

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD JAMES ASHMORE,

Defendant-Appellant.

UNPUBLISHED

November 28, 2006

No. 262305

Macomb Circuit Court

LC No. 2004-002751-FH

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a), for which he was sentenced to serve concurrent prison terms of 16 to 24 months. We affirm.

Defendant first argues that the trial court erred in failing to dismiss a juror for improper conduct after she admitted having unsuccessfully attempted to research legal information pertaining to the trial at a public library. However, because defendant's counsel affirmatively indicated that he had no objections to retaining the juror, this issue is waived, precluding review. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998); see also *People v Carter*, 462 Mich. 206, 215-216; 612 NW2d 144 (2000) (one who waives his rights may not seek appellate review of a claimed deprivation of those rights, for his waiver extinguishes any error).

Defendant also argues that his counsel was ineffective because he failed to object to the juror remaining on the jury and also failed to request that defendant be present in the trial judge's chambers when the juror was questioned about her excursion to the public library. Because defendant failed to move for a new trial or an evidentiary hearing on these claims, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether the facts in the record suggest that defendant has been deprived of his right to the effective assistance of counsel presents a question of constitutional law that we review de novo. See *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To overcome this presumption, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for

counsel's errors, the result of the proceedings would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

According to the juror's statements during voir dire on this matter, she was unable to find any information regarding the question she sought to answer, i.e., whether it was permissible for defendant to call character witnesses on his behalf. The juror also indicated that she did not discuss the topic of her research or its result with any other juror, and that her attempt to discover this information would not in any way affect her deliberation of defendant's guilt or innocence. The trial court accepted this, announced that it saw no need to remove the juror, and asked if there were any objections to the juror remaining on the panel. Given the juror's clear indication that her attempt at research was not fruitful and would not affect her ability to impartially deliberate the case, defense counsel's failure to object or otherwise insist that the juror be removed was not objectively unreasonable. *Id.* Thus, defendant has not established a claim of ineffective assistance of counsel based on trial counsel's failure to object to the continued participation of the juror.

For these same reasons, we reject defendant's claim that his counsel was ineffective for having failed to ensure that defendant be present during voir dire of the juror. Although "[a] defendant's right to be present at his trial extends to all conferences or occurrences at the trial wherein or whereby his substantial rights may be affected," the error of proceeding in such a matter without the defendant's presence may be harmless. *People v Bowman*, 36 Mich App 502, 510-511; 194 NW2d 36 (1971). Here, the record does not indicate that defendant was prejudiced by the denial of his right to be present during voir dire of the juror. As discussed above, the juror expressly denied that she found any information addressing the question to which her research was directed, and affirmatively indicated that the experience would in no way affect her ability to impartially deliberate. There is nothing in the record before us to dispute the juror's assertions in this regard, which the trial court expressly found insufficient to require that the juror be removed from the jury panel. In the absence of such evidence, we find no basis from which to conclude that had defendant been present at the voir dire, the outcome would have been any different. *Effinger, supra.*

Finally, defendant claims the trial court erred with regard to his sentence, which departed from the intermediate sanction recommended by the sentencing guidelines by imposing a term of imprisonment. We agree.

A trial court must impose a sentence within the guidelines range unless the court states on the record a "substantial and compelling" reason for a departure from the guidelines. MCL 769.34(2), (3). To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly grab the attention of the court, and must be of considerable worth in deciding the length of the sentence. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). An objective and verifiable reason is one that is "external to the minds of the judge, defendant, and others involved in making the decision, and [is] capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Whether a particular factor is objective and verifiable is reviewed by this Court de novo, as a matter of law. *Babcock, supra* at 264-265. The trial court's determination that objective and verifiable factors present a substantial and compelling reason to depart from the statutory minimum sentence is reviewed for an abuse of discretion, which "occurs when the

trial court chooses an outcome falling outside the permissible principled range of outcomes.” *Id.* at 274.

In challenging the trial court’s stated reasons for departure, defendant first claims that the trial court improperly considered his denial of guilt and lack of remorse. We do not agree. Although expressions of remorse fail as a matter of law to be objective and verifiable factors permitting departure, *People v Daniel*, 462 Mich 1, 8 n 9; 609 NW2d 557 (2000), a defendant’s absolute lack of remorse is a legitimate factor in sentencing, *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). A trial court may not, however, sentence a defendant based, even in part, on the defendant’s refusal to admit guilt. *People v Jackson*, 474 Mich 996, 996; 707 NW2d 597 (2006). Nonetheless, resentencing is required in such cases “only if it is apparent that the court erroneously considered the defendant’s failure to admit guilt, as indicated by action such as asking the defendant to admit his guilt or offering him a lesser sentence if he did.” *Spanke, supra*.

Here, the trial court linked defendant’s “total denial” and “total lack of remorse” with defendant’s assertion that the allegations against him had been fabricated because he had spurned the romantic advances of the victim’s mother. These remarks do not reference defendant’s failure to enter a guilty plea or exercise of the right to trial and thus do not indicate that the trial court improperly relied on defendant’s failure to admit guilt. Rather, the remarks are reasonably understood as referencing permissible sentencing considerations related to determinations that defendant absolutely lacked remorse as reflected in his falsely accusing the victim of having fabricated the allegations against him. Therefore, defendant has not shown that the trial court improperly considered his failure to admit guilt.

Defendant also argues that the trial court incorrectly asserted that he had alleged that the complainant’s mother was behind the charges, and erroneously relied on that “cunning [and] manipulative behavior” as a basis for departure. We agree. The trial court, both at the sentencing hearing and in its written departure evaluation, referred to defendant as having alleged that the victim’s mother had “made up [the] story to get back” at defendant for having rejected her romantic advances. Defendant, however, never testified or otherwise asserted that the complainant’s mother was involved in any alleged fabrication of her daughter’s allegations against him. Rather, as already indicated, he expressed only a belief that the complainant had herself fabricated the charges in order to punish defendant for having hurt her mother. Because a substantial and compelling reason for departure may not be based on inaccurate information, see, e.g., *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997), the trial court’s incorrect belief that defendant had attempted to implicate the victim’s mother in fabrication of the charges cannot support the departure. Moreover, even if true, that defendant’s conduct in this regard was “cunning” or “manipulative” is not an objective and verifiable factor “external to the mind” of the court and defendant, but rather a subjective conclusion drawn by the court that cannot be confirmed and, thus, may not be relied upon as a substantial and compelling reason for departure. *Abramski, supra*.

Defendant also argues that the trial court improperly referred to defendant as having multiple “victims.” It is apparent that the trial court’s remark references the presentence report’s description of defendant as having been “the subject of multiple child molestation investigations.” These included allegations that did not result in charges that in the summer of 2000 defendant’s eight- and six-year-old biological daughters asserted that he sexually molested

them, and allegations that defendant sexually abused his eight-year-old stepdaughter and three-year-old biological daughter in November 2002, leading to charges of which defendant was acquitted. A trial court may consider the contents of a presentence report in imposing sentence. See *Miles, supra* at 97 (describing presentence reports as “integral to sentencing”). Further, a trial court may consider the facts underlying uncharged offenses and acquittals. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Accordingly, the trial court was permitted to accept the evidence that defendant had molested multiple children as it implicitly did in referring to defendant as having chosen multiple “victims” for such abuse. As to defendant’s argument that this was not an objective and verifiable factor for the trial court to rely upon in exceeding the sentencing guidelines, this is incorrect. The prior child molestation allegations constitute an objective and verifiable factor because they “are external to the minds of the judge, defendant, and others involved in making the decision, and [are] capable of being confirmed.” *Abramski, supra*.

Defendant next argues that the trial court’s reliance on his perceived dangerousness as a basis for departure was inappropriate because OV 10 of the sentencing guidelines accounted for his exploitation of the complainant. We do not agree. In determining whether a sufficient basis exists to depart from the guidelines, a trial court must determine whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant’s criminal history than would adherence to the guidelines. *Babcock, supra* at 263-264. OV 10, as codified in MCL 777.40, considers whether a defendant exploited a vulnerable victim with regard to the sentencing offense. Here, it is clear that the trial court’s view of defendant as a threat to society in this case was based on the evidence of a pattern of incidents of child molestation. OV 10 simply did not account for that pattern, which, as indicated above, is supported by the record and constitutes an objective and verifiable factor. In *People v Solmonson*, 261 Mich App 657, 671-672; 683 NW2d 761 (2004), this Court held that the trial court did not abuse its discretion in finding substantial and compelling reason to exceed the sentencing guidelines based on a defendant’s extensive criminal history and the trial court’s “legitimate concern for the protection of society.” Similarly, it was not an abuse of discretion for the trial court to consider the evidence of defendant having committed multiple incidents of child molestation as providing substantial and compelling reason to exceed the sentencing guidelines in this case.

In summary, on review de novo we find that the trial court improperly relied on inaccurate information to conclude that defendant’s allegations regarding fabrication of the charges against him supported a departure in this case. The trial court also, however, properly concluded that defendant’s lack of remorse and prior criminal history were substantial and compelling reasons for departure. When a trial court articulates multiple substantial and compelling reasons for departure, we must determine whether the alternate reasons are substantial and compelling, and if some are not, we must determine whether it would have departed to the same degree on the strength of the substantial and compelling reasons alone. *Babcock, supra* at 260-261. In this case, regardless whether defendant claimed or suggested at trial that the complainant’s mother was involved in fabricating the allegations against him, it is not disputed that he expressed that the victim’s allegations against him were fabricated as retaliation for his failure to reciprocate the romantic interests of the victim’s mother. Moreover, the court expressly indicated its belief that the sentence imposed by it “will result in a more proportionate sentence than available [under] the guidelines.” Thus, despite the trial court’s

characterization of defendant's fabrication allegations as "cunning [and] manipulative," because the essence of the trial court's consideration of this point was that defendant falsely portrayed the allegations as fabricated, its misstatement or confusion regarding whether defendant suggested that the complainant's mother was involved in the alleged fabrication does not support a conclusion that the trial court would not impose the same sentence on remand. Accordingly, we find no basis for remanding this matter for resentencing.

Affirmed.

/s/ Jessica R. Cooper

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski