

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELMAR LEE TOTH,

Defendant-Appellant.

UNPUBLISHED

June 19, 2012

No. 304226

Lenawee Circuit Court

LC No. 10-014725 - FC

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), second-degree criminal sexual conduct, MCL 750.520c(1)(a), and attempted first-degree criminal sexual conduct, MCL 750.520b(1)(a). Defendant was sentenced to life imprisonment for each of the four convictions of first-degree criminal sexual conduct, 10 to 15 years' imprisonment for the second-degree criminal sexual conduct conviction, and 40 to 60 months' imprisonment for the attempted first-degree criminal sexual conduct conviction. For the reasons stated in this opinion, we affirm in part and remand for resentencing.

Defendant's convictions are the result of criminal sexual conduct between defendant and the victim, who is his step-granddaughter. The victim testified to seven specific instances of sexual conduct with defendant. The sexual conduct first occurred when the victim was six years old. Defendant was alone with the victim in his basement when he brought the victim into an office and then into a closet where he removed her pants and performed oral sex on her by moving his tongue around her vagina. The second sexual encounter occurred when the victim was six years old and was driving a tractor with defendant outside of defendant's home. When they reached a swampy area behind defendant's house, defendant removed the victim's overalls and underwear and performed oral sex on the victim while she was on the ground. Defendant also touched the victim's breasts. The third instance of sexual conduct occurred in defendant's bedroom when the victim was six or seven years old. Defendant removed the victim's pants and performed oral sex on her, placing his tongue inside of her vagina. Defendant asked the victim to place her mouth on his penis, but the victim only spit on defendant's penis. Two more sexual encounters occurred in defendant's bedroom when the victim was approximately six or seven years old. Both times, defendant performed oral sex on the victim, placing his tongue around her vagina.

The sixth sexual encounter occurred in defendant's car when the victim was approximately six or seven years old. Defendant and the victim were talking when defendant pulled down the victim's pants and underwear and performed oral sex on her, placing his tongue near her vagina. Defendant also touched the victim's breasts. The seventh sexual encounter occurred in a bedroom of defendant's house that the victim used when she was staying overnight. Defendant carried the victim to her bedroom, dropped her on the bed, pulled down her pants and underwear and performed oral sex on her. Defendant told the victim he wanted to teach her how to kiss and placed his lips against the victim's lips.

Defendant told the victim that she was his favorite grandchild and that one day they would run away together to be married. Defendant also told the victim that if she said anything to her grandmother about the sexual encounters, her grandmother would be angry because the victim would be taking away her grandmother's boyfriend. The victim testified that defendant's statement scared her because she was scared her grandmother would be angry. The victim also testified that there were other instances of sexual conduct that occurred between her and defendant, but she did not remember those instances in detail.

The victim did not talk about the sexual assault because defendant told her not to talk about it. The victim also did not report it because it was embarrassing and she did not want to talk about it. The victim wrote a story for an English class when she was in ninth grade titled "Kept Secret." The story detailed the sexual conduct between her and defendant. The victim's step-father found the story and confronted the victim, who admitted that the story was true.

During defendant's trial, defendant's daughter testified that when she was about eight or nine years old she was sleeping in bed with defendant when he placed his hand under her underwear and touched her vagina. Defendant took his daughter's hand, placed it on his erect penis, and referred to himself as her boyfriend. After approximately 10 minutes, the sexual conduct ended when defendant's daughter told defendant that he was not her boyfriend. Defendant's daughter also testified that defendant would shower with her three year old sister. After the sexual encounter between her and defendant, defendant's daughter prevented defendant from showering or sleeping in the same bed with her sister. Defendant's daughter testified that she did not tell anyone about the sexual conduct between herself and defendant because there was no one to tell since her mother had left the family. Defendant's daughter admitted that she did not have a good relationship with defendant.

Defendant elected to testify, and denied that any of the victim's allegations were true. Defendant was not asked about his daughter's allegations.

The trial court found defendant guilty of first-degree criminal sexual conduct for defendant's conduct with the victim in the basement, first-degree criminal sexual conduct for defendant's conduct with the victim in the car, first-degree criminal sexual conduct for defendant's conduct with the victim outside the house, first-degree criminal sexual conduct for

defendant's conduct with the victim in defendant's bedroom,¹ second-degree criminal sexual conduct for touching the victim's breast,² and attempted first-degree criminal sexual conduct for attempting to penetrate the victim's mouth with his penis. When sentencing defendant, the trial court departed from the sentencing guidelines. Defendant now appeals his convictions and sentences as of right.

I. ADMISSION OF OTHER ACTS TESTIMONY

Defendant argues that his daughter's testimony, admitted pursuant to MCL 768.27a,³ was improperly admitted at trial.⁴

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object" and "specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Defendant never objected to the admission of the MCL 768.27a evidence and, thus, this issue is not preserved for appellate

¹ The victim testified that defendant performed oral sex on her on three separate occasions in defendant's bedroom. The trial court did not specify which sexual encounter led to the conviction.

² The victim testified that defendant touched her breast outside and in defendant's car. The trial court did not specify which occasion led to the second-degree criminal sexual conduct conviction.

³ MCL 768.27a provides:

(1) Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a victim, evidence that the defendant committed another listed offense against a victim is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

(2) As used in this section:

(a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.

(b) "Victim" means an individual less than 18 years of age.

⁴ We note that defendant also argues that we should hold his appeal in abeyance pending the Michigan Supreme Court's decision in *People v Watkins*, 489 Mich 863; 795 NW2d 147 (2011); however, we decline to do so.

review. An unpreserved claim is reviewed only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763. We will reverse only if "the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

Defendant argues that the evidence was improperly admitted because MCL 768.27a requires that a defendant be convicted of a crime based on the evidence in order for testimony of that incident to be admitted at trial. "Where the language of the statute is unambiguous, the plain meaning reflects the Legislature's intent and this Court applies the statute as written. Judicial construction under such circumstances is not permitted." *People v Schultz*, 246 Mich App 695, 702-703; 635 NW2d 491 (2001). There is no statutory language included in MCL 768.27a that requires a conviction. Moreover, this Court has specifically stated that MCL 768.27a evidence is admissible "even if there was no conviction for the other crime." *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008). Accordingly, we reject defendant's claim that admission of his daughter's testimony was improper because he was never convicted of the described sexual conduct.

Defendant also argues that the MCL 768.27a evidence regarding the sexual conduct between defendant and his daughter, who was eight or nine years old at the time, was prejudicial and should have been excluded. While all relevant evidence is inherently prejudicial, it is only unfairly prejudicial evidence that should be excluded under MRE 403. *People v Wilson*, 252 Mich App 390, 398; 652 NW2d 488 (2002). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010), citing *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

The evidence of the sexual conduct between defendant and his daughter had significant probative value in this case. The evidence illuminated defendant's propensity to commit criminal sexual conduct with young female children under his control. In *Petri*, 279 Mich App at 411, this Court held that evidence of "a defendant's propensity to commit criminal sexual behavior can be relevant and admissible" since it "demonstrate[s] the likelihood of the defendant committing criminal sexual behavior toward another victim." See also *People v Mann*, 288 Mich App 114, 118; 792 NW2d 53 (2010) (evidence of the defendant's prior criminal sexual conduct was admissible under MCL 768.27a because it "made the likelihood of [the defendant's] behavior toward the victims at issue in this case more probable."). While prior case law has, at times, mandated the exclusion of propensity evidence, "our cases have never suggested that a defendant's criminal history and propensity for committing a particular type of crime is irrelevant to a similar charge." *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007). Also, defendant's prior criminal sexual conduct was probative of whether the victim in this case was providing truthful testimony. As this Court stated in *Mann*, 288 Mich App at 118, evidence of a defendant's prior criminal sexual conduct "was relevant because it tended to show that it was more probable than not that the two victims in this case were telling the truth when they indicated that [the defendant] had committed CSC offenses against them."

As for the prejudicial effect of this evidence, while evidence of defendant's sexual conduct with his daughter may have been repugnant, the "danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself." *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). Since defendant's daughter only testified about one instance of sexual conduct between herself and defendant that lasted for approximately 10 minutes, this evidence was not overwhelming or accompanied by significant explicit detail. Also, any risk of unfair prejudice was minimized because this was a bench trial, where a judge is presumed to have a greater understanding of the law and rule based on the law rather than emotion. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001). Thus, defendant has failed to demonstrate that the significant "probative value" of this evidence was "substantially outweighed" by any potential prejudicial effect. *Starr*, 457 Mich at 499 (emphasis in original).

II. JUDICIAL BIAS

Defendant argues that the trial court judge's bias denied him a fair trial.

In order to preserve the issue of judicial bias, a defendant must "raise [a] claim of judicial bias in the trial court." *People v Jackson*, 292 Mich App 583; 808 NW2d 541 (2011). Defendant offered no objection in the trial court on the basis of judicial bias. Thus, this issue is not preserved for appellate review. An unpreserved claim is reviewed only for plain error affecting substantial rights. *Carines*, 460 Mich at 764-765.

Before the trial began, defendant requested that his bond conditions be modified to allow him contact with his grandchildren, other than the victim in this case. After filing this motion to modify bond, the prosecution filed its notice to introduce the MCL 768.27a evidence regarding defendant's sexual conduct with his daughter. The trial court judge denied defendant's request to modify the bond conditions, and instead increased defendant's bond from \$5,000 for each count to \$50,000 for each count, in part relying on the notice regarding admission of MCL 768.27a evidence and on the request that defendant be allowed to have contact with children. On appeal, defendant argues that the trial court judge's actions regarding his motion to modify bond demonstrate that the trial court was biased against him.

This Court has recognized that "[c]omments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Moreover "[w]here a judge forms opinions during the course of the trial process on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Id.*

While the trial court judge significantly increased defendant's bond, there is no indication that the judge's decision was motivated by anything other than the facts of the case, particularly the new evidence regarding defendant's sexual conduct with his daughter. Moreover, nothing on the record indicates that the judge formed a deep-seated antagonism. The judge's statements implied only that the seriousness of the charges and the fact that defendant potentially molested other children in his family justified a more severe bond condition, and that under the circumstances his request to have contact with his other grandchildren was repugnant.

Therefore, we conclude that defendant has failed to demonstrate plain error affecting his substantial rights in regard to the trial court judge's alleged bias.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to object to his daughter's testimony about the alleged sexual conduct and for failing to move to disqualify the trial court judge on the basis of the judge's bias against him.

In order to preserve the issue of ineffective assistance of counsel, a defendant must file a motion in the trial court for a new trial or for a hearing pursuant to *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973). *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Defendant did not file a motion for a new trial or a *Ginther* hearing. Thus, this issue is not preserved for appellate review.

When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In order to establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant then must demonstrate that "the deficient performance prejudiced the defense," which "requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* at 687. The Court has held that this second prong can be understood as asking whether "there was a reasonable probability that the outcome of the trial would have been different had defense counsel" adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

Defendant argues that defense counsel's failure to object to the MCL 768.27a evidence constituted ineffective assistance of counsel.

Because the evidence of defendant's conduct with his daughter was properly admitted pursuant to MCL 768.27a, as discussed *supra*, any objection by defense counsel would have been futile. This Court has repeatedly held that defense counsel is not obligated to raise futile objections and will not be deemed ineffective for failing to do so. See, e.g., *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003); *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Accordingly, we conclude that defendant has failed to meet the burden of establishing defense counsel was ineffective.

Defendant also argues that defense counsel was ineffective for failing to move for dismissal of the trial court judge on the grounds of bias. As discussed *supra*, there is no evidence that the trial court judge was biased. Hence, any objection would have been futile, and trial counsel is not obligated to raise futile objections and will not be deemed ineffective for failing to do so. *Id.* Therefore, defendant has not demonstrated that he was provided ineffective assistance of counsel.

IV. BASIS OF VERDICT

Defendant argues that he is entitled to a new trial because the trial court improperly based its verdict, in part, on defendant's right to remain silent.

A trial court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. *People v Lanzo Const Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). A finding of fact is clearly erroneous when this Court is left with "a definite and firm conviction that a mistake was made." *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008).

MCR 2.517(A)(1) states that "[i]n actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specifically, state separately its conclusions of law, and direct entry of the appropriate judgment." As for a defendant's right to remain silent, a defendant's "post-arrest, post-*Miranda* silence may not be used substantively" because "there is no way to know after the fact whether [the silence] was due to the exercise of constitutional rights or to guilty knowledge." *People v Shafier*, 483 Mich 205, 214; 768 NW2d 305 (2009).

Before making its findings of fact and conclusions of law, the trial court summarized the trial testimony, stating that defendant "gave no testimony as to whether or not his daughter's testimony was truthful." The trial court was merely summarizing the events of trial, not making a finding of fact or conclusion of law. A finding of fact involves a determination by a judge regarding disputed facts. *Black's Law Dictionary* (9th ed). When stating that defendant did not indicate whether his daughter was providing truthful testimony, the trial court was merely stating an undisputed fact, not making a determination based on conflicting facts. Moreover, a conclusion of law is a legal inference drawn from factual showings. *Black's Law Dictionary* (9th ed). Nothing in the trial court's statement amounts to a legal conclusion, as the trial court made no reference to any type of legal meaning of defendant's failure to indicate whether his daughter was providing truthful testimony.

After summarizing the trial testimony, the trial court then made its findings of fact, stating that in its observations of the witnesses who testified, the victim in this case and defendant's daughter, were providing truthful testimony. Hence, the trial court specifically based its findings of fact on its observations of the victim's and the daughter's testimony, with no mention of defendant's silence. The trial court then stated its conclusions of law, namely, that defendant was guilty beyond a reasonable doubt of first-degree criminal sexual conduct, second-degree criminal sexual conduct, and attempted first-degree criminal sexual conduct. Again, the trial court made no reference to defendant's silence. Thus, there is no evidence that the trial court based its verdict on defendant's right to remain silent.

V. SENTENCING ISSUES

Defendant argues that the trial court improperly scored Offense Variable (OV) 7, OV 10, and OV 12. Defendant also argues that the trial court's departure from the guidelines was unjustified. Accordingly, defendant maintains that he is entitled to resentencing.

A. SCORING ISSUES

We review preserved scoring issues "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score."

People v Waclawski, 286 Mich App 634, 680; 780 NW2d 321 (2009) (quotation and citation omitted). Defendant preserved his challenges to the scoring of OV 7, 10, and 12 by objecting during sentencing. The application of the statutory sentencing guidelines is reviewed de novo. *Id.* Generally, scoring decisions for which there is any evidence in support will be upheld. *Id.*

Pursuant to MCL 769.34(2), the sentencing guidelines in effect at the time of the offense govern sentencing calculations.⁵

1. OV 7

OV 7 is scored for aggravated physical abuse. MCL 777.37. At the time of the offense in this case, a score of 50 points for OV 7, aggravated physical abuse, was justified if “[a] victim was treated with terrorism, sadism, torture, or excessive brutality.” MCL 777.37(1)(a). Otherwise, OV 7 is scored at zero points. MCL 777.37(1)(b). Terrorism was defined by the statute at that time as “conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.” MCL 777.37(2)(a).

The trial court assessed 50 points for OV 7 based upon the victim’s testimony that defendant told her not to tell her grandmother about the sexual conduct between them and that her grandmother would be angry because the victim “would be taking away [her grandmother’s] boyfriend.” The victim testified that she was scared her grandmother would be angry. The trial court explained that defendant’s comment justified terrorism because it was “obviously done to increase the fear and anxiety that the victim suffered as well as to cover up the offense of the victim.”

⁵ At the time of the offense MCL 777.37 provided:

(1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

“(a) A victim was treated with terrorism, sadism, torture, or excessive brutality . . . 50 points

“(b) No victim was treated with terrorism, sadism, torture, or excessive brutality . . . 0 points

“(2) As used in this section:

“(a) ‘Terrorism’ means conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.

“(b) ‘Sadism’ means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.”

On appeal, defendant argues that the trial court's scoring of OV 7 at 50 points was error because defendant's conduct did not rise to the level of terrorism and defendant's conduct did not occur during the actual criminal sexual conduct.

In *People v Hunt*, 290 Mich App 317, 324-325; 810 NW2d 588 (2010), this Court summarized several cases where a score of 50 points for OV 7 was upheld. The facts of the cases summarized demonstrate the type of conduct that is "designed to substantially increase" the fear and anxiety the victim experiences during the offense. MCL 777.37(1). In *Hunt*, 290 Mich App at 324-325, this Court stated:

In *People v Wilson*, 265 Mich App 386, 396-398, 695 NW2d 351 (2005), the defendant was convicted of assault with intent to commit great bodily harm less than murder after inflicting a prolonged and severe beating that left lasting and serious effects. The defendant in that case choked the victim a number of times, cut her, dragged her, and kicked her in the head. After her hospital stay, the victim was in a wheelchair for three weeks and used a cane for another three weeks. In another case in which 50 points were assessed for OV 7, the defendant was convicted of kidnapping, felonious assault, and felony-firearm after he held the victim at gunpoint for nine hours, made her look down the barrel of a gun, repeatedly threatened to kill her and himself, and asked her what her son would feel like when he saw yellow crime tape around his mother's house. *People v Mattoon*, 271 Mich App 275, 276, 721 NW2d 269 (2006), and *People v Mattoon*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2007 (Docket No. 272549), 2007 WL 3037342 (after remand). Similarly, in *People v Hornsby*, 251 Mich App 462, 468-469, 650 NW2d 700 (2002), the defendant pointed a gun at the victim, cocked it, and repeatedly threatened the victim and others in a store. In *People v Kegler*, 268 Mich App 187, 189-190, 706 NW2d 744 (2005), the defendant removed the victim's clothes, assisted with carrying him naked outside, and admitted that she wanted to humiliate him by leaving him outside naked. In *People v James*, 267 Mich App 675, 680, 705 NW2d 724 (2005), the defendant repeatedly stomped on the victim's face and chest and deprived the victim of oxygen for several minutes, causing him to sustain brain damage and become comatose. And in *People v Horn*, 279 Mich App 31, 46-48, 755 NW2d 212 (2008), the defendant terrorized and abused his wife with recurring and escalating acts of violence, including threatening to kill her.

In this case, defendant's statement to the victim regarding her grandmother cannot be said to constitute conduct "designed to substantially increase the fear and anxiety a victim suffers during the offense," MCL 777.37(2)(a), beyond the fear and anxiety that occurs in all cases of criminal sexual conduct. We conclude that defendant's comments were designed to prevent the victim from talking about the sexual abuse, and not designed to substantially increase her fear and anxiety during the offense. Accordingly, we conclude that the trial court erred in scoring 50 points for OV 7.

2. OV 10

Defendant also argues that OV 10 was scored improperly at 15 points because there was no evidence of predatory conduct.

OV 10 considers exploitation of a vulnerable victim, and is properly scored at 15 points when predatory conduct was involved. MCL 777.40(a). Predatory conduct is “preoffense conduct” that is “directed at a victim for the primary purpose of victimization.” *People v Cannon*, 481 Mich 152, 161; 749 NW2d 257 (2008). A defendant engages in predatory conduct when: (1) defendant engaged in conduct before the commission of the offense; (2) the conduct was directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation; and (3) the victimization was defendant’s primary purpose in engaging in the preoffense conduct. *Id.* at 161-162.

The victim testified that defendant sexually assaulted her when no one else was around. The victim also testified that defendant sexually assaulted her when they were in isolated locations like a basement closet, near a swamp outside defendant’s house, defendant’s bedroom, and in a car pulled over on the side of a dirt road. As this Court stated in *Witherspoon*, “the *timing* of the assault (when no other persons were present) and its *location* (in the isolation and seclusion of the basement) are evidence of preoffense predatory conduct.” *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003) (emphasis in original). Hence, there was sufficient evidence of defendant’s predatory conduct to justify scoring OV 10 at 15 points.

3. OV 12

Lastly, defendant challenges the trial court’s scoring of OV 12 at ten points, arguing that there was no evidence of contemporaneous felonious criminal acts.

Points are assigned under OV 12 for contemporaneous felonious criminal acts. OV 12 is properly scored at ten points when two contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(b).

The trial court did not indicate which of the seven specific instances of sexual conduct the victim testified to it was relying on for each of the first-degree criminal sexual conduct convictions. This is relevant because when scoring OV 12, the trial court can only look at uncharged felonious acts that occurred within 24 hours of the sentencing offense. MCL 777.42(2)(a). Without knowing which conviction the trial court was using as the sentencing offense, it is unclear whether the trial court erred in scoring OV 12 at ten points. Therefore, we conclude that remand is necessary to clarify the record.

Moreover, from a review of the record, it appears that, at most, OV 12 could have been scored at five points. The victim testified that defendant touched her breast during the sixth sexual encounter in defendant’s car and the second sexual encounter outside. Defendant was only convicted of one count of second-degree criminal sexual conduct for touching the victim’s

breast. Thus, at least one instance of defendant touching the victim's breast did not lead to a conviction and since it was contemporaneous with defendant performing oral sex on the victim, it could justify a score of five points for OV 12 if it was the sentencing offense.⁶

Accordingly, it appears from the record that OV 12 was improperly scored at ten points and should either be scored at five points or zero points. On remand, the trial court should specify the conduct that constitutes each sentencing offense and the conduct it is relying on for scoring the offense variables.

B. THE TRIAL COURT'S DEPARTURE FROM THE GUIDELINES

Defendant argues that the trial court did not state objective and verifiable reasons or substantial and compelling reasons that justified departing from the sentencing guidelines range. Defendant also argues that the trial court imposed a disproportionate sentence.

The existence of factors that a trial court uses to justify a sentence departure is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Whether those factors constitute a substantial and compelling justification to depart is reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). The extent of the departure is also reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs "when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Babcock*, 469 Mich at 269.

"The sentencing court may deviate from the guidelines range when the range is disproportionate to the seriousness of the crime and the defendant's prior record." *People v Bennett*, 241 Mich App 511, 516; 616 NW2d 703 (2000). "The reasons justifying departure should keenly or irresistibly grab the [c]ourt's attention, and [the court] should recognize them as being of considerable worth in deciding the length of a sentence." *People v Cline*, 276 Mich App 634, 648; 741 NW2d 563 (2007) (citations omitted). In order to depart from the sentencing guidelines, a trial court must have "substantial and compelling reasons to do so, and state[] those reasons on the record." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The reasons for departure must be objective and verifiable. *Id.* "The phrase 'objective and verifiable' has been defined to mean that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *Id.* Additionally, the trial court must articulate its reasons for "the *particular* departure made," not just its reasons "for a departure." *Smith*, 482 Mich at 303 (emphasis in original).

⁶ While the victim testified about three uncharged incidents of oral sex between herself and defendant, two in defendant's bedroom and one in the victim's bedroom, nothing in the victim's testimony indicated that these occurred within 24 hours of any of defendant's convictions. In fact, the victim specifically mentioned that the furniture in defendant's bedroom had changed, indicating that it was some time later that these subsequent sexual encounters occurred.

In this case, the trial court stated that it was departing from the guidelines because defendant was a pedophile and a recidivist, defendant lacked remorse, the Prior Record Variable (PRV) score was inadequate, and defendant engaged in predatory conduct.

Defendant first argues that the trial court's statement that defendant was a pedophile and a recidivist was not objective and verifiable because it was based on the trial court's assessment of future harm. In explaining its reasons for departure, the trial court never mentioned a concern for future harm or future victims. Moreover, even if the trial court's statements were reflective of a concern for future harm, in *People v Horn*, 279 Mich App 31, 44-45; 755 NW2d 212 (2008), this Court stated that while the mere mention of future risk is not objective and verifiable, when "the trial court's decision was not based on a subjective perception of future risk, but on concrete factors that established a firm probability of future offenses," there is no error. *Id.* Thus, "specific characteristics of an offense and an offender that strongly presage future criminal acts," such as evidence of "a history of recidivism, and obsessive or uncontrollable urges to commit certain offenses," may render "an upward departure from the recommended sentencing range" appropriate. *Id.*

In this case, the trial court's statement that defendant was a pedophile and a recidivist was not merely an opinion. The trial court specifically mentioned defendant's repeated history and proclivity for assaulting underage females under his control. Also, in *People v Kahley*, 277 Mich App 182, 188-90; 744 NW2d 194 (2007), this Court recognized that a defendant's status as a pedophile could be an objective and verifiable reason for departure and could be a factor that is not adequately accounted for in the sentencing guidelines. Accordingly, we find no error.

Next, defendant argues that his alleged lack of remorse is not a proper basis for departure. We agree. The Michigan Supreme Court, in *People v Daniel*, 462 Mich 1, 8-11; 609 NW2d 557 (2000), held that a defendant's remorse is not an objective and verifiable fact and "may not be considered in undertaking" a sentencing departure. Accordingly, on remand for resentencing the trial court should not consider defendant's lack of remorse.

Next, defendant objects to the trial court's statement that the Prior Record Variable (PRV) score was inadequate. The victim testified that defendant placed his tongue on or near her vagina on seven separate instances; however, defendant was only charged and convicted of four counts of first-degree criminal sexual conduct. The victim also testified that defendant sexually assaulted her on many more occasions and not just the detailed instances about which she was testifying. Defendant denied ever touching the victim in a sexual manner. As this Court stated in *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007), as long as a trial court finds that there is a preponderance of the evidence regarding the uncharged crimes and defendant is afforded the opportunity to challenge the information, "[a] trial court may consider facts concerning uncharged offenses, pending charges, and even acquittals." Hence, since the victim in this case provided clear testimony about the three uncharged instances of criminal sexual conduct and defendant responded to and denied these allegations, the trial court's use of this uncharged conduct was not improper.

Lastly, defendant argues that the trial court's consideration of his predatory conduct was improper because the trial court was relying on facts already taken into account by OV 10. A court may base its departure on "an offense characteristic or offender characteristic already taken

into account in determining the appropriate sentence range” as long as “the court finds from the facts in the court record that the characteristic has been given inadequate or disproportionate weight.” *Abramski*, 257 Mich App at 74. In this case, defendant engaged in repeated predatory conduct when assaulting the victim when she was alone and in extremely isolated locations like a swamp behind defendant’s house, a basement closet, and a car on a dirt road. Also, defendant played Barbie dolls with the victim, referred to himself as the victim’s boyfriend, and pretended to be a prince who wanted to marry the victim. This is predatory conduct because defendant was manipulating the victim’s desire to play children’s games and her “readily apparent susceptibility to . . . persuasion, or temptation” for the purpose of victimizing the victim. *Cannon*, 481 Mich at 161-162. Thus, there was ample evidence to support the trial court’s conclusion that defendant’s predatory conduct was not adequately accounted for by OV 10 due to the extensive and repeated nature of the predatory conduct.

C. CONCLUSION

Defendant is entitled to resentencing because the trial court erred in scoring OV 7 and OV 12. When OV 7 is properly scored at zero, and OV 12 is properly scored at either zero or five depending on which offenses the trial court considered to be the sentencing offenses, defendant’s minimum guidelines range is 126-210 months instead of 135-225 months. Because the trial court’s errors affect defendant’s minimum guidelines range, defendant is entitled to resentencing. See *People v Jackson*, 291 Mich App 644, 649; 805 NW2d 463 (2011). We also note that defendant’s lack of remorse is not a proper reason for departure from the sentencing guidelines range, and that when properly scored, defendant’s minimum guidelines range does not exceed the highest OV score on the sentencing grids as the trial court assumed in determining the extent of its departure from the guidelines. Accordingly, we remand for resentencing in accordance with this opinion.⁷

VI. DEFENDANT’S STANDARD 4 BRIEF

Defendant argues in his Standard 4 brief that the trial court lacked subject-matter jurisdiction because MCL 750.520b is not good law. Specifically, defendant argues that Const 1963, art 4, § 25 invalidates any non-amended statutory sections.

In order to preserve an issue for appellate review, it has to be raised before, addressed, and decided by the trial court. *Metamora Water Service, Inc*, 276 Mich App at 382. Defendant never argued in the trial court that there was a defect in subject-matter jurisdiction or that MCL 750.520b was invalid. Thus, this issue is not preserved for appellate review. Unpreserved claims are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 764-765.

Defendant cites Const 1963, art 4, § 25, for the conclusion that only the section or sections of the Michigan Penal Code that have been amended or re-enacted at length are public

⁷ Because we are remanding for resentencing, we decline to address the proportionality of defendant’s original sentence.

laws. Contrary to defendant's position, Const 1963, art 4, § 25 states: "No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length." While the plain language of Const 1963, art 4, § 25 indicates that amended sections should be reenacted and published at length, there is no indication that the non-amended sections are no longer binding law. Thus, there is no plain error affecting defendant's substantial rights, since nothing implies that the trial court lacked subject-matter jurisdiction or that the statutory sections at issue were invalid.

Affirmed in part, remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra