numerous witnesses to testify that while he often touched the shoulders of students and other adults, he was never seen engaged in inappropriate behavior. Defendant also disputed factual testimony given by the prosecution's witnesses. The jury reached a verdict with respect to only one count involving J.T. They deadlocked on the remaining counts.

I

Defendant first argues that the trial court erred in admitting evidence of other bad acts under MRE 404(b). We review this preserved evidentiary issue for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

MRE 404(b) 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 this case.

MRE 404(b) is a rule of inclusion. *People v Pesquera*, 244 Mich App 305, 317; 625 NW2d 407 (2001). Relevant, other-acts evidence does not violate MRE 404(b) unless offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v Katt*, 248 Mich App 282, 304; 639 NW2d 815 (2001), lv gtd in part on other gds 466 Mich 889; 649 NW2d 72 (2002). In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994), the Court clarified the test to be utilized to determine the admissibility of other bad acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

It is insufficient for the prosecution to merely recite one of the purposes articulated in MRE 404(b). *Crawford, supra* at 387. It must also demonstrate that the evidence is relevant. *Id.*

> Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. [*Id.* (citation omitted).]

The offered evidence must truly "be probative of something *other* than the defendant's propensity to commit the crime." *Id.* at 390. "If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded." *Id.* Where the evidence is relevant, "admissibility depends on whether its probative value outweighs its prejudicial effect, taking into account the efficacy of a limiting instruction." *Id.* at 385.

The prosecutor articulated proper purposes for the evidence under MRE 404(b), including that the evidence demonstrated a common plan or scheme, intent and lack of fabrication. The prosecutor also demonstrated that the similar-acts evidence was logically relevant to demonstrate a common plan or scheme and to demonstrate intent. It was not offered solely to show defendant's propensity to commit crime.

The evidence of the charged conduct was sufficiently similar to the evidence of the uncharged conduct to support an inference that they were manifestations of a common plan, scheme or system. *Katt, supra*, citing *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). See also *Pesquera, supra* at 319. The charged and uncharged acts involved common features beyond mere commission of acts of impermissible sexual contact, to wit: (1) all of the similar-acts witnesses were students at the school where defendant taught; (2) all were female and were of similar age; defendant had an authoritative role over all of them as a teacher and coach; (3) defendant touched all of them in nonsexual ways; and (4) in some instances, defendant touched their breasts and thighs. There is "such a

concurrence of common features" between the charged and uncharged acts that the charged acts are "naturally to be explained as caused by a general plan of which they are individual manifestations." *Katt, supra* at 306. The prosecutor's theory was that defendant engaged in a common plan or scheme of grooming and manipulating his students to accept his touchings, which in turn allowed him to engage in criminal touchings when the opportunities arose. In other words, defendant ingratiated himself into his students' confidence and conditioned them to accept his nonsexual touchings in order to take advantage of them. The similar-acts evidence supported this theory.

With respect to intent, the prosecutor was required to prove that defendant touched the three victims for sexual gratification or arousal. MCL 750.520c(1); MCL 750.520a(k). The similar-acts evidence supported that defendant acted for sexual gratification. *People v Knapp,* 244 Mich App 361, 380; 624 NW2d 227 (2001). He made statements to Kiley and Homan that he liked the breasts of his students. Some of the similar-acts witnesses testified that defendant touched their breasts after previously engaging in nonsexual contacts. This evidence was not only logically relevant to prove that defendant acted for his own sexual gratification in the instant case, it also negated that the victims misconstrued defendant's actions. In other words, there was no mistake with respect to the nature of the conduct. It was purposeful. In addition, the evidence was also logically relevant to rebut the charge of fabrication. *Id*.[2]

Defendant also argues that the evidence was unfairly voluminous and detailed, that there was a risk of jury confusion, and that the evidence was, in some cases, extremely old. He argues that the probative value was substantially outweighed by the danger of unfair prejudice. MRE 403. We disagree. The similar-acts evidence was presented in a straightforward manner with little extraneous information or detail. While the evidence was voluminous, no authority supports that this fact, by itself, requires a finding of prejudice sufficient to warrant preclusion under MRE 403. In addition, we reject defendant's argument that some of the similar-acts evidence was too old to be relevant. The argument is unsupported by any authority and is abandoned. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Moreover, it is disingenuous. The evidence, reaching as far back as defendant's early days at the same middle school, demonstrated a long term, continuing plan or scheme. Finally, nothing in the record suggests that there was a risk of confusion or a risk that the jury would be overwhelmed and unable to follow their instructions. To the contrary, the prosecutor carefully delineated the charged conduct in both opening statement and closing argument, and he clearly differentiated between the similar-acts evidence and the charged conduct. He specifically informed the jury that the similar-acts evidence could be used only to determine if defendant had a plan or scheme to groom his students with nonsexual touches so that he could take advantage when opportunity presented

---

[2] We note that the evidence was not admissible on the ground that it demonstrated defendant's motive to touch the students. An argument that a defendant is motivated out of sexual attraction is "undistinguishable from the so-called 'lustful disposition' rule," which has never been adopted by our courts. *Sabin, supra* at 68; *People v Watson*, 245 Mich App 572, 579-580; 629 NW2d 411 (2001). Use of the evidence for that purpose would have been inadmissible.

itself. Further, he indicated that the jury could consider the evidence when determining whether the touches were accidental or were intentional and for a sexual purpose. The prosecutor reminded the jury that defendant could not be convicted for the similar-acts conduct and that he could not be convicted based on a finding that he was a bad person. The prosecutor never improperly argued lustful disposition, i.e., that defendant was sexually attracted to his female students and must therefore be guilty of the charged conduct. We note that while the prosecutor recapped the MRE 404(b) evidence in detail in his closing argument, a prosecutor is entitled to argue the evidence and all reasonable inferences from it. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor did not utilize the MRE 404(b) evidence for any improper purpose. Moreover, the jury received clear cautionary instructions from the trial court during trial and during final instructions.[3]

Accordingly, the trial court did not abuse its discretion in admitting the challenged evidence under MRE 404(b).

II

Defendant next argues that testimony from eleven female students in his 1998-1999 math classes was improperly admitted under the proved-to-be false doctrine.[4] The decision to admit evidence is reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). We find no abuse of discretion in the trial court's decision, which permitted the students to testify about defendant's nonsexual touching of students. The evidence was relevant and admissible apart from MRE 404(b).

On March 10, 1999, defendant voluntarily met with the police to discuss the allegations of criminal sexual conduct. The tape of defendant's interview was played before the jury. During the interview, defendant indicated that he was "railroaded" with respect to the reprimand he received for the 1993-1994 incident involving the nonsexual touching of a student. Defendant further indicated that he learned his lesson from that incident and, accordingly, was now "extremely careful of keeping" his hands to himself. He stated that he definitely, totally refrained from touching his students. These statements were clearly designed by defendant to exculpate him with respect to the allegations of improper sexual touching.

In *People v Dandron,* 70 Mich App 439, 442-445; 245 NW2d 782 (1976), this Court stated that exculpatory statements, which are made by a defendant to a law enforcement officer, may be circumstantial evidence of guilt if they are shown to be false. Thus, the prosecutor may offer evidence to demonstrate that an exculpatory statement was false. *Id.*

---

[3] We reject defendant's contention that the jury likely disregarded instructions on how to treat the MRE 404(b) evidence. Nothing in the record supports or suggests that the jury failed to follow the given instructions. And, jurors are presumed to follow their instructions. *People v Graves,* 458 Mich 476, 486; 581 NW2d 229 (1998).

[4] Several of the student witnesses were permitted to testify under MRE 404(b). Their testimony was not admitted only because it disproved defendant's exculpatory statements to the police.

"Defendant has no claim to be protected against the exposure of this falsehood where he indulges in it for his own exculpation." *Id.* at 443, quoting *People v Arnold,* 43 Mich 303; 5 NW 385 (1880); see also *People v Wackerle,* 156 Mich App 717, 720; 402 NW2d 81 (1986).

The testimony of the eleven students demonstrated the falsity of the exculpatory statements that defendant made to the police during his interview. As such, it was relevant, circumstantial evidence of defendant's guilt. We also conclude that the number of students allowed to testify was not unfairly prejudicial. The testimony in total was short and included no extraneous facts.[5] Moreover, in order to demonstrate that defendant's statements to the police were false, it was necessary to show that defendant's touching of students was not isolated but was an ongoing pattern of behavior. There was no abuse of discretion.

III

Defendant next argues that the trial court erred in refusing to grant his motion to sever. Defendant moved to sever the charges in order to have three separate trials, one for each victim. A trial court's decision on a motion to sever is reviewed for an abuse of discretion. *People v Duranseau,* 221 Mich App 204, 208; 561 NW2d 111 (1997).

MCR 6.210(B) provides:

> On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) the same conduct, or
>
> (2) a series of connected acts or acts constituting part of a single scheme or plan.

There are three circumstances under which offenses are considered related for purposes of determining whether severance is required: (1) where the "same conduct" is at issue; (2) where a series of acts are connected together; or (3) where there is a series of acts constituting parts of a single scheme or plan. *People v Tobey,* 401 Mich 141, 150-151; 257 NW2d 537 (1977). The only category that arguably fits the present case is the last category, "a series of acts constituting parts of a single scheme or plan." In *People v McCune,* 125 Mich App 100, 103; 336 NW2d 11 (1983), this Court quoted the commentary to the then-current ABA Standard 13-1.2, relating to "common plan offenses":

> Common plan offenses are the most troublesome class of related offenses. These offenses involve neither common conduct nor interrelated proof. Instead, the relationship among offenses *(which can be physically and temporally remote)* is dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to

[5] The testimony of all eleven witnesses covered approximately sixty-eight pages of trial transcript.

> contribute to the achievement of a goal not attainable by the commission of any of the individual offenses. A typical example of common plan offenses is a series of separate offenses that are committed pursuant to a conspiracy among two or more defendants. Common plan offenses may also be committed by a defendant acting alone who commits two or more offenses in order to achieve a unified goal. [Emphasis added.]

In *People v Miller*, 165 Mich App 32, 44-45; 418 NW2d 668 (1987), this Court found that two CSC offenses were related for purposes of joinder because they both occurred during warm weather and both took place in the same building in locations of seclusion. "These facts indicate a single plan or scheme on the part of defendant to sexually molest the victim when the opportunity presented itself." *Id.* at 45. In this case, we also find that the offenses were related for purposes of joinder. The offenses all occurred while the victims were students in defendant's math classes and all of the conduct occurred in the same location, defendant's classroom. The facts support a single plan or scheme to engage in sexual contact with female students when the opportunity presented itself. Any temporal gap in the charged offenses is not sufficient to require a contrary holding. *McCune, supra.*

We also reject defendant's contention that the trial court's refusal to sever the charges resulted in unfair prejudice to him. Defendant argues that some evidence introduced at the joint trial would not have been equally admissible in each of the separate trials. He fails, however, to explain or rationalize his position. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant also argues that he was prejudiced because J.T. was unavailable for the second trial and, had there been separate trials, the prosecutor would have had a greater opportunity to locate J.T. This argument is disingenuous. First, the decision with respect to defendant's motion to sever was made before the first trial in this case and thus, any prejudice resulting from J.T.'s failure to appear at the second trial did not influence or affect the decision with respect to the motion to sever. Second, defendant was not prejudiced by J.T.'s failure to appear at the second trial. Trial was underway before it became apparent that J.T. would not appear. Defendant does not contest the trial court's rulings that J.T. was unavailable and that her prior testimony could be read into the record.[6]

IV

Defendant next complains that the trial court erred when it refused to order an in camera review of J.T.'s school and counseling records. A decision to order an in camera review of records is discretionary and is reviewed for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998); *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996). "An abuse of discretion exists only if an unprejudiced person, considering

---

[6] In a footnote, defendant "submits" that the due diligence issue is an independent issue that warrants consideration and relief. This mere assertion in a footnote is not enough to properly present this issue to this Court for review. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

the facts on which the trial court acted, would say that there was no justification or excuse for the ruling." *Id.*

> [I]n an appropriate case there should be available the option of an in camera inspection by the trial judge of the privileged record on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense. [*People v Stanaway*, 446 Mich 643, 677; 521 NW2d 557 (1994).]

The mere showing that a record exists does not warrant an in camera review.

In this case, the trial court determined, after a lengthy hearing, that defendant produced nothing of substance to support his speculations that the school and counseling records contained information material to his defense. Defendant produced an affidavit from his own private investigator to support his request for the in camera review. The affidavit contained second-hand information, which was not attributed to any identifiable person. The information included that J.T. was from a troubled home; that she had a history of running away from home; that she had a truancy problem; that she was extremely emotional, needy and self-conscious; that she was an attention seeker; that she needed peer approval; that she was a poor math student; that she knew how to manipulate people to get her way; and that she was histrionic and outgoing. The affiant further indicated that he understood that J.T. was treated or received counseling at two facilities as well as through the school system, and further, that she may have a chemical imbalance that "supposedly caused her to have difficulty" telling right from wrong. Defendant argued, based on the affidavit, that J.T.'s school and counseling records may assist him in proving any or all of his four defense theories: that J.T. felt left out of the biggest event in the school and sought to become the center of attention by making accusations and obtaining approval and sympathy from her peers; that J.T. was angry and upset that she was a poor math student; that J.T. had a troubled home life and that men she encountered after running away influenced her emotional state of mind; or that J.T. had a chemical imbalance, which affected her ability to distinguish between truth and falsity.

Defendant offered no evidence to support the alleged information in the affidavit, with one exception. Steven Cousins, the principal of the middle school at issue, testified that he had heard from others that J.T. ran away from home on two occasions. Cousins did not confirm any of the other information from the affidavit. There was simply no basis to verify the information. More importantly, there was no basis to conclude that the records might contain material evidence necessary for the defense. Defendant was on a fishing expedition to find any information that could possibly assist him in presenting his case. Therefore, we agree with the trial court that defendant failed to articulate a good faith basis for believing that information of the type sought may actually be in the records. A defendant's generalized assertion that the records might contain evidence useful for impeachment on cross-examination is insufficient to support the request for an in camera review. *Stanaway, supra* at 681. "This need might exist in every case involving an accusation of criminal sexual conduct." *Id.* Because defendant failed to meet his burden of demonstrating the need for an in camera review, the trial court's denial of the motion for an in camera review was justified.

V

Defendant also argues that the cumulative effect of the trial errors resulted in a denial of his right to a fair trial. We find that there were no errors of consequence, which cumulatively denied defendant a fair trial. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Miller (After Remand)*, 211 Mich App 30, 43-44; 535 NW2d 518 (1995).

VI

Finally, defendant argues that he is entitled to resentencing because the trial court erred in computing the sentencing guidelines and improperly departed from the guidelines recommended range.

Defendant contends that four offense variables were incorrectly scored. Defendant objected to the scoring of all four offense variables at sentencing. Thus, the issues are subject to review on appeal in this Court. MCL 769.34(10). A scoring decision will not be reversed if evidence exists to support the score. *People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002).

Offense variable 4 involves psychological injury to the victim. MCL 777.34. A score of ten points is to be assessed where there is "serious psychological injury requiring professional treatment" or where serious psychological injury may require professional treatment even if treatment has not been sought. MCL 777.34. In this case, the trial court heard testimony from the investigator who conducted the presentence investigation. The investigator testified that he spoke with J.T.'s mother and that, after the incident, the victim was hospitalized at Pine Rest psychiatric hospital and received counseling. J.T. became suicidal. Based on the testimony presented, the trial court assessed ten points for offense variable 4. Because evidence existed to support the score, we uphold the scoring decision. *Hornsby, supra.*

Offense variable 10 relates to the exploitation of a vulnerable victim and is scored at fifteen points when predatory conduct is involved. MCL 777.40. "Predatory conduct" means "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). In assessing fifteen points, the trial court referred to J.T.'s testimony where she described defendant's conduct against her. The trial court found that defendant's conduct toward J.T., which resulted in conviction, was part of a greater plan that fit within the definition of predatory conduct. Based on the record, we affirm this scoring decision. *Hornsby, supra.*

Offense variable 13 relates to a continuing pattern of criminal behavior. The variable is scored at twenty-five points if the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43. It does not matter whether the other crimes resulted in conviction and, all other crimes within a five-year period are considered. MCL 777.43(2)(a). In this case, defendant was charged with four counts of second-degree criminal sexual conduct against the victim and two counts of second-degree criminal sexual conduct against two other victims. While there was only one conviction,

there was evidence of three or more crimes against a person within the previous five-year period. Thus, the offense variable was properly scored at twenty-five points. *Hornsby, supra.*

Finally, offense variable nine, MCL 777.39, was scored at zero points. Thus, defendant's argument that it was improperly scored at ten points has no merit.

Defendant also argues that he is entitled to resentencing because the trial court departed from the sentencing guidelines range of nineteen to thirty-eight months' imprisonment. Defendant argues that there were no substantial and compelling reasons to depart and that the trial court relied on inaccurate information. MCL 769.34(3) provides:

> A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for the departure. All of the following apply to a departure:
>
> (a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.
>
> (b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

A departure must be based on objective and verifiable factors. *People v Babcock (Babcock I),* 244 Mich App 64, 75; 624 NW2d 479 (2000). Whether a factor is objective and verifiable is reviewed as a matter of law, but the determination that there are substantial and compelling reasons for departure is reviewed for an abuse of discretion. *Id.* at 75-76. Reasons justifying departure from the guidelines should irresistibly grab the court's attention and be recognized as having considerable worth in deciding the length of the sentence. *Id.* at 75. Further, the principal of proportionality may be considered in evaluating the extent of a departure. *People v Babcock (Babcock II),* 250 Mich App 463, 468-469; 648 NW2d 221 (2002), lv gtd ___ Mich ___; ___ NW2d ___ (order issued 9/18/02), citing *People v Hegwood,* 465 Mich 432, 437 n 10; 636 NW2d 127 (2001).

In this case, the trial court sentenced defendant to 7-1/2 to 15 years' imprisonment. It issued a written departure evaluation, articulating its determination that the guidelines did not adequately take into consideration defendant's twenty-nine-year pattern of abuse of middle school students. Significantly, while offense variable 13 accounts for a pattern of criminal behavior, it considers crimes only within a five-year period. MCL 777.43(2)(a). The sentencing court reviewed the testimony and found that defendant's improper sexual contact with his female students began approximately the same time that defendant began teaching and continued until he was charged. It is undisputed that defendant was employed as a math teacher in the same middle school from 1970 until 1999. The evidence at trial support's the

trial court's determination that the incidents of improper touching began in the early 1970s.[7] While evidence of improper conduct was not produced for every year of defendant's teaching career, there was testimony about improper conduct occurring in each of the three decades that defendant taught in the middle school. The trial court's finding that defendant engaged in improper conduct over the course of his twenty-nine years of teaching was objective and verifiable on the record. Moreover, it was objective and verifiable that defendant's pattern of criminal behavior involved more "abhorrent" facts, which were not presented to the jury but were known to the trial court. For example, the prosecutor sought to introduce evidence that defendant French kissed one student (Kiely) numerous times and digitally penetrated her vagina on one occasion The prosecutor also unsuccessfully sought to introduce evidence that defendant rubbed the front of his body against the back and bottom of one of his students. Clearly, the trial court identified objective and verifiable factors. In addition, we find no abuse of discretion in the trial court's determination that the factors constituted substantial and compelling reasons for departure. The factors were not adequately accounted for by the guidelines. And, finally, we conclude that the extent of the departure was proportional. Defendant is not entitled to resentencing.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Robert J. Danhof

[7] Witness Kimberly Shoemaker testified about defendant's conduct in the "early 1970s" when defendant was her ninth-grade math teacher at the middle school. Other documents in the lower court record reveal that Shoemaker was defendant's student in the 1971-1972 school year.