

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS GEORGE LAROSE IV,

Defendant-Appellant.

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UNPUBLISHED

April 16, 2009

No. 282219

Oakland Circuit Court

LC No. 2007-214779-FC

Before: Zahra, P.J., and O’Connell and K. F. Kelly, JJ.

PER CURIAM.

This matter arises out of defendant’s sexual abuse of his neighbor’s daughter between 1995 and 1997, and 2002 and 2007, when the victim was between six and eight years old and 13 and 17 years old, respectively. After a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), four counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a), three counts of accosting a child for immoral purposes, MCL 750.145a, and four counts of aggravated indecent exposure, MCL 750.335a(2)(b). He was sentenced to concurrent prison terms of 35 to 55 years for each CSC I conviction, 10 to 15 years for each CSC II conviction, 2 1/2 to 4 years for each accosting a child conviction, and 104 days in jail, with credit for 104 days served, for the indecent exposure convictions. He appeals as of right. We affirm.

I. Juror Questions

Defendant first argues that the trial court violated his due process rights by permitting jurors to submit questions to witnesses during trial, and thus a new trial is required. We disagree. Because defendant did not object, our review is limited to plain error affecting defendant’s substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Under Michigan law, jurors are expressly permitted, at the trial court’s discretion, to question witnesses. MCR 6.414(E); *People v Heard*, 388 Mich 182, 187; 200 NW2d 73 (1972).

Here, the trial court allowed the jurors to submit questions to the witnesses during trial after the parties reviewed the questions for admissibility off the record. We can see nothing wrong with this course of action. Rather, the trial court implemented an appropriate procedure to ensure that only proper questions were asked consistent with MCR 6.414(E). Defendant’s reliance on *State v Costello*, 646 NW2d 204 (Minn, 2002), is unavailing because we are bound

by our Supreme Court's decision in *Heard*. *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987). The court did not err.

## II. MCL 768.27a Evidence

Defendant next argues that the trial court erred by admitting evidence of child pornography found on defendant's home computer. Specifically, defendant contends that the evidence should have been excluded under MRE 403 because it had little probative value and it was unfairly prejudicial. We cannot agree. We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

The trial court admitted the evidence pursuant to MCL 768.27a(1), which permits the admission of other acts evidence in cases involving sexual abuse of minors "to demonstrate the likelihood of a defendant's criminal sexual behavior toward other minors" without having to justify the evidence's admission under MRE 404(b). *People v Pattison*, 276 Mich App 613, 618-620; 741 NW2d 558 (2007). That provision provides in relevant part:

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*. [MCL 768.27a(1) (Emphasis added).]

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the actions more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence may be excluded under MRE 403, which states:

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.

This Court has cautioned trial courts considering the admissibility of evidence introduced under § 27a(1) to carefully "weigh the probative value of the evidence against its undue prejudicial effect . . . before admitting the evidence." *Pattison*, *supra* at 621. Of course, all relevant evidence is prejudicial and damaging to some extent, and is thus "inherently prejudicial." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Even evidence that is difficult to view or is particularly gruesome may be admissible, as it is only when the evidence's probative value is "*substantially outweighed*" by its potential for unfair prejudice that it must be excluded. *Id.* at 75-78. This analysis involves a balancing of numerous factors, aside from assessing the evidence's danger for "unfair prejudice," including whether the evidence is needlessly cumulative, how directly it intends to prove a fact and how essential that fact is to the case, whether it will potentially confuse or mislead the jury, and whether the fact can be proved another way without as many harmful effects. *Blackston*, *supra* at 462.

We cannot conclude that the trial court abused its discretion. There is no question that the child pornography video found in defendant's home, if the jury believed that defendant used it for his own purposes, tends to increase the likelihood that defendant committed the charged offenses. It is evidence that is probative of defendant's state of mind and intent in committing the instant crimes. In addition, the evidence bolstered the credibility of the victim and her friends' testimonies, which were crucial to the prosecution's case, because the evidence demonstrated the nature of defendant's interest and predilection toward adult-child sexual contact, and thus supported the accuracy and truthfulness of their testimonies. For these reasons, the evidence is more probative than unfairly prejudicial.

Defendant's position to the contrary is unavailing. The fact that there was no evidence that defendant downloaded the child pornography, that others in defendant's household could have accessed the computer, and that ten years lapsed between defendant's crimes and the download of the material are all questions of fact for the jury to resolve when assessing the credibility and weight to be afforded the evidence. Further, we note that the trial court appropriately provided a cautionary instruction that mitigated any risk that the jury would give the evidence undue weight. The trial court properly admitted the evidence under § 27a(1).

Defendant's related argument that the evidence was inadmissible other acts evidence under MRE 404(b) lacks merit. Evidence that is inadmissible other acts evidence may nonetheless be properly admitted under MCL 768.27a. *Pattison, supra* at 618-619. As we have already concluded, the trial court appropriately admitted the evidence under MCL 768.27a, and whether the evidence constituted impermissible other acts evidence under MRE 404(b) is immaterial. The trial court did not abuse its discretion by admitting the excerpted video of child pornography found on defendant's home computer.

### III. Discovery Violations

Defendant also contends that two alleged discovery violations deprived him of his right to a fair trial. According to defendant, the prosecutor's failure to disclose the evidence frustrated defense counsel's ability to adequately represent defendant and was not harmless beyond a reasonable doubt. Thus, in defendant's view, the trial court failed to provide an adequate remedy when it denied his motion for a mistrial and his convictions should now be reversed and a new trial ordered. We disagree. We review for an abuse of discretion a trial court's decision on a motion for a mistrial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). We also review for an abuse of discretion a trial court's determination of an appropriate remedy for a discovery violation. MCR 6.201(J); *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

MCR 6.201 governs discovery in criminal cases. Where a violation occurs under these rules, trial courts have the discretion to fashion a remedy appropriate to the violation. MCR 6.201(J). In addition, a discovery violation under certain circumstances may also implicate a defendant's constitutional rights. *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997). Due process requires disclosure of evidence in the prosecutor's possession that is exculpatory and material, regardless of whether the defendant requests the disclosure. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). Such evidence is material only if it is exculpatory and raises a reasonable doubt as to the defendant's guilt. *Id.* Thus, to establish a violation of his due process rights, defendant must prove:

(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.” [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

#### A. Therapist’s Notes

Defendant first argues that the court erred by denying his motion for mistrial based on the prosecutor’s failure to disclose the victim’s therapist’s notes, the existence of which were revealed during trial. We cannot agree. Generally, there is an unqualified privilege for confidential information acquired from an individual consulting a psychologist, MCL 333.18237, and there is no right to discovery of such information under the court rules, MCR 6.201(C)(1). “A mistrial should be granted only because of an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial.” *Alter, supra* at 205 (quotation marks and citation omitted). Here, there was no procedural irregularity that was prejudicial to defendant because the prosecutor was under no obligation to disclose the therapist’s notes to defendant under the discovery rules. The trial court did not abuse its discretion in denying defendant’s request for a mistrial on this basis.

#### B. Videotapes

Defendant next argues that his due process rights were violated when the prosecutor failed to disclose videotapes of police interviews with defendant, defendant’s wife, and defendant’s son, all of which the prosecutor allegedly learned of during trial. Defendant’s statements were exculpatory, whereas the statements of his wife and son were inculpatory. Because of these discovery violations, defendant contends that the court erred by denying his motion for mistrial. Again, we cannot agree.

##### 1. Due Process Violation

The prosecutor should have disclosed defendant’s exculpatory interview pursuant to MCL 6.201(A) and, arguably, due process required such a disclosure although defendant himself provided the statements. Here, however, defendant cannot establish the requisite prejudice in support of his due process argument because defense counsel admitted that his trial strategy would not have changed had he obtained the videotape of defendant’s interview earlier. As such, there is no reasonable probability that the result of the trial would have been different had defendant obtained a copy of the interview prior to trial. Thus, there is no due process violation. See *Cox, supra* at 448.

Similarly, the videotapes of defendant’s wife and son, containing inculpatory statements, also should have been disclosed under the discovery rules. MCR 6.201(A)(2). Again, however, defendant cannot establish that this violation offended his due process rights. As defense counsel admitted, this evidence was unfavorable to defendant and the defense strategy would not have changed had the evidence been disclosed earlier. See *Cox, supra* at 448. Accordingly, defendant’s due process rights were not violated.

## 2. Remedy for Discovery Violations

Having determined that defendant's due process rights were not violated, we must consider whether the trial court fashioned an appropriate remedy for these discovery violations. Contrary to defendant's position, we conclude that it did. When a discovery violation occurs, "trial courts have discretion to fashion appropriate remedies for such prosecutorial misconduct." *People v Clark*, 164 Mich App 224, 229; 416 NW2d 390 (1987). The determination of an appropriate remedy involves a balancing of the interests of the courts, the parties, and the public, including an examination of the reason for noncompliance in light of all the relevant circumstances. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 454 n 10; 722 NW2d 254 (2006).

Here, the videotaped interviews of defendant's wife and son were favorable to the prosecution, whereas defendant's taped interview was unfavorable. It was determined at an evidentiary hearing that the prosecutor's failure to disclose this evidence was inadvertent. As a result, the trial court denied the motion for mistrial and prohibited the prosecutor from using any of this evidence in his case-in-chief. This is a remedy that is generally reserved for egregious cases. *Clark, supra* at 229-230. Defendant's conclusory argument that a mistrial should have been granted is unavailing. Defendant has not explained why the remedy provided was not appropriate or inadequate as opposed to a mistrial. Rather, the discovery violations ultimately aided defendant's case, as defense counsel admitted that he would prefer that the jury not view the tapes. Under the circumstances, the trial court's decision to preclude the prosecutor from using the evidence in his case-in-chief was sufficient and appropriate to address the violations. Accordingly, the trial court's decision to deny defendant's motion for a mistrial was not an abuse of discretion.

## IV. Sentencing

Lastly, defendant argues that he is entitled to resentencing. Because the offenses occurred between 1995 and 1997, before the January 1, 1999, effective date of the statutory sentencing guidelines, the former judicial sentencing guidelines apply. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Consequently, the trial court's sentencing decision under the judicial sentencing guidelines, and any departure from those guidelines, is reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

### A. Proportionality

Defendant first argues that his sentence is disproportionate to his crimes and that the trial court failed to adequately state reasons for its departure from the guidelines. We disagree. The test for proportionality is whether the sentence reflects "the seriousness of the circumstances surrounding the offense and the offender." *People v Houston*, 448 Mich 312, 341-342; 532 NW2d 508 (1995) (quotation marks and citation omitted); *Milbourn, supra* at 636. When a defendant's actions are so egregious that the guideline calculations do not reflect their severity, an upward departure from the guidelines range is permissible. *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995). This departure may be based on factors already considered in the sentencing guidelines. *Milbourn, supra* at 660 n 27. Where the imposed sentence exceeds the guidelines range, the trial court must articulate its reasons for departing from the guidelines. *People v Adams*, 195 Mich App 267, 280; 489 NW2d 192 (1992).

In the instant matter, before announcing defendant's sentence, the trial court stated the following:

[T]he jury of his peers has . . . found [defendant] guilty beyond a reasonable doubt of a series of consistent, persistent, and egregious and outrageous criminal sexual conduct acts against a very young victim who then later became older, and that pattern of behavior was resurrected in an extremely egregious way. This obviously is a man who refuses to accept responsibility for his actions. I do not feel that there is much chance of rehabilitation. And the protection of society is utmost of the Court's consideration in connection with the sentence.

The trial court then imposed concurrent sentences of 35 to 55 years each for defendant's CSC I convictions, which exceeded the sentencing guidelines minimum sentence range of 10 to 25 years. After announcing this sentence, the court stated:

Although I think that the Counsel is correct that there was a recommended guideline range as opposed to a mandatory guideline range, and therefore, the Court does not have to find that there were keenly and irresistibly objective facts that grabbed this Court's attention which have not been appropriately accounted for. The guideline range, I do find that the ex—the persistent and repeated violation of a young girl over a series of years and having been stopped and then resurrected again certainly meets those criteria. And therefore, an upward deviation would be legitimate under the current statutory sentencing regime as well.

Under these circumstances, we conclude that defendant's sentence is proportionate and we agree that the circumstances warrant a departure. Here, the guidelines did not adequately account for the egregiousness of defendant's crimes, including the frequency and duration of defendant's sexual abuse of the victim, the victim's very young age, and the fact that defendant abused the victim for a period of years, stopped, and then resurrected that abuse years later. Although defendant was convicted of only four counts of CSC I and four counts of CSC II, the evidence indicated that his sexual contact with the victim was much more frequent—on an almost biweekly basis starting from the time the victim was six years old and decreasing in frequency until she was nine years old. The court appropriately took these factors into consideration when departing upward from the recommended sentence, as it stated on the record, and in fashioning a sentence proportional to defendant's crimes.

Defendant, however, emphasizes that he has only one prior 1997 misdemeanor conviction for indecent exposure and, therefore, his sentence is not proportionate. We cannot agree. A proportionality analysis requires consideration of more than just the offender's actual prior criminal record. See *People v Lemons*, 454 Mich 234, 259-260; 562 NW2d 447 (1997). Further, where the defendant's prior criminal record is scant or non-existent, a sentence outside the guidelines' range is not automatically disproportionate; however, the circumstances of the crime must merit the increased sentence. See *Granderson, supra* at 681. As already noted, the circumstances merit the sentence. Defendant's sentences of 35 to 55 years are proportionate to the seriousness of the circumstances surrounding the offenses and the offender and the trial court adequately stated its reasons for departure on the record.

## B. Sentencing Considerations

Defendant also asserts that the trial court impermissibly considered his refusal to admit guilt at sentencing. It is true that a sentencing court cannot base a sentence, even in part, on a defendant's refusal to admit guilt, *People v Dobek*, 274 Mich App 58, 104; 732 NW2d 546 (2007), but defendant's assertion mischaracterizes the court's reasoning and determination at the sentencing hearing. The trial court neither attempted to procure an admission of guilt from defendant, nor did its statements suggest that it would impose a lesser offense had defendant admitted guilt, and defendant did not expressly maintain his innocence. See *id.* In other words, nothing in the record indicates that the trial court based its sentence on defendant's refusal to admit guilt.

We similarly reject defendant's argument that the trial court impermissibly based its sentence on defendant's rehabilitative capacity because its determination was neither "objective nor verifiable." A trial court's departure from the guidelines must be based on "objective and verifiable" factors. *People v Downey*, 183 Mich App 405, 413-414; 454 NW2d 235 (1990). Our Supreme Court has held that a defendant's potential for rehabilitation is an appropriate factor to consider. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). Here, the trial court observed that defendant's improper conduct occurred over a lengthy period of time, beginning when the victim was very young and recurring in her teen years, which reflected negatively on his prospect for rehabilitation and heightened the need to protect society. That the court based its sentence, in part, on these considerations is not improper as consideration of defendant's potential for reformation was not a subjective judgment internal to the mind of the judge. Resentencing is not warranted on this basis. Because defendant has failed to demonstrate that resentencing is necessary, defendant's final argument, that a new judge is required for resentencing, is moot.

Affirmed.

/s/ Brian K. Zahra

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly