

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD THOMAS PATTERSON,

Defendant-Appellant.

UNPUBLISHED

April 27, 2004

No. 244691

Bay Circuit Court

LC No. 02-001071-FH

Before: O’Connell, P.J., and Wilder and Murray, JJ.

PER CURIAM.

Defendant appeals by right his conviction of third-degree criminal sexual conduct, MCL 750.520d, following a jury trial, as well as his sentence of seven to fifteen years’ imprisonment. We affirm.

I. Facts and Proceedings

Defendant’s oldest daughter, the victim in this case,¹ testified at trial that late in the summer of 1999, she moved from her parents’ house in Bay City to an apartment that she shared with her fiancé. On one occasion when the victim visited her parents’ house between August 1999 and November 1999, defendant told her to go to the basement because she owed him “checks” and “he wanted to get ‘em all caught up before [her upcoming] wedding.” When the two were near the workbench in the basement, defendant told the victim to pull her pants and underwear down and bend forward. After applying a condom and Vaseline, defendant anally penetrated the victim. The victim said that she complied with defendant’s instructions because she did not want to anger defendant and wanted her family to attend her wedding.

According to the victim, the term “checks,” which she mentioned in her description of the incident underlying the charge against defendant, referred to a system that defendant instituted several years earlier, whereby defendant told the victim that she owed him “checks” for getting her out of trouble with her mother or for giving her special privileges. When defendant “collected” the “checks,” as he did numerous times over a period of several years, he required

¹ Testimony revealed that defendant and his wife adopted the victim, defendant’s biological niece, when she was five or six years old.

the victim to submit to sexual activities that varied depending on the type of check he was collecting. The victim testified that if she owed defendant a “back check,” she was required to submit to anal intercourse; if she owed a “regular check” she was required to permit defendant to touch her private parts; and if she owed a “front check” she was supposed to submit to vaginal intercourse. Although she “owed” defendant “front checks” over the years, she was able to convince him to trade the “front check” for a higher number of “back” or “regular checks” and never engaged in vaginal intercourse with defendant. Defendant collected “checks” from the victim in various locations, including her bedroom, near the workbench in the basement, and in the car. The victim believed that on certain occasions, defendant deliberately made trouble for her so that she would owe him more “checks.” She stated that if she did not comply, defendant would report to his wife that the victim had a bad attitude.

Some time after the incident in the basement of defendant’s home that occurred between August 1999 and November 1999, the victim learned that her younger sister, who was still living with defendant, had been getting into trouble frequently. The victim testified that after receiving this information, she reported defendant’s conduct against her to the police out of concern that defendant may have been abusing her sister as well.

Detective David Harris of the Bay City Police Department testified that he spoke with defendant in May 2001 and advised him of the accusations against him. When he asked defendant what the word “check” meant to him, defendant hesitated and his face turned red. Defendant responded by asking Detective Harris the same question and then asking him, “What does she say it means?” Detective Harris testified that he had not mentioned the victim’s use of the term “check” at that point in his conversation with defendant.

Defendant testified that he did not engage in any sexual conduct with the victim. He further testified that the victim was a discipline problem and frequently threatened to get back at her adoptive parents when she became angry with them. Defendant’s wife, youngest daughter, and other witnesses testified in support of defendant. The jury convicted defendant as charged of one count of third-degree criminal sexual conduct.

At sentencing, the trial court departed upward from the recommended minimum sentencing range of twenty-nine to fifty-seven months’ imprisonment and sentenced defendant to eighty-four to 180 months’ imprisonment. This appeal followed.

II. Standards of Review

We review for an abuse of discretion whether the trial court properly admitted evidence. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). We review unpreserved claims of constitutional and nonconstitutional error to determine whether the defendant has demonstrated a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

“A sentencing court has discretion in determining the number of points to be scored [for each offense variable], provided that the evidence of record adequately supports a particular score. . . . ‘Scoring decisions for which there is any evidence in support will be upheld.’ *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

We review de novo legal questions involved in the application and interpretation of the sentencing guidelines. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003).

III. Analysis

Defendant first argues that the trial court abused its discretion by granting the prosecution's motion to permit the victim to testify about prior uncharged "bad acts" without knowing what specific acts would be described in the victim's testimony. We disagree.

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.

Evidence concerning other acts is admissible if: (1) it is offered for a proper purpose under Rule 404(b); (2) it is relevant under Rule 402 as enforced through Rule 104(b); and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, MRE 403. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Additionally, upon request, the trial court may provide a limiting instruction to the jury concerning the evidence. *Sabin, supra* at 56. MRE 404(b)(2) requires the prosecution to provide pre-trial notice of "the general nature of any such evidence it intends to introduce and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence."

In the present case, the prosecution provided the notice required by MRE 404(b)(2) by filing a "Motion to Allow Usage of MRE 404(b) Other Acts." In its motion, the prosecution stated that it intended to call the victim to testify concerning prior sexual assaults by defendant over a period of several years. It also stated that testimony regarding the other acts was necessary in order to inform the jury of the system of "checks" that pre-dated the charged offense and explain how defendant was able to perpetrate the crime charged. According to the prosecution, evidence of defendant's plan, scheme, and design in collecting the "checks" put the victim's behavior in context and supported her allegation that the crime occurred.

Defendant argued in response that the prosecutor failed to specifically articulate what evidence would be offered at trial. He also contended that the evidence was not relevant and would show only his propensity to commit the charged act. The trial court granted the prosecution's motion. Although the prosecution presented the victim at the hearing and offered to have her testify, neither the trial court nor defendant requested to hear her testimony.

Defendant contends that the trial court could not evaluate the testimony's potential for prejudice without knowing specifically what the victim would testify. We disagree. As required by MRE 404(b)(2), the prosecution provided notice regarding "the general nature" of the evidence. Moreover, the information the prosecution provided was sufficiently specific to

permit the trial court to weigh the potential for unfair prejudice. The prosecution stated in its motion and at the hearing that the victim would testify that defendant “collected” “checks” from the victim on many occasions over a number of years by performing sexual acts with her that corresponded with the type of “check” defendant collected from her. These statements adequately described the “check” system that the victim recounted at trial. Contrary to defendant’s assertions, this case is distinguishable from *People v Carner*, 117 Mich App 560, 565-566; 324 NW2d 78 (1982), in which this Court stated that the trial court abdicated its discretion by denying the defendant’s motion to exclude evidence of “similar acts” without *any* knowledge of the testimony the prosecution intended to introduce.

To the extent defendant argues that the trial court abused its discretion because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, MRE 403, we disagree. Although, generally, the prosecutor’s evidence prejudices a criminal defendant by damaging his case, only evidence that is *unfairly* prejudicial is subject to exclusion. *People v McGuffey III*, 251 Mich App 155, 163; 649 NW2d 801 (2002), citing *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Evidence is unfairly prejudicial if “‘a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect,’ or ‘it would be inequitable to allow the proponent of the evidence to use it.’” *Id.*, quoting *Mills, supra* at 75-76. In this case, the evidence regarding the “check” system had significant probative value in that it provided the context for the victim’s testimony, corroborated her testimony concerning the charged act, *People v Sabin (After Remand)*, 463 Mich 43, 69-70; 614 NW2d 888 (2000), citing *People v DerMartex*, 390 Mich 410, 413-415; 213 NW2d 97 (1973), and rebutted the defense of fabrication. We conclude that the risk that the jury would disproportionately weigh the evidence concerning the “check” system was minimal; therefore, the risk of unfair prejudice did not substantially outweigh the probative value of the evidence.

Defendant also argues that portions of the victim’s trial testimony regarding other acts were inadmissible because the testimony did not relate to the “check” system and, additionally, was highly prejudicial. Defendant challenges the victim’s testimony that her father once made her stand nude in front of him until she told the truth and sometimes stood outside her bedroom window and told her to undress while he watched her. Although we agree that these incidents were not specifically mentioned in the prosecution’s motion regarding other acts evidence, defendant failed to object to this testimony at trial.² Accordingly, our review of defendant’s claim that this testimony was improper is limited to determining whether a plain error occurred that affected defendant’s substantial rights. *Carines, supra*.

Assuming without deciding that a plain error occurred, reversal is not required because defendant fails to demonstrate a reasonable probability that the admission of this testimony affected his substantial rights. In light of the victim’s testimony regarding the charged act of

² Although defendant stated a general objection to “the 404(b) evidence” early in the trial, intending to preserve his objection to the prosecution’s pre-trial motion, he did not object to this particular testimony on the basis that it exceeded the scope of the prosecution’s pretrial notice and the trial court’s ruling regarding other acts evidence.

anal penetration and the prolonged system of “checks” that included instances of anal penetration, we cannot conclude that excluding the limited testimony concerning these specific acts would have changed the jury’s verdict.

In a related argument, defendant contends that introducing testimony regarding these specific acts without pre-trial notice violated his Fifth Amendment right to due process. We disagree. Defendant failed to preserve this issue by asserting this constitutional argument in the trial court. Our review, therefore, is limited to determining whether a plain error occurred that affected defendant’s substantial rights. *Carines, supra*. As stated above, defendant has failed to demonstrate that excluding the victim’s testimony regarding these specific acts would have altered the jury’s verdict. Accordingly, even if a plain error occurred, reversal is not required.

Defendant next contends that the trial court improperly scored offense variables (OV) four, seven, and eight when calculating his minimum sentencing guidelines range. We disagree.

The trial court must assess ten points for OV 4 if “[s]erious psychological injury requiring professional treatment occurred to the victim,” MCL 777.34(1)(a), or “if the serious psychological injury may require professional treatment,” MCL 777.34(2). Defendant contends that the trial court improperly assessed ten points for OV 4 because the victim did not testify at trial that she suffered serious psychological harm, and the trial court based its ruling on the victim’s statement in the presentence investigation report (PSIR), the victim’s impact statement, and letters the trial court received from a counseling service that was treating the victim. Defendant fails to acknowledge, however, that the trial court may consider more than trial testimony when scoring offense variables. “A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a PSIR, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial.” *People v Ratkov*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

Here, the information the trial court considered supports its finding of serious psychological injury. The victim discussed in her impact statement the psychological injuries that resulted from defendant’s conduct and, according to the trial court, the letters from the counseling service indicated that the victim would need counseling for approximately two years.³ Because the record indicates that the victim suffered serious psychological harm that required professional treatment, we affirm the trial court’s score for OV 4.

The trial court must assess fifty points for OV 7 if a victim “was treated with terrorism, sadism, torture, or excessive brutality.” MCL 777.37(1)(a). Defendant asserts that the record evidence does not support the trial court’s decision to assess fifty points for this offense variable. We disagree. For purposes of OV 7, “sadism” means “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.” MCL 777.37(2)(b). The trial court, relying on portions of the victim’s statement

³ Although the letters from the counseling services are not contained in the lower court record, defendant acknowledged at sentencing that he received a letter from the counseling service that stated that the victim would need counseling for two years.

to the police included in the PSIR, decided that defendant subjected the victim to humiliation for his gratification by abusing her for a number of years as a part of his system of “collecting” what he said she owed him for what he had done for her. We conclude that the victim’s trial testimony and the PSIR support the trial court’s conclusion. Defendant’s reliance on *People v Rockey*, 237 Mich App 74; 601 NW2d 887 (1999), is misplaced. In that case, this Court concluded that the trial court improperly relied on factual information in the PSIR that was based on an anonymous investigator’s description of the offense and was challenged as inaccurate by the defendant. *Id.* at 80-81. Unlike the trial court in *Rockey*, the trial court in the instant case relied on information in the PSIR that, as the trial court stated, reflected the victim’s trial testimony. The trial court properly scored fifty points for OV 7.⁴

With regard to OV 8, the trial court must score fifteen points if the victim “was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” MCL 777.38(1)(a). Defendant asserts that the trial court improperly assessed fifteen points because the record does not reflect that defendant asported the victim to another place. We disagree. In *People v Spanke*, 254 Mich App 642, 647-648; 658 NW2d 504 (2003), this Court determined that asportation for purposes of OV 8 occurs when the victim is moved in furtherance of the crime and the movement is not merely incidental to the commission of an underlying offense. The victim’s movement need not be forcible. *Id.* In this case, defendant instructed the victim to move to the basement so he could commit the charged offense. Like the victims in *Spanke*, *supra* at 648, the victim moved to the basement voluntarily. The basement, a place where defendant and the victim were “secreted from observation by others,” *id.*, was a place of greater danger than the open areas of the home. Therefore, the trial court properly assessed fifteen points for OV 8.⁵

Finally, defendant asserts that the trial court improperly departed from the recommended minimum sentence range because it based its departure, in part, on the “other acts” evidence rather than only the single criminal act for which defendant was convicted. We disagree.

The trial court may depart from the minimum recommended sentence range if it articulates a substantial and compelling reason for the departure. *Babcock*, *supra* at 255, 258-259. A “substantial and compelling” reason is an objective and verifiable reason that keenly or irresistibly grabs our attention and is “of considerable worth” in deciding the length of the sentence. *Id.* at 257-258. The sentencing guidelines prohibit the trial court from basing a

⁴ To the extent defendant argues, in connection with his claim regarding OV 7, that the trial court improperly based its departure from the recommended minimum sentence range on factors accounted for in OV 10, defendant failed to properly preserve this argument because he did not include it in his statement of questions presented. *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003).

⁵ To the extent defendant asserts that the trial court improperly scored OV 8 because the score for OV 10, exploitation of a vulnerable victim, accounted for the “psychological” asportation referred to by the trial court, defendant failed to preserve this argument by raising it in his statement of questions presented. *Busch*, *supra*.

departure on certain factors, including offense or offender characteristics already accounted for in calculating the sentence range.⁶

In departing from the recommended minimum sentence range in this case, the trial court stated, in relevant part:

Not only do I believe in your guilt for this particular offense for which you were charged, I believe that you, with predatory intent over the course of numbers of years, victimized your adopted daughter by use of position of authority as her father over you [sic].

You injected fear into her mind that if she didn't do what you told her to do, that she was going to lose her position in your household and that she would face the life that she faced before being adopted.

I believe that you, in fact, possess a sexual, predatory intent when it comes to this particular young child that you adopted and took advantage of over the course of the numbers of years.

The maximum sentence in this case is 180 months or 15 years. The prosecution argues that I should deviate upwards from the guidelines, and the guideline range is, I believe, 57 months. Twenty-nine to 57 months.

* * *

⁶ 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 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 PSIR, that the characteristic has been given inadequate or disproportionate weight.

I believe a deviation upwards from the guidelines is appropriate in this case. I believe the guidelines fail to consider the position of trust that the defendant held over the victim and that this position of trust was utilized to dominate the victim sexually over an extended period of years.

I recognize that the guidelines do take into consideration a position of trust, but do not take that position of trust, connected with the utilization to dominate the victim sexually over a period of years, that the – the guidelines do not take that into consideration. Consequently, after considering all of the facts and circumstances surrounding this case, the background of the defendant, it is the sentence of this Court that the defendant will serve a minimum of 84 months to a maximum of 180 months with the Department of Corrections.

The trial court's statements indicate its intent to depart from the guidelines range because the guidelines do not adequately account for the entire factual situation in this case. Specifically, in the trial court's opinion, the guidelines do not account for defendant's use of his position of trust to sexually dominate the victim for several years. Contrary to defendant's assertions, the law does not require the trial court to view the charged act in isolation. The principle of proportionality, by which all sentences are measured, requires the trial court to consider "the seriousness of the circumstances surrounding the offense and the offender." *Babcock, supra* at 254, quoting *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); see also *Babcock, supra* at 262-264. The language of the sentencing guidelines also permits the trial court to consider crimes other than the sentencing offense. MCL 777.43, OV 13, expressly permits the trial court to assess points if the sentencing offense is part of "a pattern of felonious criminal activity involving 3 or more crimes against a person," even if the other crimes did not result in convictions, MCL 777.43(2)(a). Accordingly, the trial court properly considered the charged act in context with the uncharged acts and determined that the charged act was part of a prolonged system of victimization.

To the extent that defendant claims that the trial court violated his Fifth Amendment rights by considering the uncharged acts in forming his sentence, defendant has abandoned this issue by failing to adequately brief it. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Affirmed.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray