STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER NEAL, JR.,

Defendant-Appellant.

UNPUBLISHED
February 10, 2004

No. 243552
Muskegon Circuit Court
LC No. 00-045327-FC

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant entered a conditional plea of nolo contendere to two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b). He was sentenced to concurrent terms of life in prison and 35 to 100 years in prison. This Court granted leave to appeal. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant had sexual relations with his stepdaughter from the time she was thirteen years old until she was sixteen years old. She gave birth to two of his children. The second child was born in a restroom at the stepdaughter's high school and died shortly after birth.

After defendant requested an attorney while in custody, he inquired whether the baby "that they found up there" was his stepdaughter's infant. A detective responded, "Yeah, your son." Twenty minutes later the detective handed defendant a photograph of the infant. Defendant then admitted that he had been having sexual relations with his stepdaughter and that he believed he was the father of both children. Defendant argues that handing him the photograph constituted interrogation, and that his statements should have been suppressed.

A suspect who has requested an attorney cannot be subjected to further interrogation, in the absence of counsel, unless the suspect initiates further communication. *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). "The 'functional equivalent' of interrogation includes 'any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *People v Kowalski*, 230 Mich App 464, 479; 584 NW2d 613 (1998), quoting *Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980). In denying defendant's motion to suppress, the trial court concluded that defendant must have been independently aware of the death of the infant, since the photograph appeared to be of a normal sleeping baby. The

court found that the photograph did not induce the confession. Further, the court concluded that defendant's question about the baby was an initiation of further communication.

> We review a trial court's factual findings in a ruling on a motion to suppress for clear error. To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo. [*People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).]

The trial court did not commit clear error when it found that defendant's request for information about the child initiated discussion of the topic and signaled a willingness to communicate about the subject without his attorney. The record does not indicate that defendant ever renewed his desire to see an attorney between the time he asked the police about the infant and the time he fully confessed. Because the actions of the police constituted communication about the limited subject of the identification and welfare of defendant's dead infant, which defendant initiated, their communication with him was not inappropriate and the trial court correctly denied his motion to suppress his voluntary confession.

Defendant next argues that the trial court erred in scoring 10 points for Offense Variable 4 based on a determination that there was serious psychological injury to the victim requiring professional treatment. MCL 777.34. Because the trial court related the psychological trauma to the second birth, which may have resulted from a sexual act after age 16, defendant argues that this score was error. Defendant did not preserve this issue by objecting on this ground, so we will not review it on appeal. MCR 6.429(C). Defendant also challenges the score of 50 points for Offense Variable 7 based on defendant's threats to kill the stepdaughter if she told of the sexual abuse, since the threats did not occur during the actual offense of intercourse. The former, applicable version of MCL 777.37 defined "terrorism" as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." Defendant's death threats, although occurring before or after the abuse, were egregious enough to support the trial court's finding that they were designed to increase the victim's fear or anxiety during his abuse. Moreover, defendant would receive the same score for OV 7 on resentencing because his abusive actions constituted "sadism" under MCL 777.37(3), so any error was harmless.

Finally, defendant argues that the trial court's reasons for departure from the sentencing guidelines were not substantial or compelling. The court did not believe that the guidelines accounted for the extent of psychological trauma evidenced by the stepdaughter's hiding of the pregnancy and the unusual circumstances of the birth and death of the infant. Further, the court did not believe that the maximum score of 25 points under Offense Variable 11 adequately addressed the minimum of 100 sexual crimes involving defendant's stepdaughter. The court found it particularly egregious that defendant continued to sexually abuse his stepdaughter even after she gave birth to his child. Departures are appropriate "where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight." *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001), citing MCL 769.34(3)(a) and (b). The trial court correctly determined that the guidelines did not address these factors or give them adequate weight.

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood