STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2008
v	No. 272537 Livingston Circuit Court
DONALD ROBERT GROCHOWSKI, Defendant-Appellant.	LC No. 06-015575-FC

Before: Saad, C.J., and Murphy and Donofrio, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of five counts of first-degree criminal sexual conduct (CSC I), 750.520b(1)(a) (victim under thirteen years old), and three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under thirteen years old). The court sentenced defendant to concurrent prison terms of 20 to 40 years for each count of CSC I, and 10 to 15 years for each count of CSC III, with 197 days jail time served credited to each sentence. We affirm.

Defendant raises three arguments challenging the constitutionality of MCL 768.27a.[1] Defendant says that because MCL 768.27a conflicts with MRE 404(b)(1),[2] it unconstitutionally

[1] MCL 768.27a provides as follows:

> (1) Notwithstanding [MCL 768.27], in a criminal case in which 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. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.
>
> (2) As used in this section:

(continued…)

infringes on our Supreme Court's rule-making authority. We rejected this argument in *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007). *Pattison* observed that the statute "reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavior history and view the case's facts in the larger context that the defendant's background affords." *Id.* at 620. *Pattison* reasoned that although the Michigan Constitution prohibits the Legislature from enacting laws that are purely procedural with respect to judicial functions,[3] because "MCL 768.27a is substantive in nature, . . . it does not violate the principles of separation of powers." *Id.*

Defendant also contends, incorrectly, that admitting the evidence denied defendant due process of law because MCL 768.27a allows the admission of irrelevant evidence that might otherwise be inadmissible on relevancy grounds. Clearly, MCL 768.27a provides explicitly that the evidence is admissible only for purposes for which it is relevant. Here, the trial court found that that the evidence was relevant to defendant's propensity to commit the charged crime, and thus, defendant's argument lacks merit. "In cases involving the sexual abuse of minors, MCL 768.27a now allows the admission of other acts evidence to demonstrate the likelihood of a defendant's criminal sexual behavior toward other minors." *Id.* In other words, in the context of a prosecution involving the sexual assault of a minor, MCL 768.27a represents the legislative determination that, as a matter of policy, propensity evidence "that previously would have been inadmissible" unless justified under MRE 404(b), should be allowed into evidence.[4]

(…continued)

> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
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> (b) "Minor" means an individual less than 18 years of age.

[2] MRE 404(b)(1) provides as follows:

> 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 the case.

[3] Const 1963, art 6, § 5.

[4] *Pattison* notes that "our cases have never suggested that a defendant's . . . propensity for committing a particular type of crime is irrelevant to a similar charge. On the contrary, it is because of the human instinct to focus exclusively on the relevance of such evidence that the judiciary has traditionally limited its presentation." *Pattison, supra* at 620.

Additionally, defendant maintains that MCL 768.27a violates his right to due process of law because it allows evidence to be admitted that could otherwise be excluded under MRE 403.[5] Plaintiff argues that MRE 403 does not apply to evidence proffered under MCL 768.27a. The trial court did not expressly decide this issue.

Pattison makes clear that MRE 403 balancing applies to evidence proffered under MCL 768.27a. In *Pattison*, the defendant raised several challenges to MCL 768.27a, including whether evidence of prior sexual assaults against minors is "truly relevant to whether the alleged acts occurred." *Id.* at 620. In rejecting this argument, *Pattison* referenced MRE 403:

> Although we find this information extraordinarily pertinent to a given defendant's behavior in a similar case, we caution trial courts to take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case before admitting the evidence. See MRE 403. [*Id.* at 620-621.]

In context, this passage clearly indicates that the *Pattison* Court believed that MRE 403 balancing applied to MCL 768.27a. The determination that the evidence at issue here is properly and unquestionably relevant to demonstrate the likelihood of a defendant's criminal sexual behavior toward other minors, does not necessarily obviate the need for 403 balancing. The danger MRE 403 is designed to safeguard against is still implicated.

The other-acts evidence showed that defendant had inappropriately touched numerous other minor females the approximate same age as the named victims. Although the evidence was highly prejudicial, it was also highly probative of defendant's attraction to girls of a certain age, his modus operandi in engaging in the improper touching, and his propensity for engaging in the type of behavior underlying the current convictions. Thus, even assuming that the trial court did not subject the evidence to an MRE 403 balancing analysis, the trial court did not abuse its discretion in admitting the evidence because defendant has not shown that the potential for undue prejudice substantially outweighed the probative value of the evidence. MRE 403.

Pattison also rejected defendant's argument that MCL 768.27a violated ex post facto protections[6] when applied to conduct occurring before its effective date. *Pattison, supra* at 618-619. The Court noted that a law that lowered the quantum of evidence necessary for a conviction from what existed at the time of the offense would violate ex post facto protections. *Id.* at 619.

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[5] MRE 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[6] US Const, art 1 § 10; Const 1963, art 1, § 10.

The Court held that that MCL 768.27a did not impermissibly lower the quantum of proof necessary for conviction, stating as follows:

> In this case, for example, defendant could have been tried and convicted before this statute was enacted solely on the basis of his daughter's proposed testimony. That same testimony, if presented as it appears in the record, remains legally sufficient to support his conviction at his upcoming trial. Therefore, the standard for obtaining a conviction against defendant has not changed, and the application of MCL 768.27a to this case does not violate the Ex Post Facto Clause. [*Id.*]

Here, the quantum of proof necessary for conviction was undeniably supplied by defendant's victims.

Finally, we reject defendant's argument that the trial court erred in sentencing him beyond the applicable guidelines range. The calculated guidelines rage was 135 to 225 months. MCL 777.62. The trial court stated the following at sentencing:

> I have exceeded the sentencing guidelines in this case. I do so based upon factors that are contained within the report. And the sentencing guidelines only had taken into account two victims in the instant case. They do not take into account the fact that at least six young women . . . were sexually assaulted by the Defendant. They do not take into account the fact that is reported in the presentence report that sexually stimulating materials were used on at least one of the victims. They do not take into effect that . . . at the end of the term [defendant] will still be young enough to find those to prey on. They do not take into account the fears that were reported in the victim impact statement. A loss of trust in men and . . . the difficulty in the relationship that the young girls are having with their fathers. And they do not take effect the extraordinary high level of offense variable points. In that as indicated in the report[,] the only reason there's not a higher grid is that one does not exist.

A trial court may depart from the sentencing guidelines for substantial and compelling reasons that are "objective and verifiable." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). These reasons should "keenly and irresistibly grab [the] attention [of an appellate court], and should be "of considerable worth in deciding the length of a sentence." *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003) (citations and internal quotation marks omitted). "[A] court may 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 in the court record that the characteristic has been given inadequate or disproportionate weight." *Abramski, supra* at 74.

Offense variable (OV) 9, MCL 777.39, provides for the scoring of 25 points when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death." The trial court indicated that it was departing, in part, on the basis that the guidelines "only had taken into account two victims . . . . They do not take into account the fact that at least six young women . . . were sexually assaulted." However, only two victims were scored not because of a failure of

the guidelines to account for these circumstances, but because the crimes charged only involved two victims. If defendant had been charged for sexually assaulting six girls in total, he still would fall in the "2 to 9" range, resulting in the same 25-point score. Accordingly, the trial court erred in basing its departure on this factor.

The trial court did not err, however, in departing based on the number of children defendant had molested over time. The number and time frame involved not only evidence a consistent pattern of preying upon vulnerable young girls, but they also show and entrenched personality that warrants separation from society for a considerable period of time in order to protect society. See *People v Reincke* (*On Remand*), 261 Mich App 264, 271 (2004). It is clear to us that the court would have departed to the same degree based solely on this valid reason. *Babcock, supra* at 273.

Nor did the trial court err in departing based on the objective and verifiable statements of the victims found in the presentence investigation report (PSIR). The PSIR indicates that one of the victim's father's "indicated that his daughter does have a continued fear of men" and "she won't even let him get physically close to her." This victim's stepmother reported "that the victims had wanted to commit suicide over the shame they felt." The stepmother also told of her stepdaughter's "night terrors." She indicated that her stepdaughter continues to receive professional psychological services, and that the victim even had to been hospitalized due to her psychological trauma. The other victim's father reported "that his daughter has been engaged in psychotherapy, and continues to have fears of me, including all male family members."

OV 4 scores points for psychological injury to a victim. MCL 777.34(1). Ten points are scored if "[s]serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Here, not only have both victims needed professional treatment, but one has already been hospitalized because of the psychological impact. The psychological damage is so severe that the victims have reported contemplating suicide. OV 4 scoring for "require[ed] medical treatment" does not proportionately reflect this level of psychological impact. Further, OV 4 does not take into account the "the effect on family occasioned by the [victims'] loss of trust in all men, including" their own fathers. *People v Armstrong*, 247 Mich App 423, 425-426; 636 NW2d 785 (2001). Moreover, a score of ten points is provided for a psychological injury inflicted upon "*a* victim," and here there are two victims that have suffered psychologically at the hands of this defendant.

Finally, the trial court also did not err in imposing an upward departure based on defendant's high total OV score. Defendant's OV score was 140 points. The OV levels on the applicable grid, MCL 777.62, increase in 20-point increments, topping out at 100+ points. If the levels continued to increase in the established pattern instead of concluding with the all-inclusive 100+ point level, defendant would score out two levels higher.

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Pat M. Donofrio