

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY KNAJDEK II,

Defendant-Appellant.

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UNPUBLISHED

December 20, 2007

No. 273909

Oakland Circuit Court

LC No. 2006-207971-FC

Before: Saad, P. J., and Owens and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree criminal sexual conduct (person under 13 years of age) (CSC-1), MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct (person under 13 years of age) (CSC-2), MCL 750.520c(1)(a). The trial court sentenced defendant to 22 to 50 years in prison for the CSC-1 conviction and 10 to 15 years in prison for the CSC-2 convictions. We affirm.

I. Basic Facts

In 2003, defendant pleaded nolo contendere to two counts of CSC-1 and one count of CSC-2 regarding incidents involving his two daughters in 2002. The victim in the instant case is defendant's son, who suffers from a closed-head injury resulting from being hit by a vehicle when he was two years old. The victim testified that defendant engaged in anal intercourse with him on five occasions in 2002, when the victim was 11 or 12 years old. The victim did not report the incidents until 2005, when his family was undergoing therapy.

II. Jury's Request to Rehear Testimony

Defendant argues that the trial court erroneously foreclosed the jury's right to rehear testimony during deliberations. We disagree. Because defendant failed to preserve this issue, we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005), citing *Carines*, *supra* at 763.

During deliberations, the jury requested the transcript, and the trial court replied that the transcript had not been prepared simultaneously and it was “only a one day trial.” The trial court suggested that the jury refer collectively to their notes and memories. The trial court informed the jury that, if they sent another note, it would make arrangements or “try to make accommodations” to have a tape played for them, but it would take “as long as it took to have testimony taken down initially[.]” Defendant claims that this foreclosed the jury’s right to rehear testimony.

MCR 6.414(J), which governs a jury’s request for the review of evidence during deliberations, provides that the trial court may order the jury to deliberate further as long as it does not foreclose the possibility of having the testimony reviewed at a later time, but it may not refuse a reasonable request. *People v Carter*, 462 Mich 206, 210-211; 612 NW2d 144 (2000);<sup>1</sup> *People v Howe*, 392 Mich 670, 677-678; 675; 221 NW2d 350 (1974). This Court has upheld a trial court’s refusal of a jury’s request to rehear testimony where it ordered the jurors to rely on their memories and advised that the testimony could be read back if the jurors were unable to recall the information. *People v Crowell*, 186 Mich App 505, 508; 465 NW2d 10 (1990). However, in *People v Watroba*, 450 Mich 971, 973-975; 547 NW2d 649 (1996), the Supreme Court found error where the trial court refused a jury’s request to rehear testimony without telling the jury that a second request would be reviewed if the jury members continued to find it necessary to rehear certain testimony. In the instant case, the trial court informed the jury that it would try to accommodate the jury’s request if the jury sent a second note. Its instruction that the jury rely on its memories and notes was appropriate, and it did not foreclose the possibility of reviewing the testimony at a later time.

Defendant further asserts that the trial court foreclosed future requests to rehear testimony when it said that it would take a full day to rehear the tape. This argument is misplaced. The trial court never said that potential review would last a full day; rather, it advised the jury that it was a one-day trial and playing a tape “will take as long as it took to have testimony taken down initially.” Further, a trial court may weigh the time spent to rehear testimony against the need for the material. *People v Joseph*, 114 Mich App 70, 75; 318 NW2d 609 (1982). Because the trial in this case lasted less than one day and the jurors could collectively refer to their notes and memories, the trial court found that the need for the material was minimal. Therefore, the trial court’s reference to the time required to rehear testimony was within its discretion and did not foreclose future requests. Defendant has failed to show any error in the trial court’s decision not to provide the jury an opportunity to review testimony at that time.

### III. Upward Departure

Defendant claims that the trial court abused its discretion in sentencing him to 22 to 50 years’ imprisonment for his CSC-1 conviction, which constitutes a departure from the guidelines minimum sentence range of 108 to 180 months. The trial court stated that it was departing from

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<sup>1</sup> We note that the *Carter* Court applied MCR 6.414(H). The subsections of MCR 6.414 have subsequently been renumbered such that the current MCR 6.414(J) is identical to the former MCR 6.414(H).

the guidelines to protect society from defendant and because the guidelines did not reflect the offenses involving defendant's daughters. The trial court also noted that, because of the timing of the offenses, defendant was not charged as a third habitual offender.

#### A. Standards of Review

In reviewing a trial court's grounds for departing from the sentencing guidelines, this Court reviews for clear error the trial court's factual finding that a particular factor in support of departure exists. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). However, whether the factor is objective and verifiable is a question of law that this Court reviews de novo. *Id.* Finally, this Court reviews for an abuse of discretion the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence. *Id.* at 264-265. A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes. *Id.* at 269.

#### B. Protecting Society

Defendant argues that the trial court abused its discretion in determining that the need to protect society from him was an appropriate factor upon which to base a departure. A trial court must impose a minimum sentence within the sentencing guidelines range unless there are substantial and compelling reasons for a departure and the court states those reasons on the record. *People v Lowery*, 258 Mich App 167, 169-170; 673 NW2d 107 (2003); MCL 769.34(3). To be "substantial and compelling," a reason must be both objective and verifiable. *Babcock*, *supra* at 258. Additionally, it must be a reason that "keenly" or "irresistibly" grabs a court's attention and is of "considerable worth" in deciding the length of a sentence. *Id.* Substantial and compelling reasons exist only in exceptional cases. *Id.* Further, a trial court may not base its departure on an offense characteristic that was already taken into account in calculating the appropriate sentence range unless it finds that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b).

Defendant contends that protecting society is a subjective factor, which cannot be externally proven. In *People v Geno*, 261 Mich App 624, 625; 683 NW2d 687 (2004), the defendant was convicted of CSC-1 for sexually assaulting his girlfriend's daughter. This Court concluded that an upward departure from the sentencing guidelines was permissible to protect other children because the trial court considered the following underlying factors: "defendant's past criminal history of sex crimes with children, his admitted sexual attraction to children, and his repeated failure to rehabilitate himself when given the opportunity." *Id.* at 636-637. In this case, defendant was convicted of sexually assaulting his son and had previous convictions for assaulting his daughters, but there is no evidence that the trial court identified any additional underlying factors. Therefore, protection of society is not a substantial and compelling reason for departure.

Where the trial court articulates multiple reasons for its departure, and some reasons are substantial and compelling while others are not, this Court must determine the trial court's intentions. *Babcock*, *supra* at 260. This involves determining whether the trial court would have departed, and if so to the same degree, if it had not considered protection of society. *Id.* In the instant case, the trial court explained that the guidelines did not accurately reflect the facts and

circumstances of the case because none of the prior record variables (PRVs) took the prior convictions into account. The trial court referenced these prior convictions and stated that, but for the timing, they would have been taken into account in scoring the PRVs and defendant would have been charged as an habitual offender. The trial court maintained that the guidelines did not provide the appropriate sentence and that, for “that reason and for the reason of protection of society,” it would impose the departure. From a review of the record, we believe it is obvious that the trial court would have departed to the same degree regardless of its brief mention of protecting society because of its focus on defendant’s prior convictions. Because we conclude *infra* that defendant’s prior convictions are substantial and compelling reasons for departure, it is not necessary for us to remand for resentencing or rearticulation of its substantial and compelling reasons. *Babcock, supra* at 260-261.

### C. Prior Convictions

Defendant claims that his prior sexual assault cases involving his daughters are inappropriate factors for departure and the trial court erred in stating that he should have been sentenced as a third habitual offender and in relying on these uncharged or unproven crimes. The trial court noted that, because of the timing of defendant’s current offense and the offenses involving his daughters, the prior convictions involving his daughters were not scored as prior convictions or used to charge him as an habitual offender.

Defendant’s assertion that the trial court relied on conduct for which he was never charged or convicted is mistaken, as is evidenced by the presentencing information report, which identifies three prior CSC convictions involving his daughters in 2003. The trial court correctly noted that defendant was not scored any PRV points for the prior convictions involving his daughters. PRV 1, which pertains to prior high severity felony convictions, was scored at zero points. Pursuant to MCL 777.51(2), points may only be assigned for PRV 1 if the prior convictions were “entered before the sentencing offense was committed.” Because the sentencing offense occurred in April 2002, and defendant’s convictions involving his daughters were entered in 2003, the trial court was unable to take the prior convictions into account under PRV 1. The only PRV for which defendant was assigned any points was PRV 7, which applies to subsequent or concurrent felony convictions. MCL 777.57(a). Defendant received a score of 20 points, which is appropriate where the offender has two or more subsequent or concurrent convictions. MCL 777.57(a). Defendant was convicted of three concurrent felony convictions involving his son, which alone would support the score. Therefore, the trial court properly found that defendant’s prior convictions were not taken into account in the scoring of the PRVs.

Defendant devotes much of his argument concerning this issue to his assertion that the trial court erred in relying on its belief that defendant should have been charged as a third habitual offender. However, the trial court did not state that it believed defendant should have been charged as an habitual offender; rather, it noted that, but for the timing of the offenses, he *would* have been charged in that manner. Defendant is correct that he could not have been charged as an habitual offender because the prior convictions did not precede the commission of the instant offense. *People v Stoudemire*, 429 Mich 262, 283; 414 NW 2d 693 (1987). Regardless, it was defendant’s pattern of criminal activity against his children that keenly grabbed the trial court’s attention. The trial court stated that, “no amount of time . . . is going to ever justify the actions that I heard during the course of [the trial].” Therefore, we conclude that

the trial court did not err when it found that defendant's sexual assaults against his daughters were objective and verifiable factors necessitating departure.

Defendant also argues that the trial court erred in relying on his prior CSC convictions because they were adequately taken into consideration under offense variable (OV) 13. The trial court assigned 50 points for OV 13, which applies to a continuing pattern of criminal behavior. This score is appropriate when the sentencing offense is CSC-1 and the "the offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age[.]" MCL 777.43(1)(a), (2)(d). Further, all crimes within a five-year period, including the sentencing offense, may be scored, regardless of whether they resulted in convictions. MCL 777.43(2)(a). The victim testified that defendant had engaged in anal intercourse with him on five occasions. At sentencing, defendant argued that these points had been assigned for the prior convictions involving his daughters. The trial court agreed with the 50-point score and the prosecutor's argument that the score was based on defendant's multiple offenses in the instant case. This Court concludes that the trial court did not abuse its discretion when it found that defendant's prior CSC convictions were not adequately embodied in OV 13. MCL 769.34(3)(b).

#### D. Proportionality

Defendant contends that the trial court's upward departure was disproportionate to defendant's conduct and criminal record under the principle of proportionality. *Babcock, supra* at 262. The substantial and compelling reasons for departure should "contribute to a more proportionate criminal sentence than is available within the guidelines range." *Id.* at 264. Defendant's sentence was specifically imposed based on the circumstances surrounding his conduct. The trial court noted that defendant simultaneously sexually assaulted all three of his children. Based on this conduct, the trial court concluded that a 22-year-minimum sentence was more proportionate than the 9 to 15 year minimum guidelines range. Therefore, this Court concludes that defendant's sentence does not violate *Babcock's* principle of proportionality. The trial court's departure from the sentencing guidelines was not an abuse of discretion.

Affirmed.

/s/ Henry William Saad  
/s/ Donald S. Owens  
/s/ Kirsten Frank Kelly