STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 4, 2010
v	No. 287731 Cass Circuit Court
JOHN CLYDE TIGHE, Defendant-Appellant.	LC No. 08-010131-FH

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, defendant John Clyde Tighe was convicted of three counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(a) (person under 13),[1] and three counts of second-degree criminal sexual conduct (CSC-2), MCL 750.520c(1)(a) (person under 13). He was sentenced to 20 to 40 years' imprisonment for each of his CSC-1 convictions and to 7 to 15 years' imprisonment for each of his CSC-2 convictions. Defendant appeals as of right. We affirm.

I. FACTS

The charges in the instant case stem from defendant's sexual assaults of his minor step-granddaughter from 2001 to 2004 or 2005. At trial, defendant's biological daughter and two nieces by a previous marriage testified that defendant sexually assaulted them in the 1970's and 1980's when they were minors.

Defendant was married to Melanie Smith from January 22, 1972 to May 3, 1993. Smith's minor nieces resided with their parents in a residence across the street during this time. Both nieces testified at defendant's trial. One niece testified that defendant sexually assaulted her on a number of occasions from the time she was approximately eight years old until she was

[1] The prosecution also charged defendant under MCL 750.520b(2)(b), which provides for a 25-year minimum sentence for CSC-1 convictions when the offender is 17 years of age or older and the victim is less than 13 years of age. The trial court determined that that provision did not apply, because the instant offenses occurred before the provision's effective date of August 28, 2006.

14 years old. When the niece was younger, defendant would primarily assault her by touching her vagina, but when she was older, defendant would engage in sexual intercourse with her. Although the niece claimed that she told her mother about the sexual assaults in 1981, it appears that no police investigation of her allegations occurred.

The other niece testified that in 1982, while spending the night as a guest of defendant's young daughter, defendant approached her as she slept, pulled down her underwear, and touched her vagina. The niece told defendant to leave her alone, returned to her home, and told her parents. According to a police officer investigating the allegation, defendant admitted that he touched the girl, but he was just "fooling around with her." He also admitted to "peeping" into the nieces' bedroom windows.

Defendant's daughter testified that in 1980 or 1981, when she was six or seven years old, defendant would go into the bathroom while she showered. Defendant would then hold her down and pretend to tickle her, but he would touch the sides of her breasts and her inner thighs. When the daughter was 11 or 12 years old, defendant digitally penetrated her on three separate occasions. The daughter later told Smith, who confronted defendant. When Smith confronted defendant, he told her that "he was glad that it was finally out; that he could get help; and that he was trying to show her the difference in good touching and bad touching." Defendant admitted to Smith that he touched their daughter's vagina one time. Smith arranged for counseling. Defendant and Smith then separated, but they reconciled before divorcing six years later. The record indicates that defendant was convicted in 1995 for charges related to his daughter's allegations.

In 2001, defendant married Vicky Tighe, who had lived with him in his Dowagic home since 1999. Occasionally, Vicky's granddaughter, who is the victim in this case, stayed overnight on Saturday's at defendant's home, and she would accompany Vicky to church the following morning. When the victim was eight years old, defendant began touching her vagina. The victim recalled the first time defendant touched her. She was sleeping, and he came into the bedroom, pulled down her pants, and started touching her vagina. She testified that defendant touched her vagina on more than five occasions: "He would come in, sit at the bottom of the bed, and pull down my pants and he would just like touch me." Later, defendant began digitally penetrating the victim's vagina. According to the victim, defendant digitally penetrated her vagina three or four times. She testified, "He would do the same thing, he would just sit there, and then he'd pull my pants down, and then he would just put his finger inside of me." During the sexual assaults, defendant usually was silent. However, the victim heard his voice during one or two of the instances.

The last instance occurred when the victim was 11 or 12 years old. The victim indicated that she stopped going to defendant's residence in 2005 or 2006. At trial, the victim estimated that defendant sexually assaulted her 50 to 100 times. However, there were only three or four sexual penetrations, while the rest were sexual contacts.

When she was 12 or 13 years old, the victim disclosed the sexual assaults to her older brother. The victim's brother then told their mother about the sexual assaults, and she informed the Michigan State Police.

II. ALLEGED PROCEDURAL ERRORS

On appeal, defendant first challenges the lack of specificity in the information. Defendant also claims that he was entitled to a bill of particulars, entitled to severance of the six charges against him, and deprived of due process. Defendant did not object to or move to amend the information before trial, made no request for a bill of particulars, failed to move to sever the charges, and raised no due process challenges below. Thus, these issues are not preserved. MCL 767.76; *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Unpreserved allegations of error are subject to plain-error analysis. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Generally, a criminal indictment or information must contain the following:

> (a) The nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged.
>
> (b) The time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense.
>
> (c) That the offense was committed in the county or within the jurisdiction of the court. [MCL 767.45(1).]

Defendant was charged with three counts of CSC-1 involving digital/vaginal penetration with a person less than 13 years of age, and three counts of CSC-2 involving sexual contact with a person less than 13 years of age. The offenses were alleged to have occurred between 2001 and 2006. At the preliminary examination, the victim testified that the sexual assaults began when she was eight or nine years old, and that there were more than ten instances of sexual contact and two or three instances of sexual penetration. She testified that the sexual assaults happened over the course of three or four summers, and the last one occurred when she was 11 or 12 years old (in 2004 or 2005). The preliminary examination narrowed the date of offenses by one year. The prosecution was under no obligation to pinpoint specific dates for the offenses, because "[t]ime is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim." *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). On appeal, defendant nevertheless claims that the lack of specificity essentially prevented him from asserting an alibi defense. However, "an alibi defense does not make time of the essence." *Id.* Moreover, we are disinclined to hold that an information was deficient for failing to pinpoint a specific date "[w]here the facts demonstrate that the prosecutor has stated the date and time of the offense to the best of his or her knowledge after undertaking a reasonably thorough investigation . . . ." *People v Naugle*, 152 Mich App 227, 234; 393 NW2d 592 (1986). Further, due process was not offended because defendant had reasonable notice of the charges against him and an opportunity to present a defense. See *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). We conclude that reversal is not warranted because defendant was not prejudiced in his defense, and a failure of justice did not result in this case. MCL 767.76.

Defendant further claims that he was entitled to a bill of particulars. Under MCR 6.112(E), the trial court may, on motion, order the prosecutor to provide a bill of particulars. However, defendant's need for a bill of particulars was unnecessary because the preliminary examination adequately informed him of the charges against him. *People v Harbour*, 76 Mich App 552, 557; 257 NW2d 165 (1977).

We also conclude that defendant was not entitled to severance of the charges below pursuant to MCR 6.120(C) ("On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1)."). The charges all stem from the same conduct, i.e., defendant's sexual assaults of his step-granddaughter, and such conduct demonstrated a single scheme or plan. MCR 6.120(B)(1)(a) and (c). Defendant failed to establish plain error affecting his substantial rights.[2] *Carines*, 460 Mich at 763-764.

III. EVIDENTIARY ERROR

A. OTHER-ACTS EVIDENCE

Defendant claims that the trial court erroneously admitted improper other-acts evidence concerning alleged sexual assaults that defendant committed against his nieces and daughter. Such evidence was admissible pursuant to MCL 768.27a, which states, in pertinent part, "[I]n 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 allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b)."[3] *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). Accordingly, it is a substantive rule of evidence. *Id.* at 619. In this case, the prosecution introduced evidence of defendant's past sexual assaults of his biological daughter and two nieces related by a previous marriage. The first niece testified regarding various sexual assaults by defendant beginning when she was eight years old (in 1974 or 1975) and continuing until she was 14 years old. Another niece testified that defendant sexually assaulted her in 1982. Defendant's daughter testified that defendant began touching her in inappropriate ways when she was six or seven years old, and that he digitally penetrated her vagina when she was 11 or 12 years old. Defendant's conduct against these witnesses was generally proscribed by MCL 750.520b(1)(a) (sexual penetration of an individual who was less than 13 years of age) and MCL 750.520c(1)(a) (sexual contact with an individual less than 13 years of age), which are listed offenses. MCL 28.722(e)(*x*); MCL 768.27a(2)(a). The trial court did not err in admitting the challenged testimonial evidence, because in cases involving the sexual abuse of minors, MCL 768.27a permits the admission of evidence that the defendant committed other listed offenses against a minor for consideration with regard to any relevant matter, including demonstrating the likelihood that defendant would engage in criminal sexual behavior toward the victim. See *Pattison*, 276 Mich App at 620.

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[2] Because defendant is not entitled to a bill of particulars and because the trial court's decision not to sever the charges was proper, any motion to address these issues would be meritless. Defense counsel is not ineffective for failing to bring a meritless motion. *People v Cline*, 276 Mich App 634, 641-642; 741 NW2d 563 (2007).

[3] MRE 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, such evidence may be admissible for other purposes.

The evidence is obviously relevant, MRE 401, because defendant's past activity of molesting prepubescent girls makes it more probable that he molested the victim in this case. We are also satisfied that the trial court took seriously its responsibility to weigh the probative value of the evidence against its undue prejudicial effect, MRE 403, before admitting the evidence. *Id.* at 621. Evidence of uncharged sexual offenses against the witnesses was an essential component of the case presented by the prosecution. But almost all evidence of previous behavior has some prejudicial effect, *People v Albers*, 258 Mich App 578, 591; 672 NW2d 336 (2003), and there was no danger that marginally probative evidence would be given undue weight by the juror or that the jury was confused or misled. The evidence did not cause undue delay, nor was it a waste of time. In sum, MRE 403 did not require the denial of the admission of evidence.

B. EXPERT TESTIMONY

Next, defendant argues that the trial court admitted improper expert testimony when it permitted Dr. James Henry to testify as an expert in child sexual abuse. The prosecution questioned Dr. Henry regarding his background, defense counsel conducted voir dire regarding his qualifications, and the trial court was satisfied regarding his qualifications. See MRE 104(a); MRE 702. In child sexual abuse cases, "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). However, in CSC cases involving children,

> an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and . . . may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. [*Id.* at 352-353.]

We conclude that the expert's testimony did not violate any of the foregoing principles. On appeal, defendant fails to cite any specific testimony by Dr. Henry that runs afoul of *Peterson*. Notably, the record demonstrates that Dr. Henry's testimony amounted to a general explanation of "the common post-incident behavior of children who are victims of sexual abuse." *Id.* at 373. Dr. Henry did not testify that the victim's behavior was consistent with that of a sexually abused child, and we find no error related to Dr. Henry's testimony. Further, "[t]he prosecution may, in commenting on the evidence adduced at trial, argue the reasonable inferences drawn from the expert's testimony and compare the expert testimony to the facts of the case." *Id.* at 373. Dr. Henry's testimony was proper, the use of the testimony was proper, and the admission of such testimony was not an abuse of discretion. Additionally, we reject defendant's related claim of ineffective assistance of counsel, because defense counsel is not obligated to make a futile objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

C. ADMISSION OF PRIOR CONSISTENT STATEMENTS

Defendant claims that the trial court improperly admitted prior consistent statements, which were also hearsay. However, defendant's cursory treatment of this issue constitutes abandonment on appeal. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). The mere fact that one witness discussed statements that the victim had made to him does not automatically mean that another witness's testimony concerning a conversation with the victim cannot be admitted. Defendant failed to establish that the prosecutor introduced the challenged testimony solely to establish that the victim made consistent statements, and not for any other reason, and he does not otherwise explain how the challenged statements constitute hearsay.

D. ADMISSION OF REBUTTAL EVIDENCE

Defendant alleges that Trooper Gregory O'Toole's rebuttal testimony was improperly admitted to impeach defendant. Generally, rebuttal evidence is admissible to explain, contradict, dispute, or otherwise refute an opponent's evidence. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). At trial, defendant denied the victim's sexual assault allegations. He also denied the sexual assault allegations made by his nieces. During cross-examination, he claimed that he could not recall what he told the police during the 1982 investigation of his second niece's sexual assault allegations. Trooper O'Toole testified as a rebuttal witness regarding defendant's statements during that investigation. "[A] party may introduce rebuttal evidence to contradict the answers elicited from a witness on cross-examination regarding matters germane to the issue if the rebuttal evidence is narrowly focused on refuting the witness' statements." *People v Spanke*, 254 Mich App 642, 644-645; 658 NW2d 504 (2003). The challenged evidence is proper because it was properly focused on refuting defendant's testimony.

IV. MOTIONS FOR RESENTENCING AND A NEW TRIAL

Defendant also claimed that the trial court improperly denied his post-trial motions for resentencing and for a new trial. Because defendant provided only cursory treatment of these claims of error on appeal, they are abandoned. *Watson*, 245 Mich App at 587.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Next on appeal, defendant claims that defense counsel rendered ineffective assistance of counsel by failing to either object to improper expert testimony at trial or to obtain an expert witness to rebut the prosecution's expert witness. In his Standard 4 brief, defendant also alleges that defense counsel's failure to remove a biased juror constitutes ineffective assistance of counsel. We have thoroughly reviewed the record and conclude that defendant ultimately failed to overcome a strong presumption that defense counsel's performance constituted sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

VI. SUFFICIENCY OF THE EVIDENCE

In his Standard 4 brief on appeal, defendant claims that his convictions should be overturned because there was insufficient credible evidence to establish his guilt. We disagree. We review sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

Defendant was convicted of three counts each of CSC-1 and CSC-2 for engaging in sexual penetrations and sexual contacts with the victim, who was under 13 years of age. MCL 750.520b(1)(a); MCL 750.520c(1)(a). MCL 750.520a(r) defines "sexual 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(q) defines "sexual contact" as

> the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose . . . .

Identity is an element of every offense, *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008), and "may be shown by either direct testimony or circumstantial evidence." *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

A victim's uncorroborated testimony is sufficient to sustain a CSC conviction. MCL 750.520h; *People v Lemmon*, 456 Mich 625, 632 n 6; 576 NW2d 129 (1998). The victim's testimony established defendant's identity as the perpetrator, contrary to defendant's strained argument. We defer to the jury's credibility decisions regarding witness identification testimony. *People v Edwards*, 55 Mich App 256, 259-260; 222 NW2d 203 (1974). The victim testified that defendant sexually assaulted her from the time she was eight years old until she was 12 years old. Defendant touched her vagina numerous times during that period. A reasonable inference can be made that this was done for a sexual purpose, especially in light of the testimony of defendant's daughter and two nieces. Further, the victim testified that defendant digitally penetrated her vagina on three or four separate occasions, and her testimony demonstrated that there was an intrusion by a part of defendant's body into her genital opening. We reject defendant's arguments related to the victim's credibility because "[t]he credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact found that the essential elements of three counts each of CSC-1 and CSC-2 were proven beyond a reasonable doubt. MCL 750.520b(1)(a); MCL 750.520c(1)(a); *McGhee*, 268 Mich App at 622.

VII. PROSECUTORIAL MISCONDUCT

In his Standard 4 brief, defendant claims that the prosecutor engaged in numerous unpreserved instances of prosecutorial misconduct by (1) making improper remarks during opening statement and closing argument, (2) eliciting irrelevant and prejudicial testimony, (3) making an improper appeal for jurors' sympathy, and (4) improperly impeaching defendant. After thoroughly reviewing the entire record and the specific claims of misconduct, we find that defendant has failed to establish plain error affecting his substantial rights on each and every claim of prosecutorial misconduct. *Carines*, 460 Mich at 763-764. Therefore, reversal is not necessary with regard to this issue.

VIII. FAILURE TO REMOVE A BIASED JUROR

In his Standard 4 brief, defendant claims that he was denied his right to a fair and impartial jury trial when the trial court refused to remove, sua sponte, a biased juror for cause. Defendant failed to raise an objection during voir dire and, when asked, indicated his satisfaction with the jury, foreclosing his objection on appeal. *People v Wise*, 18 Mich App 21, 23; 170 NW2d 487 (1969). Nevertheless, defendant failed to demonstrate that the challenged juror was biased, *People v Marsh*, 108 Mich App 659, 668; 311 NW2d 130 (1981), and the trial court was not required to excuse the challenged juror for cause. *Wise*, 18 Mich App at 23.

IX. SENTENCING

A. UPWARD DEPARTURE

Defendant asserts that the trial court improperly imposed an upward departure of his minimum sentences for CSC-1. The reasons that a trial court gives for a departure are reviewed for clear error. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure." *Id.*

According to the sentencing information report, defendant's recommended minimum sentence range under the legislative guidelines was 126 to 210 months' imprisonment, given defendant's prior record variable (PRV) level of D and offense variable (OV) level of IV. See MCL 777.62. The trial court imposed a minimum sentence of 20 years' (240 months') imprisonment, departing upward from the maximum-minimum sentence recommended under the legislative guidelines by 30 months. The trial court based the departure on the gravity of the offenses given the Legislature's recent imposition of harsher penalties for CSC-1 convictions, the fact that defendant sexually assaulted a minor female family member, and the inadequacy of PRV 7 to reflect the extent of defendant's crimes.

The trial court first concluded that upward departure was warranted in part because of "how serious the crime is viewed by society in light of the penalty provisions it now carries." The Legislature's amendment to include a 25-year minimum sentence for CSC-1 in certain cases keenly and irresistibly grabs our attention and is of considerable worth in deciding the length of defendant's sentence. *Babcock*, 469 Mich at 258. In *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001), this Court noted that "the need to protect other children by the sentence imposed is another factor not adequately considered by the guidelines." The trial court's reason for upward departure rests on an implicit understanding that society views the instant offenses as particularly serious because they were against a child, and this departure meets the goal of protecting young children from future abuse. *Id.* We conclude that this reason for upward departure was objective and verifiable, *Smith*, 482 Mich at 300, and was not an abuse of discretion, *Babcock*, 469 Mich at 269.

Next, the trial court found the victim's vulnerability to be a basis for the upward departure. Although defendant was scored ten points for OV 4, MCL 777.34 (addressing psychological injury to a victim), and 15 points for OV 10, MCL 777.40 (addressing exploitation of a vulnerable victim), this Court has previously held that such scores can be inadequate to address the particularly abhorrent nature of some criminal sexual conduct cases involving children. See *People v Kahley*, 277 Mich App 182, 190-191; 744 NW2d 194 (2007). Moreover,

"all CSC-1 cases do not wreak the same amount of damage." *Smith*, 482 Mich at 310. In this case, there was testimony that defendant performed sexual acts on several prepubescent females for over 30 years. Notably, according to the victim's testimony, defendant sexually assaulted her from 50 to 100 times between the time she was 8 and 12 years of age. Defendant sexually assaulted the victim when she stayed overnight at his residence in order to visit her grandmother. The OV scores did not adequately reflect the young victim's vulnerability to repeated sexual assault at the hands of defendant, and this reason given by the trial court for the upward departure was objective and verifiable. *Id.* at 300. The number of alleged instances of sexual abuse over that period of years keenly and irresistibly grabs our attention and is of considerable worth in deciding the length of defendant's sentence. *Babcock*, 469 Mich at 258. Thus, this stated reason for the upward departure did not constitute an abuse of discretion. *Id.* at 269.

Finally, the trial court based the upward departure on the inadequacy of PRV 7, MCL 777.57 (subsequent or concurrent felony convictions), to properly reflect the circumstances of this case. "[A] trial court may not depart from the recommended minimum on the basis of a defendant's prior record unless the trial court first finds that the sentencing guidelines gave inadequate or disproportionate weight to the defendant's criminal history." *People v Young*, 276 Mich App 446, 454; 740 NW2d 347 (2007).

We note that the trial court failed to determine the effect of this factor on the recommended minimum sentence range to ascertain whether the factor was given inadequate or disproportionate weight in the guidelines calculations. *Id.* at 451. However, we deem this failure to be harmless. MCR 2.613(A). A trial court may score PRV 7 at 20 points when "[t]he offender has 2 or more subsequent or concurrent convictions." MCL 777.57. In this case, defendant was convicted of three counts of CSC-1 and three counts of CSC-2 for sexually abusing his minor step-granddaughter over a period of several years. "[T]he trial court's determination that the guidelines failed to adequately consider the similar nature of defendant's pattern of felony crimes, and the aggravating circumstances," provide a satisfactory reason for upward departure. *People v Petri*, 279 Mich App 407, 421-422; 760 NW2d 882 (2008). See also *Babcock*, 469 Mich at 258 n 12. The inadequacy of the PRV 7 score and the number of felonies committed in this case keenly and irresistibly grab our attention and are of considerable worth in deciding the length of defendant's sentence. *Id.* at 258. It is undisputed that defendant was convicted of six felonies; therefore, this basis for upward departure was objective and verifiable. *Smith*, 482 Mich at 300.

In sum, we conclude that defendant has not established a sufficient basis for disturbing the trial court's determination that substantial and compelling reasons existed to depart from the guidelines' recommended range for the minimum sentence. Moreover, the degree of departure, 30 months, was not an abuse of discretion. A minimum sentence of 240 months' imprisonment is within the range of reasonable and principled outcomes. *Id.* at 268-269.

Further, we find that the sentence was proportionate. We review the proportionality of the sentence under an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990). "[T]he principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." *Babcock*, 469 Mich at 262. As such, we must determine "whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record." *Id.*

In this case, the trial court provided no explanation for the extent of the departure other than the reasons offered to impose a departure sentence. Defendant's CSC-1 crimes are classified as class A felonies. Defendant had a total PRV score of 45 points, which corresponds to PRV level D, and a total OV score of 75 points, which corresponds to OV level IV; accordingly, defendant's recommended minimum sentence range was 126 to 210 months' imprisonment. MCL 777.62. However, defendant was sentenced to a minimum of 240 months. Our Supreme Court has suggested that courts compare a defendant's actual minimum sentence to the recommended minimum sentences for offenders with similar criminal histories to determine whether the defendant's sentence may be proportionate. *Smith*, 482 Mich at 308. Here, the prosecution charged defendant under MCL 750.520b(2)(b), which provides that CSC-1 is a felony punishable as follows: "For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years." The trial court did not impose defendant's sentences under this provision, concluding that the instant offenses occurred before this provision's effective date of August 28, 2006. Nonetheless, the amended statute now sets a minimum sentence for the offense committed by defendant. Other defendants convicted of the same crime are being sentenced to a greater minimum.

Moreover, we find it significant that when defendant committed the instant offenses, he could have been charged as an habitual offender, second offense, as a result of his 1995 felony assault conviction. A second-time offender with similar PRV and OV levels would have had a recommended minimum sentence of no more than 262 months. MCL 777.21(3)(a); MCL 777.62. Defendant's 240-month minimum sentence is below that maximum-minimum sentence. In comparing defendant's sentences to the sentences recommended for other offenders who committed the same type of crime, we conclude that defendant's sentences are proportionate. See *Smith*, 482 Mich at 309. Defendant's CSC-1 sentences were not disproportionate, given that they involved multiple sexual assaults of a minor female spanning several years, defendant pleaded guilty to assault arising from similar instances of sexual abuse against his minor daughter, and defendant had committed similar acts against other minor females. In ascertaining whether a departure was proper, we defer to the trial court, acknowledging its "extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender." *Babcock*, 469 Mich at 270. In this case, there was no abuse of discretion regarding the extent of the departure. *Milbourn*, 435 Mich at 634-635.

B. SCORING OF OFFENSE VARIABLES

In his Standard 4 brief, defendant complains that the trial court incorrectly scored three offense variables. Because there were no scoring errors, resentencing is not warranted. We review issues concerning the proper scoring of sentencing guidelines variables for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

1. OV 4

First, defendant challenges the sentencing court's score of ten points for OV 4, which reflects that a "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). At trial, the victim testified that she was scared during the sexual assaults and that she did not tell anyone because she was afraid of defendant. She stopped visiting her grandmother because she was uncomfortable in defendant's presence. The victim

impact statement, prepared by the victim's mother, indicated that the victim is now experiencing panic attacks, participates in counseling, and takes medication. The victim has also experienced problems in school as a result of the instant offenses. "A presentence report is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant." *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Because record evidence supports the trial court's decision to score ten points for OV 4, we will uphold the trial court's scoring decision with regard to this offense variable. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

2. OV 10

Second, defendant challenges the trial court's score of 15 points for OV 10, which reflects that defendant's offenses involved predatory conduct. MCL 777.40(1). MCL 777.40(3)(a) defines predatory conduct as "preoffense conduct directed at a victim for the primary purpose of victimization." Here, defendant was married to the victim's grandmother, and the victim spent the night at their residence on many occasions, sleeping in her aunt's old bedroom. She testified that defendant sexually assaulted her from the time she was eight years old until she was either 11 or 12 years old. The sexual assaults occurred at night, when defendant awakened the victim by removing her pants and touching her vagina. The victim noted at trial that defendant did not sexually assault her when her sister stayed at defendant's residence. We conclude that the timing of the assault (at night, presumably when the victim's grandmother was sleeping) and its location (in the isolation and seclusion of another bedroom) are evidence of preoffense predatory conduct. See *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003). Because there is record support for the trial court's scoring decision, we will uphold the scoring decision with regard to this offense variable. *Kegler*, 268 Mich App at 190.

3. OV 13

Third, defendant challenges the trial court's score of 50 points for OV 13, reflecting that defendant's offenses were "part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age." MCL 777.43(1)(a). In this case, defendant was convicted of three offenses against the victim under MCL 750.520b(1)(a), where defendant sexually penetrated her three or four times In light of the victim's testimony that defendant sexually penetrated her when she was less than 13 years of age, there was sufficient evidence for the trial court to assess 50 points for OV 13. *Id.*

C. *BLAKELY* VIOLATION

We reject defendant's argument that his sentences violate the principles expressed by the United States Supreme Court in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). "'[T]he Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by a jury in violation of the Sixth Amendment.'" *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), quoting *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Defendant received a sentence within the statutory maximum, and the trial court's scoring of the prior record and offense variables was appropriate. Accordingly, no *Blakely* violation occurred.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O'Connell