

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARENCE DANIEL FISK,

Defendant-Appellant.

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UNPUBLISHED

September 11, 2003

No. 239367

Bay Circuit Court

LC No. 01-001223-FH

Before: Meter, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under thirteen years of age). Defendant was sentenced as a fourth-offense habitual offender to a term of twenty to thirty years' imprisonment. This case arose out of defendant's improper sexual contact with the eight-year-old daughter of his girlfriend while he was on parole from an earlier CSC II conviction involving a minor child. Defendant argues on appeal that the trial court abused its discretion in admitting certain bad act evidence and did not have substantial or compelling reasons to depart from the sentencing guidelines. We affirm the conviction, vacate the sentence and remand for resentencing.

Defendant first contends that the trial court abused its discretion by permitting the prosecution to present evidence of other bad acts – specifically, evidence of defendant's sexual assault on another young child almost fourteen years earlier; reference to the thousands of photographs of child pornography that were found in defendant's possession and one such picture admitted into evidence; and a questionnaire from an undercover pornographic website that he had filled out indicating his particular interest in child pornography.

This Court reviews a trial court's ruling regarding the admissibility of other acts evidence for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be logically relevant to a matter at issue at trial, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). A proper purpose is one other than establishing the respondent's character to show his propensity to commit the offense. *People v Crawford*, 458 Mich 376, 391; 582 NW2d 785 (1998).

Here, evidence of defendant's prior CSC II conviction was not introduced for the purpose of showing defendant's criminal propensity, but rather, to show the absence of mistake or accident as well as intent, scheme, plan or system in doing an act. As to the purpose of showing the absence of mistake or accident, the theory of the defense was that defendant did not touch the victim in any sexual manner but that he may have touched the victim by accident when he was playing with her and when they fought over the television remote control and defendant attempted to retrieve the device from underneath the victim after she allegedly sat on the device so that defendant would not change the television channels.

As to the purposes of showing intent, scheme, plan or system in doing an act, the trial court determined that this was defendant's method of obtaining sexual gratification was from viewing naked children. In order to justify utilizing other acts evidence to establish a scheme, plan, or system in doing an act, the prosecutor had to show a "heightened" degree of similarity between the other act and the charged conduct. *Sabin, supra* at 64-66. "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." *Id.* at 65-66 (citation omitted).

There was a similarity between the instant offense and the prior CSC act. In each case defendant was alleged to have touched a child aged seven or eight years in a house where adults were present. Defendant was well-known to both the child and the child's parent. Defendant initiated the contact by rubbing the child's buttocks and genital area. As in *Sabin, supra* at 67, there were also dissimilarities between the instant case and the prior conviction. While the existence of these differences rendered this a close question, close evidentiary rulings do not constitute an abuse of discretion. *Id.* Accordingly, the trial court properly admitted evidence of the other act in this case.

As to the evidence of the child pornography and the questionnaire that were found in defendant's possession, the trial court ruled that they were admissible to show intent, scheme, plan or system in doing an act. The court allowed into evidence only one photograph from the child pornography to show that defendant's method of obtaining sexual gratification was from viewing naked children. The court allowed the questionnaire into evidence because it indicated defendant's sexual interest in children. We conclude that this evidence was properly admitted into evidence. See *People v Knox*, 256 Mich App 175, 192-195; 662 NW2d 482 (2003).

We are satisfied that the probative value of the evidence substantially outweighed the danger of unfair prejudice. MRE 403. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *Crawford, supra* at 398. The evidence refuted defendant’s claim that the child manufactured her story in response to police pressure and that the victim mistakenly related an incident that actually involved an accidental touching. The evidence also assisted the jury in determining whether the victim fabricated her claim of being sexually molested.

Additionally, the trial court limited the prosecutor to presenting one photograph, it redacted many of the checkmarks on the questionnaire and it gave the jury a detailed limiting instruction. The court instructed the jury that it was only to consider the evidence of defendant’s prior conviction for the limited purpose of determining the credibility of testimony and that the jury was only to consider evidence of the photograph and the questionnaire for the limited purposes of determining defendant’s motive, plan or scheme and whether defendant had intended to engage in a sexual contact with the victim. A jury is presumed to follow the trial court’s instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, any possibility of undue prejudice was avoided by the trial court’s limiting instruction to the jury. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). The trial court did not abuse its discretion in admitting the other acts evidence pursuant to MRE 404(b).

Defendant next contends that the trial court did not provide substantial and compelling reasons to depart from the statutory sentencing guidelines and that the extent of the departure rendered the sentence disproportionate.

This Court reviews the sentencing court’s determination of the existence or nonexistence of a particular factor for clear error. *People v Babcock (Babcock III)*, \_\_\_ Mich \_\_\_; 666 NW2d 231 (Docket No. 121310, decided July 31, 2003) slip op at 18, quoting *People v Babcock (Babcock I)*, 244 Mich App 64, 75-76; 624 NW2d (2000).<sup>1</sup> The determination that a particular factor is objective and verifiable should be reviewed as a matter of law. *Babcock III, supra* citing *Babcock I, supra*. The trial court’s determination that the objective and verifiable factors represent a substantial and compelling reason for departure is reviewed for an abuse of discretion. *People v Lowery*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 240001, 8/21/2003) slip op p 2. “An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *Babcock III, supra* at slip op p 29. As this Court has recently explained:

The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is otherwise permitted. A court may depart from the appropriate sentence range if it has substantial and compelling reasons for that departure and states those reasons on the record. Substantial and compelling reasons only exist in exceptional circumstances, and the reasons justifying departure should keenly or irresistibly grab the court's attention and be

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<sup>1</sup> The recent decision in *Babcock III, supra*, reversed and remanded *People v Babcock*, 250 Mich App 463; 648 NW2d 221 (2002) (*Babcock II*).

recognized as having considerable worth in determining the length of a sentence. The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight. [*Lowery, supra* (quotations and citations omitted).]

Here, defendant was sentenced under the sentencing guidelines for the year 2000, which called for a minimum sentencing range of thirty-six to 142 months. The trial court imposed a minimum sentence of twenty years which constituted a departure of ninety-eight months, or 8.17 years, from the upper limit of the minimum sentencing range.

The trial court articulated four reasons for the departure, the first of which was that the sentencing guidelines failed to take into account one of defendant's prior convictions. We conclude that this was not a proper departure factor. While the court correctly noted that defendant had five prior convictions, it concluded that only four convictions were taken into consideration. In fact, the sentence information report accounted for two prior high severity and three prior low severity convictions. Accordingly, the court erred in considering defendant's prior convictions as a departure factor.

The second factor cited by the trial court was the fact that this was defendant's second conviction for criminal sexual conduct involving a child. Defendant was convicted of CSC II in 1984 and sentenced to twelve to 22½ years' imprisonment. The prior conviction was accounted for in the sentencing guidelines, MCL 777.51, but the guidelines do not award points based on the similarity between the paroled offense and the sentencing offense. Because the similarity of the paroled offense with the sentencing offense is an objective and verifiable factor that was not accounted for in the guidelines, it was a proper factor for the court to consider in determining whether to exceed the recommended minimum sentence range. We conclude that this was a substantial and compelling reason for the departure.

The third factor cited by the trial court was that defendant was on parole for a short period of time for the prior CSC II conviction when the present offense occurred. As the court acknowledged, the guidelines take into account the fact that defendant was on parole; however, the guidelines did not take into account the fact that the current offense occurred shortly after the offender was paroled. Moreover, the trial court explained that the terms of the paroled offense, for which defendant served fourteen years imprisonment, barred defendant from associating with children but, within a year, he violated his parole and the law by associating with children, collecting extensive child pornography and committing the current CSC offense. Because this objective and verifiable factor was not accounted for in the guidelines, it was a proper factor for the court to consider. We conclude that this was a substantial and compelling reason for the departure.

The final factor given to support the departure was that the victim in this case identified two incidents of sexual touching. The first of the two incidents was not accounted for under OV 12 in the guidelines because the incidents did not occur within twenty-four hours of each other. As the trial court explained, the guidelines only account for contemporaneous felonious criminal acts. MCL 777.42(2)(a)(i) defines a contemporaneous felonious act as (1) an act that occurred within twenty-four hours of the sentencing offense and (2) the act has not and will not result in a separate conviction. Because this objective and verifiable factor was not accounted for in the

guidelines, it was a proper factor for the court to consider. We conclude that this was a substantial and compelling reason for the departure.

In light of the above, three substantial and compelling departure reasons existed in this case. Because the trial court also relied on one improper reason for the departure, we must determine whether the court “would have departed, and would have departed to the same degree, on the basis of the substantial and compelling reasons alone.” *Babcock III, supra* at slip op p 28. In this case, the court stated the following

. . . if any one of these [four reasons], alone, were a reason to depart, I would indicate that it wouldn’t be sufficient; it would just be a sufficient reason to go to the top of the guidelines, not to depart; not a substantial and compelling reason.

But with four of ’em in here, it is, in my opinion, substantial and compelling.

From the above language, we cannot determine whether the trial court would have departed on the basis of the three substantial and compelling reasons alone. Accordingly, we vacate the sentence and remand the case to the trial court for resentencing.

The conviction is affirmed. The sentence is vacated and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ Michael J. Talbot  
/s/ Stephen L. Borrello