S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 6, 2010
v	No. 285666 Wayne Circuit Court
JAMES CHRISTOPHER SCHNEIDER, Defendant-Appellant.	LC No. 05-009901-FC

Before: Hoekstra, P.J., and Stephens and M.J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (under 13), two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b) (relationship), one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (under 13), and two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(d) (incest).[1] Defendant was sentenced to 25 to 40 years in prison for each first-degree criminal sexual conduct conviction, 10 to 15 years in prison for the second-degree criminal sexual conduct conviction, and 10 to 15 years in prison for each third-degree criminal sexual conduct conviction. We affirm in part, vacate in part and remand for further proceedings.

Defendant first argues on appeal that he was entitled to a new trial or an evidentiary hearing because of a juror's allegations that other members of the jury were forming opinions based on personal experiences. We disagree.

"Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent an abuse of that discretion. An abuse of discretion occurs when the result is outside the range of principled outcomes." *People v Brown*, 279 Mich App 116, 144; 755 NW2d

[1] Defendant was charged with two counts of first-degree criminal sexual conduct (under 13), MCL 750.520b(1)(a), two counts of first-degree criminal sexual conduct (relationship), MCL 750.520b(1)(b), and two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(d) (incest). The information was amended at trial to include second-degree criminal sexual conduct as an alternative to Counts I through IV (first-degree criminal sexual conduct) and fourth-degree criminal sexual conduct as an alternative to Counts V and VI (third-degree criminal sexual conduct).

664 (2008). Similarly, "a trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion." *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). A lower court may grant a new trial on any ground that would support appellate reversal of the defendant's conviction or if the court believes that the verdict has resulted in a miscarriage of justice. MCR 6.413(B). "[I]t is well established that not every instance of misconduct in a juror will require a new trial. The general principle underlying the cases is that the misconduct must be such as to affect the impartiality of the jury . . . . The misconduct must be such as to reasonably indicate that a fair and impartial trial was not had . . . ." *People v Miller*, 482 Mich 540, 551; 759 NW2d 850 (2008), quoting *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960).

On the first full day of deliberations, Juror Nine sent the trial court a note stating that she wished to leave. When asked to explain, Juror Nine told the judge that deliberations had reached an impasse and "people are using their opinions based on experiences in the past." The trial court brought the jury back into the courtroom. Before re-instructing the jurors on evidence, CJI2d 3.5, the judge stated:

> . . . .[*Y*]*ou are only to consider that evidence which was properly admitted in this case and you cannot consider your personal experiences when you're weighing the evidence in this case*.
>
> If you consider your personal experiences in this case, then you are doing a great injustice by not serving true to your oath. Your oath was to follow the law. The law is clear and I'm going to give you the instruction verbatim as it relates to evidence, okay, because if you do not follow this instruction then clearly there's going to be an issue down the road because *you cannot allow personal experiences to get in the way of what is otherwise the evidence that's been presented in this case*, okay. [Emphasis added.]

The court re-instructed the jury, repeating the portion of CJI3.5, " To repeat one more time you must decide this case based only on the evidence admitted during this trial. Are you all clear on that?" Asked about clarity, all of the jurors raised their hands. Defense counsel's subsequent motion for a mistrial was denied as was its post-trial motion, which raised the same issue of juror misconduct, and included an affidavit from Juror Nine. The affidavit stated that (1) "Once the jury began its deliberation, I became increasingly concerned that some of my fellow jurors were basing their opinions about the defendant's guilt on their own past experiences," and (2) after the court addressed the jury regarding her concerns and gave them the evidence instruction, "my fellow jurors voiced their anger with me for saying something to the court about what had gone on. I was intimidated by their reaction and felt that this limited how much I could contribute to the discussion and how much my fellow jurors were willing to listen to my arguments."

In this case, the allegations of misconduct were limited to Juror Nine's belief that jurors were forming opinions based on their personal experiences. "Traditionally, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict. The only recognized exception to this common-law rule related to situations in which the jury verdict was affected by extraneous influences." *People v Fletcher*, 260 Mich App 531, 539; 679 NW2d 127 (2004) (internal citations omitted).

The defendant must initially prove two points to prove that the alleged extrinsic influence constituted error requiring reversal: "First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict . . . . If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt." *Fletcher*, 260 Mich App at 540, quoting *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997). There is a threshold question regarding whether Juror Nine's affidavit may be considered.

> Juror affidavits "may only be received on extraneous or outside errors, such as undue influence by outside parties." *Any conduct, even if misguided, that is inherent in the deliberative process is not subject to challenge or review*. A jury verdict may be challenged on the basis of juror misconduct only when the verdict is influenced by matters unrelated to the trial proceedings. In this regard . . . "The distinction between an external influence and inherent misconduct is not based on the location of the wrong, e.g., distinguished on the basis whether the 'irregularity' occurred inside or outside the jury room. Rather, the nature of the allegation determines whether the allegation is intrinsic to the jury's deliberative process or whether it is an outside or extraneous influence." [*Id.*, quoting *Budzyn*, 456 Mich at 91 (emphasis added).]

In the case at bar, Juror Nine merely stated that jurors were using their "personal experiences" to form opinions. This case is very different form the circumstance in *Budzyn*, 456 Mich 90-92, where the jurors viwed the film *Malcolm X*, heard rumors regarding one of the accused having participated in the STRESS unit and hear media reports concerning impending civil disturbances. In this case, the juror's affidavit spoke to factors regarding the discussions that occurred during deliberations. While it is true that "[j]urors may not use their own private or secret information concerning a matter at issue. They may, however, view the evidence presented in the light of their general knowledge of the field embraced within the scope of the inquiry." *People v Schmidt*, 196 Mich App 104, 107-108; 492 NW2d 509 (1992). Formulation of opinions is inherent to the jury's deliberative process, and therefore, the trial court was precluded from considering Juror Nine's testimony to impeach the verdict. Notified of the perceived problem after only one day of deliberation, the court reminded the jurors of their oath and re-instructed them on what was and was not proper for them to consider. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Therefore, the trial court did not abuse its discretion in denying either defendant's motion for new trial or evidentiary hearing based on juror misconduct.

Defendant next argues that the court erred in excluding the victim's prior sexual history, which was offered to show that she had the knowledge to explain to the doctor whether sexual penetration had occurred. Defendant argues that the court's ruling that such evidence was inadmissible violated defendant's Sixth Amendment right to confrontation and to present a defense. We disagree.

This Court reviews de novo the constitutional questions whether a defendant was denied the right to present a defense and to confront the witnesses against him. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002), *People v Breeding*, 284 Mich App 471, 479; 772

NW2d 810 (2009). "A criminal defendant has a right to present a defense under our state and federal constitutions." *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006), citing US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 17, 20.

The defense argues that the court's application of MRE 403 and the "Rape Shield Act" resulted in the denial of defendant's Sixth Amendment rights. The rape shield statute, MCL 750.520j(1), addresses the type of evidence defendant sought to admit at trial:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [See also MRE 404(a)(3).]

In contrast, our Supreme Court has instructed that:

> [I]n certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. [*People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984) (internal citations omitted).]

In other instances, however,"[a] complainant's sexual history with others is generally irrelevant with respect to the alleged sexual assault by the defendant. More importantly, a witness' sexual history is usually irrelevant as impeachment evidence because it has no bearing on character for truthfulness." *People v Adair*, 452 Mich 473, 481; 550 NW2d 505 (1996), citing MRE 401, MRE 608. Although the statute contains exceptions, "*the touchstone of the rape-shield statute is relevance*. In providing two narrow exceptions to the exclusionary rule, the Legislature premised both exceptions on the threshold determination that the proposed evidence is 'material to a fact at issue.'" *Id*. at 482 (emphasis added).

In addition to presenting a defense, "[a] defendant has the right to be confronted with the witnesses against him or her." *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008). "The right of confrontation is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. The required elements of the Confrontation Clause are: (1) physical presence, (2) an oath, (3) cross-examination, and (4) observation of demeanor by the trier of fact." *People v Buie*, 285 Mich App 401, 408; 775 NW2d 817 (2009). Thus, like

the right to present a defense, "[t]he right of cross-examination does not include a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interests of the trial process or of society . . . . Defendants are, however, guaranteed a reasonable opportunity to test the truth of a witness' testimony." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993) (emphasis added).

In this case, on cross-examination, the victim acknowledged that, three weeks after making her statement to police, which indicated that there had been "sexual penetration" (as phrased by defense counsel) during abuse by defendant, she met with Dr. Leena Dev and told the doctor that there had been no penetration. The victim explained, however, that the doctor "was asking me a lot of questions and I was unclear about the meaning then of the word ('penetration')." The victim further acknowledged that, at the time of the preliminary examination, she told defense counsel that, she *did* understand the word's meaning.

After the victim's testimony, defense counsel argued that because the prosecutor, on redirect examination, had also tried to clear up whether and at what point the victim knew the meaning of the word "penetration,"[2] defense counsel should be able to question the victim on her sexual history. Defense counsel contended that, as a result of the prosecutor's questioning, the jury was under the impression that the victim "was some naïve young girl that doesn't know what sexual activity is, what sexual penetration is, and I'm afraid that he gave that misrepresentation to the jury . . . ." Defense counsel further asserted that the victim "clearly was sexually active," and knew the meaning of "penetration" because Dr. Dev had questioned her about her sexual history and the victim indicated that she had had three sexual partners. The trial court agreed to the prosecutor's request to make a ruling after hearing testimony from Dr. Dev.

Dr. Dev testified that, while the victim indicated that there had been no penetration, the victim herself did not actually use the term "penetration," but rather, that was the doctor's term. In fact, the doctor testified that she would most likely have asked the victim something to the effect of "did anything go inside?" Further, according to Dr. Dev, "most doctors use the word 'penetration' as something going through the vagina. We don't usually use 'penetrations' to describe anything else . . . ." Finally, Dr. Dev testified that her purpose in talking to the victim was to get basic details of what happened in order to know what type of injuries for which to look during the examination. Thus, she was not conducting a forensic interview in order to determine what charges could be brought and whether defendant's actions met the legal definition of "sexual penetration." The court thus ruled to exclude evidence of the victim's sexual history because "there's no question the evidence being sought . . . is, in fact, in contravention of the rape shield act."

In the case at bar, defendant does not offer the evidence of the victim's sexual history to explain the presence of semen, pregnancy, or disease, or to show her past sexual conduct with defendant, nor does he offer it to show that the victim is biased or has made false accusations in

[2] The prosecutor asked, "So at the time of the preliminary exam, which was a month after you saw the doctor, you knew what penetration [was]? The victim answered, "Correct." He then stated, "but the month before, you didn't, right?" She again answered, "Correct."

the past. Instead, he offers it to show, that while the victim knew the meaning of the term "penetration" when she spoke to the doctor, she told the doctor that penetration did not occur. The fact that the victim had sexual partners indicates that she might have experienced the literal meaning of sexual "penetration," but it is not evidence that she knew the dictionary definition of the word, let alone the legal definition.

Defendant had a full opportunity, without the admission of the evidence on past sexual history, to explore issues relevant to her credibility in general and her credibility concerning the word "penetration." Defense counsel spent much time and effort questioning the victim on whether and at what point in time she was cognizant of the definition of "penetration," and therefore, defendant cannot show that he was denied his right to cross-examine the victim. He extracted testimony about her history of lying to her parents, her chaffing against parental rules, her extensive therapy history and her many inconsistent statements. Exclusion of the victim's sexual history from trial, therefore, did not deny defendant his Sixth Amendment rights to confrontation or to present a defense.

Defendant next argues on appeal that his right to present a defense was violated when this Court determined that defendant's proffered expert testimony on child abuse syndrome was inadmissible because it was not scientifically reliable. We disagree.

In *People v Schneider*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2007 (Docket No. 273421), this Court reversed the trial court's decision to allow defendant's expert to testify, explaining, "The expert testimony proffered in this case is analogous to the testimony found to be inadmissible in [*People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007)]. Because the reasoning and decision in *Dobek* is dispositive, we conclude that the trial court abused its discretion in ruling that the expert testimony was admissible." *Schneider*, slip op, p 1.

"Where a prior ruling of this Court concerns the same question of law in the same case, the doctrine of law of the case applies and the prior ruling is controlling. A legal issue raised in one appeal may not be raised in a subsequent appeal after proceedings held on remand to a lower court." *People v Osantowski*, 274 Mich App 593, 614-615; 736 NW2d 289 (2007), rev'd in part on other grds 481 Mich 103 (2008), quoting *People v Stinson*, 113 Mich App 719, 730; 318 NW2d 513 (1982). It is true that "[t]he law of the case doctrine is a general rule that applies only if the facts remain substantially or materially the same." *People v Robinson (After Second Remand)*, 227 Mich App 28, 31-32; 575 NW2d 784 (1997). In addition, "[p]articularly in criminal cases, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice." *Id*. at 33. Nevertheless, quite clearly, this Court has already decided this issue. Defendant does not cite any change in facts or case law indicating that *Dobek* is no longer controlling. Therefore, the law of the case doctrine precludes this issue on appeal.

Defendant next argues that the trial court erred in basing an upward departure in sentencing on an offense characteristic (Offense Variable 10) already taken into account in determining the appropriate sentence range. Further, he argues that the court did not address the reason for the particular departure. We conclude that trial court did not abuse its discretion in determining that substantial and compelling reasons warranted a departure from the sentencing guidelines, however, the court failed to articulate on the record its reasons for the extent of the departure, and therefore, failed to show that the sentence is proportionate.

As this Court has previously explained, multiple standards of review apply when reviewing the propriety of a trial court's departure.

> 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. However, whether the factor is objective and verifiable is a question of law that this Court reviews de novo. 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. A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes. [*People v Petri*, 279 Mich App 407, 420-421; 760 NW2d 882 (2008), quoting *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007) (internal citations omitted).]

In addition, "[o]n appeal, this Court must engage in a proportionality review. Such a review considers whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record." *People v Smith*, 482 Mich 292, 305; 754 NW2d 284 (2008) (internal citations omitted).

"In Michigan, . . . the law provides that the maximum portion of a defendant's indeterminate sentence must be the maximum penalty provided by law . . . . [T]he sentencing judge ascertains the minimum portion of a defendant's indeterminate sentence by calculating the minimum sentence range under the statutory sentencing guidelines . . . ." *People v Harper*, 479 Mich 599, 612-613; 739 NW2d 523 (2007). "A defendant's recommended minimum sentence range under the guidelines is determined on the basis of the defendant's record of prior convictions (the PRV [prior record variable] score), the facts surrounding his crime (the OV [offense variable] score), and the legislatively designated offense class. A court must generally sentence a defendant to a minimum prison term within the guidelines range unless it states on the record a substantial and compelling reason to depart. A substantial and compelling reason "exists only in exceptional cases, and is an objective and verifiable reason that keenly or irresistibly grabs our attention and is of considerable worth in deciding the length of a sentence." *Id*. at 616. A trial 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 contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." *Id*. at 616-617 (internal citations and punctuation omitted).

Regarding proportionality:

> [i]n determining whether a sufficient basis exists to justify a departure, the principle of proportionality defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed. For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history. [*Smith*, 482 Mich at 299-300.]

"Everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment." *Id.* at 305. "The departure from the guidelines recommendation must contribute to a more proportionate criminal sentence than is available within the guidelines range." *Id.*

In this case, defendant disputes his sentences for first-degree criminal sexual conduct, a Class A felony, MCL 777.62. Defendant had a PRV score of 20, and all points came from PRV 7, concurrent felony convictions, MCL 777.57, resulting in a PRV level of C, MCL 777.62. Defendant's OV score was 75. He received ten points for OV 4, degree of psychological injury to a victim, MCL 777.34; 15 points for OV 10, exploitation of a victim's vulnerability, MCL 777.40; and 50 points for OV 11, criminal sexual penetration, MCL 777.41. All points assessed under these offense variables were the maximum allowed and resulted in an OV level of IV, MCL 777.62. As a result, defendant's minimum guidelines range for the first-degree criminal sexual conduct convictions was 108 to 180 months in prison, MCL 777.62.

Noting the minimum guidelines, the trial court stated at sentencing:

> The court does find substantial and compelling reasons to exceed the guidelines . . . . [T]he court finds the weight given to OV 10 is substantially inadequate and when the court looks at the entire – or the totality of the circumstances that surround this case and given the fact that [the victim] was at all counts the age of seven at which point this abuse began and did not stop until the age of sixteen, the court finds her age to be a substantial and compelling reason to exceed the guidelines, in that these guidelines for this kind of case are wholly inadequate. But it is OV 10, make it certain on this record, that the court is going to exceed the guidelines, because there is clearly not proper weight given her age, the tender years of seven.

On the departure evaluation form, the trial court similarly wrote:

> The court finds there exists substantial and compelling reasons to exceed the guidelines based on the following: OV 10 allows the assessment of 15 points if "the defend[ant] exploited the victim's . . . youth or . . . the offender abused his authority status." MCL 777.40(1)(b). The court finds that the scoring of OV 10 does not accord proper weight to the exploitation of the victim's vulnerabilities – age of minor child during tender years of 7 to 16 years of age.

The trial court thus sentenced defendant to 25 to 40 years in prison for the three first-degree criminal sexual conduct convictions.

The facts in the case at bar are similar to *Smith*. In *Smith*, the defendant, who was a father figure to a nine-year-old victim with a dysfunctional home life, had sexually abused her for a 15-month period. Among the reasons the trial court found to depart from the sentencing guidelines, was the length of time the abuse had occurred, and the Supreme Court upheld this as a substantial and compelling reason that was objective and verifiable. *Smith*, 482 Mich at 298, 301. In the case at bar, the abuse happened over a much longer period of time, and the victim was even younger when it started. Though the trial court seemed to emphasize the victim's young age, noting that it started at age seven, the court considered her youth in conjunction with

the extended period of time and repeated abuse. Thus, as in *Smith*, the trial court here satisfied the initial burden of articulation of substantial and compelling reasons to depart from the guidelines. *Id*. at 303.

As noted above, however, and as conceded by the prosecutor, "the statutory guidelines require more than an articulation of reasons for a departure; they require justification for the particular departure made." *Smith*, 482 Mich at 303. "When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *Id* at 304. The Supreme Court suggested that the extent of departure in *Smith*, which was somewhat lengthier than in the case at bar, was potentially disproportionate.

The defendant in *Smith* was a PRV level C (20 points) and an OV level IV (60 points) on the Class A felony grid (as opposed to 20 PRV points and 75 OV points in the case at bar). *Smith*, 482 Mich at 307. As the Supreme Court observed:

> The trial judge sentenced defendant as if his OV and PRV scores corresponded to the E-VI, F-V, or F-VI cell of the grid. These cells provide the highest possible minimum sentences for class A felonies. For defendant's sentence to fall within the guidelines recommendation for the E-VI, F-V, or F-VI cell, the judge would have had to assess 20 to 40 additional OV points and 30 to 45 additional PRV points. On this record, it is hard to understand what factors would justify the extent of the departure made. [*Id*.]

The *Smith* Court further explained:

> It is compelling to compare defendant's departure sentence, 30 to 50 years (360 to 720 months), with the recommended minimum sentences on the applicable sentencing grid. Given defendant's PRV level of C, his recommended minimum sentence could not have been 360 months. *The highest recommended minimum sentence on the grid for that PRV level is 225 months.* Accordingly, simply comparing defendant's actual minimum sentences to the recommended minimum sentences for offenders with similar criminal histories suggests that defendant's sentences might be disproportionate. [*Id*. at 308 (emphasis added).]

In addition, and again, similarly to the case at bar, "the departure reasons pertained to defendant's OV score, not his PRV score." *Id*. Therefore:

> . . . . [T]he trial judge must explain why the reasons for the departure that he articulated warranted a drastic departure from the highest minimum available for a defendant with a similar PRV score. The burden will be heavy, because the sentence imposed is literally off the charts for a defendant with a criminal background similar to that of this defendant.
>
> A comparison of defendant's sentences to the sentences recommended for other offenders who committed the same type of crime suggests that defendant's sentences might be disproportionate. Although the atrocity of any criminal sexual conduct offense is not to be minimized, proportionality is still judged by weighing

> both the nature of the offense and the offender's criminal history. *Given the fact that defendant had no criminal history, the 30-year minimum sentence imposed for each conviction might be a disproportionate departure*. [*Id*. at 308-309 (emphasis added).]

Thus, the *Smith* Court vacated the defendant's sentence and remanded so that the trial court could "articulate why this level of departure is warranted or resentence [the] defendant." *Id.* at 311. In the case at bar, defendant's departure sentence is 300 to 480 months (25 to 40 years), and, as in *Smith*, the highest recommended minimum sentence on the grid for that PRV level is 225 months. Thus, in the case at bar, the trial court must explain why the level of departure from the sentencing guidelines was warranted.

Defendant next argues that the case should be remanded to amend the presentence investigation report. We agree.

"This Court reviews a trial court's response to a defendant's challenge to the accuracy of a PSIR for an abuse of discretion. A trial court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes." *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008). If the trial court "finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections." MCL 771.14(6).

At sentencing, defense counsel challenged the portion of the presentence report that stated, "it should be noted that Mr. Schneider made several attempts to intimidate this writer. During the presentence investigation interview he continued to ask this writer if she was scared to be locked in a cell with him and he mentioned how trusting this writer must have been to be locked in with him." The court agreed that the following portion of the above statement could be taken out: "It should be noted that Mr. Schneider made several attempts to intimidate this writer." Therefore, because the agreed upon change has not been made, we remand the case so that the sentence in question can be deleted.

In his Standard 4 brief on appeal, defendant argues that testimony solicited by the prosecutor, in addition to remarks made by the prosecutor during rebuttal argument, constituted prosecutorial misconduct. We disagree.

Generally, claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair trial. *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005). Where there is no "contemporaneous objection or request for a curative instruction in regard to any alleged error, . . . review is limited to ascertaining whether plain error affected defendant's substantial rights." *Brown*, 279 Mich App at 134. Success under the plain error rule requires the defendant to show prejudice, "meaning that the error must have affected the outcome of the lower court proceedings." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

At trial, Officer Chad Baugh testified that he interviewed the victim on the day she came to the Canton Police Department and made the allegations against defendant. He then met with

his partner, the patrol division lieutenant, and the deputy chief, after which he submitted a warrant to Wayne County. The testimony continued as follows:

> *Q*. "Before you submitted the warrant did you take any action regarding [defendant]?"
>
> *A*. "Yes, I went to his home and I tried to interview him."
>
> *Q*. Okay. Did you place him into custody?
>
> *A*. Yes.

Defendant argues that this exchange with Officer Baugh was not inadvertent, and further, the comments suggested to the jury that defendant refused to be interviewed and was arrested because he remained silent, or the officer decided that defendant was guilty based on his silence. We disagree.

"A defendant's right to due process guaranteed by the Fourteenth Amendment is violated where the prosecutor uses his postarrest, post-*Miranda*[3] warning silence for impeachment or as substantive evidence unless it is used to contradict the defendant's trial testimony that he made a statement, that he cooperated with police, or that trial was his first opportunity to explain his version of events." *People v Solmonson*, 261 Mich App 657, 664; 683 NW2d 761 (2004) (footnote added), citing *Doyle v Ohio*, 426 US 610, 619 n 11; 96 S Ct 2240; 49 L Ed 2d 91 (1976).

In this case, the prosecutor himself did not comment on defendant's silence, but he, arguably, elicited such testimony from Officer Baugh. It does not appear that the prosecutor acted deliberately, although perhaps it can be concluded that the question was ill-conceived because, as the prosecutor explained in his response to defense counsel's motion for mistrial, the prosecutor merely sought to establish that defendant had been arrested. See *People v Dennis*, 464 Mich 567, 571-75; 628 NW2d 502 (2001) (No prosecutorial misconduct found where police officer's testimony "about [the] defendant refusing to be questioned before speaking with an attorney" was in response to the prosecutor's "inartfully phrased" question, which was "aimed at eliciting testimony about . . . investigative efforts, not about the defendant's refusal of a police interview.") Regardless, Officer Baugh's testimony made no mention of the fact that defendant asserted his Fifth Amendment rights or asked for an attorney. In addition, the prosecutor did not ask Officer Baugh to elaborate on what he meant by "attempt," and moved on to establish that defendant was arrested and the officer interviewed other people with knowledge of the case.

Furthermore, the purpose behind the rule against commenting on a defendant's silence is to protect a defendant who elects to testify, which was not implicated in the case at bar:

> Because defendant did not testify, the testimony at issue . . . could not possibly have been used against defendant for impeachment purposes. Thus, this is not a

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> case . . . in which the prosecution essentially attempted to use a defendant's post-*Miranda* silence to further an argument that the defendant presented a fabricated version of events on the basis of hearing the evidence presented by the prosecution at trial. This reinforces that the prosecution did not use defendant's post-*Miranda* silence against him in this case. [*Dennis*, 464 Mich at 578-579.]

In short, "[i]t is the use of an accused's silence against him at trial by way of *specific inquiry or impeachment* that forms the basis for a violation of the Fourteenth Amendment." *Id.* at 579 (emphasis added). Thus, in the case at bar, there existed "no specific inquiry by the prosecution regarding defendant's silence or any attempt to use that silence for impeachment purposes. Accordingly, . . . there was no violation of defendant's constitutional right to due process . . . ." *Id*. at 580.

Defendant also contends that comments made by the prosecutor in rebuttal argument referred to defendant's silence during trial, and therefore, denied defendant a fair trial. We conclude that even if the comments were in error, the error was unpreserved and defendant cannot show prejudice.

"A prosecutor may not comment upon a defendant's failure to testify." *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993), citing MCL 600.2159. During rebuttal argument, the prosecutor stated:

> Now, [defense counsel] doesn't have for [sic] put on a defense. *[Defendant] doesn't have to do anything. They can just sit there*. The burden always lies with the people. We always have to prove the defendant's guilt beyond a reasonable doubt. *They don't have to say anything and if [defense counsel] didn't ask a single question, then that's fin*e. He didn't have to. And if the [sic] didn't say anything in his closing then I couldn't comment on it, but if he comments in argument in his closing, I can comment on it and one of the things he'd have you believe is there's lots of reasons [the victim] would make this up . . . . [Emphasis added.]

The prosecutor did seem to comment indirectly on defendant's failure to testify. Nevertheless, viewing the remark in context, it is clear that the prosecutor's main focus is to acknowledge that he has the burden of proof and address defense counsel's strategy of attacking the victim's credibility. Defense counsel's cross-examination of the victim and his focus in closing argument on her inconsistencies were not diminished by the prosecutor's statement in rebuttal. In fact, the trial judge used language similar to that of the prosecutor when she instructed the jury on the presumption of innocence: "You may recall, ladies and gentlemen, at the beginning of this trial when we did the voir dire I indicated to you that if [defendant] wanted to sit in that chair and say nothing and do nothing, that is his constitutional right and you cannot hold it against him. He has the right to remain silent at all phases and you cannot hold it against him when you are considering a verdict in this case." Furthermore, such curative instructions "are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Unger*, 278 Mich App at 235. Therefore, defendant cannot show that he was prejudiced by the prosecutor's comments.

Affirmed in part, vacated in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly