

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS FRANK HAWKINS,

Defendant-Appellant.

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UNPUBLISHED

January 15, 2008

No. 273409

Mescota Circuit Court

LC No. 05-005631-FC

Before: Davis, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, second offense, for sexually assaulting his then-girlfriend's eleven-year-old daughter, with whom defendant lived at the time. MCL 750.520b(1)(a); MCL 750.520f. The victim testified at trial, as did two other prior victims of defendant, who testified to sexual assaults defendant committed on them while they were aged thirteen or younger. The trial court departed upward from the sentencing guidelines and sentenced defendant as a third habitual offender, MCL 769.11, to 25 to 50 years' imprisonment, with credit for 324 days served. Defendant appeals his conviction and sentence as of right. We affirm.

The testimony of defendant's prior victims was admitted pursuant to MCL 768.27a, which provides in relevant part that if "the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." It is undisputed that all of the sexual assaults at issue are "listed offenses" within the meaning of MCL 768.27a. Defendant primarily contends that the prior assaults were inadmissible under MRE 403 because the danger of unfair prejudice substantially outweighs its probative value, and the evidence is also inadmissible under MRE 404(b) because it is primarily being admitted to show character and propensity.

We review a trial court's decision whether to admit evidence for an abuse of discretion except to the extent that decision involves a question of law, such as interpreting a statute or evidentiary rule; we review questions of law de novo. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). This Court has unambiguously explained that MCL 768.27a is a substantive evidentiary rule that the Legislature was constitutionally permitted to enact without violating the doctrine of separation of powers. *Pattison*, *supra* at 619-620. As a substantive rule, it prevails over a court rule where the statute and court rule conflict. *People v Watkins*, \_\_\_ Mich

App \_\_\_\_; \_\_\_\_ NW2d \_\_\_\_ (Docket No. 277905, published December 13, 2007), slip op at 3. Moreover, MCL 768.27a is not an unconstitutional ex post facto law because it neither criminalizes an act that was not criminal at the time, nor does it reduce the evidentiary requirements necessary to convict a defendant of any crime. See *Pattison*, *supra* at 618-619; see also *People v Dolph-Hostetter*, 256 Mich App 587; 664 NW2d 254 (2003). The trial court properly relied on MCL 768.27a in admitting the evidence of defendant's prior sexually assaultive acts. See *Watkins*, *supra*, slip op at 4.

Nevertheless, even under MCL 768.27a, the courts are still obligated to "take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case," MRE 403; and MCL 768.27a itself reiterates the prohibition against evidence that is irrelevant. MRE 402. See *Pattison*, *supra* at 621. We find no abuse of discretion in the trial court's weighing of the evidence in this case. The evidence was highly probative to show defendant's tendency<sup>1</sup> to forcibly sexually assault adolescent girls who were living with him or who were in some way opportunistically under his control, as well as his tendency to use threats or violence to induce his victims not to disclose the assaults. The fact that some of the assaults were long in the past is actually more probative of this tendency, and we do not find that the dissimilarities in some of the assaults take them outside the range of principled evidentiary rulings. The trial court properly admitted the testimony from defendant's other victims.

Defendant also contends that the trial court impermissibly departed upward from the sentencing guidelines. We disagree. A departure from the sentencing guidelines requires the trial court to place on the record substantial and compelling reasons for doing so, and those reasons must be objective and verifiable. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). We review the existence of a particular finding for clear error, and we review de novo whether it is objective and verifiable. *Id.*

The trial court departed here on the basis of defendant's threat to kill his victim after assaulting her and on the basis of defendant's prior violent sexual assaults. Both factors were facts clearly in evidence; they are therefore both objective and verifiable. We agree with the trial court that they "keenly and irresistibly grab our attention" and are "of considerable worth in deciding the length of a sentence." *Babcock*, *supra* at 257 (citations and internal quotation marks omitted). Furthermore, it is proper for a trial court to determine that a sentence within the guidelines range is inadequate based on related offenses in evidence. See *People v Hicks*, 259 Mich App 518, 535-537; 675 NW2d 599 (2003).

Defendant argues, however, that his threat was already taken into account by the sentencing guidelines under Offense Variable (OV) 19, MCL 777.49(b) (force or threat to interfere with administration of justice). "[A] court may not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate

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<sup>1</sup> As discussed, because MCL 768.27a controls, defendant's argument that this constitutes character evidence inadmissible under MRE 404(b) is inapposite in this case.

sentence range, unless the court finds from the facts in the court record that the characteristic has been given inadequate or disproportionate weight.” *Abramski, supra* at 74. OV 19 encompasses defendant’s threat to kill the victim. See *People v Endres*, 269 Mich App 414, 421-422; 711 NW2d 398 (2006). Nevertheless, the trial court was permitted to find that OV 19 does not *adequately* account for the egregiousness of the threat here, where defendant threatened an eleven-year-old girl over whom he was in a position of power with death after violently sexually assaulting her. The trial court’s upward departure, on the basis of defendant’s prior sexual assaults and on the basis of the threat of death immediately after a forcible sexual assault, was proper in this case.

Affirmed.

/s/ Alton T. Davis  
/s/ William B. Murphy  
/s/ Helene N. White