

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE THOMAS NOVAK,

Defendant-Appellant.

UNPUBLISHED

January 26, 2010

No. 284838

Bay Circuit Court

LC No. 06-010653-FC

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his jury-trial convictions of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c. The victim, defendant's granddaughter, was nine years old at the time of trial. Defendant was sentenced as a second habitual offender, MCL 769.10, to prison terms of 240 to 480 months for the CSC I conviction and 120 to 270 months for the CSC II conviction. We affirm.

I

Defendant first argues that the trial court abused its discretion by ruling that a "sex manual," as well as evidence of certain other acts, was admissible under MRE 404(b). We agree in part and disagree in part. However, we find that any errors committed in this regard were harmless beyond a reasonable doubt.

MRE 404(b)(1) states:

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.

In *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), our Supreme Court adopted a four-part test first enunciated by the United States Supreme Court in *Huddleson v*

United States, 485 US 681, 691-692; 108 S Ct 1496; 99 L Ed 2d 771 (1988), to determine the admissibility of other acts evidence under 404(b). See also *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000). First, the evidence offered must be relevant to an issue other than the defendant's character or propensity. *VanderVliet*, 444 Mich at 74. Second, the evidence must satisfy the relevancy requirement of MRE 402. *Id.* Third, the evidence must survive the balancing test of MRE 403. *Id.* Lastly, upon request, a limiting instruction may be given to the jury. *Id.*

MRE 402 states that "[a]ll relevant evidence is admissible Evidence which is not relevant is not admissible." Evidence is relevant if it has any tendency to make a fact in issue more or less probable than without the evidence. MRE 401. However, even relevant evidence is inadmissible if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" MRE 403. But evidence is not unfairly prejudicial merely because it is damaging to a party's case. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

Other acts evidence is admissible only to prove an issue actually in dispute. *People v Brown*, 137 Mich App 396, 404; 358 NW2d 592 (1984). A defendant's general denial of culpability places all the elements of the crime in issue. *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998). The prosecution bears the initial burden to demonstrate that the other acts evidence is being introduced for a purpose other than to prove character or propensity. *Sabin*, 463 Mich at 60. It is not sufficient for the prosecution to merely cite a permissible purpose. *People v Dobek*, 274 Mich App 58, 85; 734 NW2d 546 (2007). Instead, the prosecution must show a sufficient factual nexus between the two crimes. *People v Crawford*, 458 Mich 376, 395-396; 582 NW2d 785 (1998). However, a high degree of similarity is not required. *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004).

A

It is undisputed that the "sex manual" written by defendant was a fictional story. There was no evidence produced at trial to suggest that the characters in the "sex manual" were actually defendant or the victim. However, the "sex manual" was certainly probative of defendant's interest in sex with minors.

We must reject defendant's assertion that the "sex manual" was inadmissible evidence of other acts pursuant to MRE 404(b). The "sex manual" did not describe any other crime or prior act at all, and therefore did not fall within the general rule of exclusion contained in the first sentence of MRE 404(b)(1). Indeed, the "sex manual" was a fictional story written by defendant, himself, that tended to show his interest in sexual activity with minor children. It was therefore admissible as a party admission under MRE 801(d)(2)(A), and was certainly relevant evidence of defendant's state of mind and motive, MRE 401. Moreover, contrary to defendant's assertion, we cannot conclude that the probative value of the "sex manual" was substantially outweighed by the danger of undue prejudice under MRE 403. *People v Watson*, 245 Mich App 572, 581; 629 NW2d 411 (2001). The trial court properly admitted the "sex manual" into evidence.

B

Defendant also argues that the trial court abused its discretion by admitting other acts testimony regarding his alleged prior sexual assaults of his two other granddaughters pursuant to MRE 404(b). We agree with defendant that there was insufficient similarity between the testimony of defendant's other two granddaughters and the circumstances of the instant case. Unlike in the instant case, the alleged acts defendant perpetrated against his other two granddaughters did not involve sexual penetration or any attempt on defendant's part to sexually penetrate the girls. Accordingly, there was insufficient similarity between these alleged prior acts and those charged in the instant case to warrant admissibility under MRE 404(b).

Nevertheless, we conclude that the erroneous admission of this testimony was harmless beyond a reasonable doubt. There was sufficient independent evidence of defendant's guilt in this case, and it does not appear likely that the jury would have acquitted defendant in the absence of the improperly admitted testimony of the two other granddaughters. We cannot conclude that it is more probable than not that a different outcome would have resulted without the error. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); see also *Watson*, 245 Mich App at 582. Reversal is not warranted on this issue.¹

C

On the other hand, we conclude that the trial court properly admitted the evidence concerning defendant's prior sexual assault of his adopted daughter. There was sufficient similarity between the allegations of defendant's adopted daughter and those in the instant case to justify admission of her testimony pursuant to MRE 404(b). The prior acts evidence offered in this regard was relevant to proving that defendant acted with a common design or plan. See *People v Hine*, 467 Mich 242, 252; 650 NW2d 659 (2002).

II

Defendant next argues that the trial court abused its discretion by precluding him from cross-examining his adopted daughter concerning her alleged efforts to persuade her son to falsely claim that defendant had sexually abused him. We disagree. We review a trial court's decision to limit the scope of cross-examination for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). At trial, the prosecution objected to defendant's efforts to introduce this evidence on hearsay and relevancy grounds. Defendant argued that the evidence was not hearsay because he was not offering it for the truth of the matter asserted and because it was relevant to his theory of fabrication. The trial court excluded the evidence on relevancy grounds. Because defendant has failed to demonstrate how the trial court abused its discretion, his argument must fail.

¹ The prosecution also argues that this evidence was admissible under MCL 768.27a. However, because the prosecution did not rely on MCL 768.27a below, we decline to address this issue on appeal.

III

Defendant further argues that there was insufficient evidence to support his conviction of CSC I. Specifically, defendant argues that because the victim testified that he wore his jeans at the time he sexually assaulted her, and because she could not recall what defendant's penis felt like, there was insufficient evidence that he penetrated the victim. We disagree.

A challenge to the sufficiency of the evidence on appeal is reviewed de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found beyond a reasonable doubt that all essential elements of the offense were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). We must draw all reasonable inferences and resolve credibility issues in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In this case, the victim testified that defendant's "front butt" touched the inside of her "back butt." While the victim did not use the generally accepted terminology, it reasonably follows from her explanation of the various anatomical parts that she was describing her anus and defendant's penis. Moreover, the fact that the victim testified that defendant wore jeans when he sexually assaulted her does not mean that it was impossible for a sexual penetration to occur. See *People v Hammons*, 210 Mich App 554, 556-557; 534 NW2d 183 (1995). A victim's testimony concerning a sexual assault need not be corroborated by other evidence. MCL 750.220h. "It is for the trier of fact, not the appellate court, to determine what inferences may fairly be drawn from the evidence and to determine the weight to be accorded to those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). We conclude that a rational jury could have determined beyond a reasonable doubt that defendant sexually penetrated the victim.

IV

Defendant also argues that he is entitled to a reversal of his convictions on the basis of certain claimed instructional errors. We perceive no errors requiring reversal.

A

First, defendant objects to the limiting instruction given to the jury with regard to the proper use of other acts evidence under MRE 404. We need not address this argument because defendant has failed to support it with proper citation to authority. It is not enough for an appellant to simply announce his position or assert an error and then leave it to this Court to discover and rationalize the basis for his claims. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Nor may he give only cursory treatment to an issue with little or no citation of supporting authority. *Id.* We decline to consider defendant's argument in this regard further. For this same reason, we also decline to address defendant's argument that he was deprived effective assistance of counsel because his counsel failed to object to the limiting instruction.

B

Defendant also contends that the trial court's instruction to the jury describing the meaning of "sexual penetration" was improper. During deliberations, the jury submitted a question to the court asking for further clarification about what constituted sexual penetration. Specifically, the jury asked: "Does the defendant's penis have to be out of his pants to constitute first-degree or can it be inside of his pants?" After a discussion with the attorneys in chambers, the following exchange occurred on the record:

THE COURT: And the question [is], "Does the defendant's penis have to be out of his pants to constitute first-degree or can it be inside of his pants?"

And this is the answer that we, counsel and I, put together in chambers, and we want to put it on the record and see if there [are] any objections to it.

You must only decide whether the penetration of the anal opening of [the victim] occurred. The presence of clothing does not rule out penetration. Clothing may or may not interfere with penetration, that's up to you to decide. The law states that sexual penetration means anal intercourse or any other intrusion however slight of any part of a person's body, but emission of semen is not required.

Ms. Broushko?

MS. BROUSHKO: Your Honor, the People have no objection to that.

THE COURT: And, Mr. Beggs?

MR. BEGGS: Your Honor, I think the record should reflect that we did have fairly extended conversations yesterday—yesterday and today relative to this. I was proposing some language in a Federal case, where this appears to the compromise that we worked out.

THE COURT: All right. And so it's acceptable then?

MR. BEGGS: Yes, your Honor.

Defendant asserts that this instruction to the jury was improper because it impermissibly infringed on the jury's role as fact finder. We need not address this assertion because defendant's statement to the trial court that the instruction was acceptable constitutes a waiver of this issue on appeal. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). For the same reason, we decline to address defendant's argument that trial counsel's failure to object to this instruction deprived him of effective assistance of counsel.

At any rate, however, we note that this instruction to the jury appears to have been correct. The Legislature has defined "[s]exual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, *however slight*, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r) (emphasis added). And as this Court has observed, clothing is not "some type of impenetrable barrier precluding penetration" *Hammons*, 210 Mich App at

557. Therefore, in certain circumstances, sexual penetration may be accomplished even in the presence of clothing. *Id.*

V

Defendant argues that he was deprived the effective assistance of counsel at trial on multiple grounds. Because defendant preserved this issue by moving for a new trial or *Ginther*² hearing, we review the trial court's factual findings for clear error and review de novo the underlying questions of law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008).

Because effective counsel is presumed, a defendant who challenges his counsel's assistance bears a heavy burden. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show (1) that trial counsel's actions fell below those of a reasonably competent attorney when objectively viewed, and (2) that but for counsel's unreasonable conduct, there is a reasonable probability that the outcome of trial would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Lawyers have wide discretion over matters of trial strategy, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and we will not review a lawyer's trial decisions with the benefit of hindsight, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The decision whether to call a witness, what evidence to object to, and what questions to ask are matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). The failure to call witnesses, object to evidence, or present other evidence deprives a defendant of effective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308. A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

A

Defendant asserts that he was deprived of effective assistance of counsel because his trial attorney failed to call certain witnesses that he told the jury he would call during his opening statement. At the *Ginther* hearing, defendant's trial attorney testified that he had intended to call the witnesses at issue to support his theory that defendant's adopted daughter³ had fabricated the alleged abuse and convinced the victim to make false allegations. The attorney testified that the witnesses would have proven that defendant's adopted daughter was a liar who could not be trusted. However, after the adopted daughter's testimony, defendant's attorney stated that he no longer felt that it was necessary to call these other witnesses. This is because defendant's adopted daughter, herself, admitted on the stand that she had recanted certain of her own allegations against defendant in the past. Defendant's attorney testified that he believed the adopted daughter's own admission that she had recanted certain allegations was the most

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

³ Defendant's adopted daughter is the victim's mother.

effective way to support the defense's theory that she was an incredible witness. We agree with the trial court that counsel's reasons for not calling the other witnesses was strategic and not unreasonable.

B

Second, defendant asserts that he was deprived of effective assistance by his attorney's failure to further attack defendant's adopted daughter's credibility. Specifically, defendant argues that his attorney should have taken every opportunity to attack his adopted daughter's credibility because her testimony was so prejudicial to the defense. For the reasons stated above, we find that counsel's strategy was reasonable. As noted previously, defendant's adopted daughter admitted to the jury that she had recanted certain of her own allegations of sexual abuse in the past. Thus, it was not unreasonable for defendant's attorney to believe that her credibility was already impaired and that no other witnesses were required in this regard. We will not second-guess this strategic decision with the benefit of hindsight. *Matuszak*, 263 Mich App at 58.

C

Third, defendant contends that trial counsel's failure to introduce evidence that the victim's stepbrother had previously sexually abused her was objectively unreasonable. Prior to trial, the trial court granted defendant's motion to admit police reports that showed that the victim's stepbrother had previously sexually assaulted her. However, at the *Ginther* hearing, defendant's trial counsel testified that he chose not to introduce this evidence at trial because the court would not allow him to fully explain the evidence. Counsel further explained that without an opportunity to explain to the jury the relevance and importance the information, he feared the jury might misconstrue his reasons for introducing the evidence. This was plainly a strategic decision by counsel, and we will not second-guess counsel's decision on appeal. *Matuszak*, 263 Mich App at 58.

D

Defendant lastly contends that trial counsel's failure to object to, or move to strike, damaging and inadmissible hearsay statements introduced at trial deprived him of the effective assistance of counsel. Even if we were to agree with defendant that his trial counsel should have objected, because defendant has failed to demonstrate that the alleged error was outcome-determinative, this argument must fail.

VI

Defendant argues that the trial court improperly scored 10 points for offense variable 4 (OV 4) and 15 points for offense variable 10 (OV 10). We disagree with the former assertion, but agree that error occurred with respect to OV 10. Nevertheless, because the corrected score for OV 10 would not alter defendant's sentencing range, we find no error requiring reversal.

A

Zero or 10 points may be scored for OV 4. MCL 777.34(1)(a) and (b). To assess 10 points, the trial court must find that the victim suffered a “[s]erious psychological injury requiring professional treatment.” MCL 777.34(1)(a). The court may score 10 points even though the victim has not sought psychological treatment prior to sentencing. MCL 777.34(2). Here, the victim testified that defendant’s abuse made her feel bad and scared. This statement was sufficient to support a finding that the victim suffered a serious psychological injury requiring professional treatment. We cannot conclude that the trial court abused its discretion by assessing 10 points for OV 4. See *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005).

B

We do find that the trial court abused its discretion by assessing 15 points for OV 10. To assess 15 points for OV 10, the trial court must find that the defendant engaged in predatory conduct to exploit the victim’s vulnerability. MCL 777.40(1)(a). The instructions for OV 10 define “predatory conduct” as “an offender’s preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a).

The trial court reasoned that a score of 15 points was appropriate under OV 10 because the totality of the circumstances established that defendant’s preoffense conduct was directed at “a victim” within the meaning of the statute. The trial court did not consider defendant’s conduct against the particular victim at issue in this case, but instead considered only the testimony of the other witnesses and defendant’s alleged conduct against them. Defendant contends that it was error for the trial court to consider unconvicted acts against other people in determining the number of points to be assessed under OV 10. Defendant’s argument has merit. The term “victim” in the language of OV 10, MCL 777.40, refers only to victims of the *sentencing offense*, and does not contemplate victims of other, uncharged offenses. See *People v Sargent*, 481 Mich 346, 348; 750 NW2d 161 (2008). There is simply no evidence on the record to establish that defendant engaged in “predatory conduct” against the specific victim in this case. See *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).

Nevertheless, we conclude that 10 points clearly would have been appropriate under OV 10 in this case. It cannot be seriously disputed that defendant “exploited . . . a domestic relationship” or “abused his . . . authority status” in the commission of the present offenses. MCL 777.40(1)(b); see also MCL 777.40(3)(d). At the time of sentencing, defendant’s overall prior record variable (PRV) score was calculated at 10 points, and defendant’s overall OV score was calculated at 50 points. A reduction of five points in defendant’s overall OV score from 50 to 45 simply would not affect his guidelines range. See MCL 777.62. Accordingly, resentencing is not required on this ground. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

VII

Finally, defendant argues that he is entitled to resentencing because the trial court abused its discretion by exceeding the guidelines in this case. We disagree.

Our Supreme Court restated the appropriate standards of review for issues such as this in *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003):

“the existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A 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 shall be reviewed for abuse of discretion.”
[Citations omitted.]

In determining whether substantial and compelling reasons exist to merit departure from the sentencing guidelines, the appellate court must give appropriate deference to the trial court’s sentencing determination. *Id.* at 270.

To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. Further, the trial court must articulate the reason for the departure on the record. MCL 769.34(3). In departing from the guidelines range, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the offender. *Babcock*, 469 Mich at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A trial court may depart from the guidelines range for nondiscriminatory reasons based on a factor or offender characteristic that was already considered in calculating the guidelines range so long as that factor or characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b).

A

The trial court found that defendant’s past abuse of his adopted daughter, the victim’s mother, was a substantial and compelling reason to exceed the guidelines in this case. The evidence showed that when defendant’s daughter was a child, she alleged that defendant had abused her. It is true that she admitted at trial that she later recanted certain of these allegations, but she also testified that defendant had in fact abused her.

We cannot conclude that the trial court clearly erred by finding that defendant abused his adopted daughter or that it erred as a matter of law by determining that this factor was objective and verifiable. *Babcock*, 469 Mich at 264-265. It appears that a substantial and compelling reason to depart from the sentencing guidelines need only be substantiated by a preponderance of the evidence. *People v Ewing (After Remand)*, 435 Mich 443, 446 (BRICKLEY, J.), 473 (BOYLE, J.), 458 NW2d 880 (1990); *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007). And the trial court was in the best position to assess the demeanor of defendant’s adopted daughter and to judge the credibility of her testimony. See *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *People v Terlisner*, 96 Mich App 423, 431; 292 NW2d 223 (1980). We accordingly defer to its findings on this matter. *Miller*, 433 Mich at 337; see also *Babcock*, 469 Mich at 270.

Nor can we conclude that the trial court abused its discretion by determining that defendant's past abuse of his adopted daughter justified an upward departure from the sentencing guidelines. *Babcock*, 469 Mich at 264-265. The testimony of defendant's daughter showed that defendant was a repeat child molester who took advantage of familial relationships to achieve his illicit ends. This evidence was not given adequate weight in the scoring of the guidelines, MCL 769.34(3)(b), and tended to establish that defendant continued to pose a danger to children within his family.

B

Similarly, the trial court properly determined that the existence of defendant's "sex manual" constituted an objectively verifiable, substantial and compelling reason for exceeding the guidelines in this case. *Babcock*, 469 Mich at 264-265. The "sex manual" was admitted as a physical piece of evidence, and its existence was therefore certainly objective and verifiable. Moreover, the "sex manual" plainly demonstrated defendant's continuing interest in sexual activity with minors, and this was not adequately accounted for in the guidelines. MCL 769.34(3)(b). The existence of the "sex manual" was also an appropriate reason for exceeding the sentencing guidelines.

VIII

Finally, we cannot conclude that the extent of the departure in this case was improper. The guidelines recommended a minimum range of 81 to 168 months for defendant's CSC I conviction. The trial court exceeded that range by six years, imposing a minimum sentence of 240 months. We find that this minimum sentence was more proportionate to defendant's actual offenses than that which would have been available within the guidelines range; it therefore did not constitute an abuse of discretion. *People v Smith*, 482 Mich 292, 300, 305; 754 NW2d 284 (2008); see also *Babcock*, 469 Mich at 264.

We do note that the guidelines deal only with the minimum sentence to be imposed. The trial court must impose a maximum sentence in accordance with statutory law. Upon a conviction of CSC I, the trial court is authorized to impose a sentence of life or any term of years. MCL 750.520b(2)(a). Here, the trial court chose to impose a term-of-years sentence, and set the maximum at 40 years. We perceive no error in this regard.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood