STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 7, 2006
v	No. 261843 Oakland Circuit Court
MOHAMMAD HARIS HASAN, Defendant-Appellant.	LC No. 2004-198705-FC

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant was convicted of kidnapping, MCL 750.349, six counts of first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(c), (d)(ii), and (f), and two counts of assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced as a second sexual offender, MCL 750.520f, and a second-felony habitual offender, MCL 769.10, to concurrent prison terms of 40 to 90 years for each of the kidnapping and CSC convictions, and 83 to 180 months for each of the assault convictions. He appeals as of right. We affirm.

Defendant was convicted for his role in the January 20, 2002 kidnapping, sexual assault, and beating of CK, and the beating of her friend, Jeremiah Kelly.[1] Defendant participated in the offense with Ali Tleis and Erik Muehlenbein. Defendant admitted assaulting Kelly after Kelly allegedly made racial comments. Defendant also admitted to slapping CK and leaving her in a park after she allegedly made racial comments, but claimed that she had voluntarily accompanied Tleis, Muehlenbein, and himself to defendant's home and engaged in consensual sexual activity with all three of them.

I

Defendant first argues that the trial court erroneously admitted Tleis's hearsay statements to the police, thereby violating defendant's right of confrontation. We disagree.

[1] While Kelly was also a victim, the term "victim" is used in this opinion to refer only to CK.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). Constitutional questions are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

In *Crawford v Washington*, 541 US 36, 53-56, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that testimonial statements of a witness absent from trial are not admissible for their truth unless the declarant is unavailable and there has been a prior opportunity for adequate cross-examination. Although the Court did not define the term "testimonial," the Court stated that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id*. at 52. The Court explained that "[w]hatever else the term covers, it applies at a minimum . . . to police interrogations." *Id*. at 68. Thus, contrary to the prosecutor's argument in this case, we conclude that Tleis's statements to the police were testimonial. However, the *Crawford* Court made clear that "[t]he [Confrontation] Clause *does not* bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id*. at 59 (emphasis added).

Viewing the evidence in context, the record discloses that Tleis's statements were not offered for their truth. An officer explained that he obtained co-defendant Muehlenbein's Arabic name from Tleis, that Tleis confirmed Muehlenbein's address, and that Tleis also gave the police defendant's name and address and confirmed that "the incident happened" at defendant's home. This information was not offered to prove the truth of the matters asserted in the statements, but to explain how the police discovered defendant's address and obtained a search warrant for that address. Because the statements were not offered for their truth, they were not inadmissible hearsay under MRE 801(c), and there was no violation of defendant's right of confrontation.

More importantly, defendant admitted that he picked up the victim and Kelly at a bar, that he assaulted Kelly and left him in the street, that he hit the victim twice and left her on Belle Isle, and that he, Tleis, and Muehlenbein had sexual intercourse with the victim at defendant's home in River Rouge. The only facts that defendant contested at trial were whether the victim voluntarily accompanied him to his home and consented to the sexual encounter, whether he intended to injure Kelly, and whether he intended to kill the victim. Thus, it is clear that Tleis's statements, even if hearsay and erroneously admitted for their truth in violation of defendant's right of confrontation, were harmless beyond a reasonable doubt, because they were not relevant to any contested facts at trial.

II

Next, defendant argues that the trial court erred in allowing a police officer to testify that, at defendant's arraignment, defendant leaned over and spontaneously told the officer that he "wanted a plea bargain." We disagree.

Contrary to what defendant argues, the statement was not prohibited by MRE 410(4). That rule prohibits "[a]ny statement made in the course of plea discussions *with an attorney for the prosecuting authority* which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." Because the statement was made to a police officer, not a prosecuting attorney, it was not prohibited by MRE 410(4). Further, the statement had considerable

probative value in impeaching defendant's credibility and the probative value was not substantially outweighed by the danger of unfair prejudice. MRE 403.

III

Defendant next argues that the trial court erred in allowing an officer to testify that defendant did not assert his innocence. We disagree.

Evidence of a defendant's silence is generally inadmissible. *People v Dennis*, 464 Mich 567, 573-574; 628 NW2d 502 (2001); *People v Schollaert*, 194 Mich App 158, 162, 164; 486 NW2d 312 (1992). However, "[t]he right to be free from compelled self-incrimination is not self-executing;" it must be invoked or it is waived. *People v Watkins*, 468 Mich 233, 240; 661 NW2d 553 (2003). Additionally, it is not a violation of due process to refer to a defendant's silence that did not occur during custodial interrogation. *Schollaert*, *supra*, at 164-167.

In this case, after the police officer testified about defendant's statement asking for a plea bargain, defense counsel elicited, on cross-examination, that the officer did not know whether defendant was requesting a plea bargain for "fighting" with Kelly, for "hitting" the victim, or for something else. Defendant only stated that he wanted a plea bargain. On redirect examination, the prosecutor asked the officer, "Did he tell you, 'I am innocent of any crimes I am being charged for'?," and the officer answered no. Defendant spoke to the officer voluntarily and requested a plea bargain. Although defendant was clearly in custody, there is no indication that he was being interrogated, or that he asserted his Fifth Amendment right to remain silent. Under the circumstances, the trial court did not err in allowing this brief and limited question.

IV

Defendant next argues that the trial court erred in admitting evidence of flight. We again disagree.

"Michigan recognizes the equivocal nature of evidence of flight; however, evidence of flight is generally relevant and admissible." *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993), overruled on other grounds in *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Flight can be evidence of purpose, intent, or knowledge, and it is for the jury to determine whether the circumstances evidence guilt. *Cutchall*, *supra*.

At trial, the prosecutor introduced evidence that, after assaulting Kelly, defendant left the scene. Defendant did not contest that fact. The prosecutor also introduced evidence that defendant took the victim to Belle Isle, assaulted her, and again left the scene. Defendant claimed that he intended to come back for the victim, but admitted that he fled after seeing the police. The prosecutor additionally introduced evidence that defendant left the country ten days after the charged incident. Defendant admitted doing so, but claimed that he left for innocent reasons.

During closing argument, the prosecutor told the jury that it could consider defendant's flight to evaluate his credibility, and that the evidence showed that defendant went to Pakistan because he knew that the police were looking for him. The trial court instructed the jury that evidence of flight does not prove guilt, and that a person may run or hide for innocent reasons

such as panic, mistake or fear, but that flight may also show consciousness of guilt. The court instructed the jury that it must decide whether the evidence was true, and whether it showed that defendant acted with a guilty state of mind.

In this case, the evidence of flight was relevant to defendant's consciousness of guilt, and defendant has failed to show that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The evidence was admitted for a proper purpose, the prosecutor urged the jury to consider the evidence for a proper purpose, and the trial court properly instructed the jury that flight alone does not prove guilt, and that it must determine whether defendant fled for an innocent reason or because he had a guilty conscience. Accordingly, there was no error.

V

In a pro se supplemental brief, defendant argues that defense counsel was ineffective (1) in the way he conducted jury voir dire and not requesting a change of venue based on pretrial publicity, (2) for failing to call witnesses to support defendant's claims that the sexual activity was consensual and that he traveled to Pakistan for innocent reasons, and (3) for failing to object to the testimony concerning defendant's request for a plea bargain and his failure to assert his innocence, and failing to object to Tleis's statements. We disagree.

Because defendant did not raise this issue in a motion for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy. *Id.* at 312, 314. Further, defendant must show that he was prejudiced by the error in question, i.e., that the error may have made a difference in the outcome of the trial. *Id.*; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

A. Jury Voir Dire and Venue

Because voir dire involves the exercise of an attorney's professional judgment, the presumption of sound trial strategy applies. See *People v LeBlanc*, 465 Mich 575; 640 NW2d 246 (2002). Although defendant complains that defense counsel incorrectly identified him as a person of Middle Eastern descent, rather than as being from Pakistan, the evidence clearly established that defendant was from Pakistan and this was not a disputed issue at trial. There was no risk of juror confusion concerning defendant's heritage. Further, defendant's defense to the assault charges was that the victims provoked him by making offensive comments about Arabic people. Thus, defendant made his ethnicity and his perception as a person of Middle Eastern descent an issue in the case. Defendant has failed to overcome the presumption that defense counsel made a sound strategic decision to question the jurors on this subject, both to

find potential jurors who might be prejudiced, as well as potential jurors who might be sympathetic when confronted with evidence of alleged anti-Arabic prejudice.

Regarding defendant's venue argument, even assuming, as defendant contends, that the case received a lot of media attention after the offense was committed, defendant was not tried until more than three years later. To justify a change of venue, a defendant must prove either the existence of strong community feelings against him and that publicity was so extensive that jurors could not remain impartial when exposed to it, or that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice. *People v Hack*, 219 Mich App 299, 311; 556 NW2d 187 (1996). Defendant has failed to show, nor does the record indicate, that at times relevant to defendant's trial, this case received such extensive publicity that a change of venue was necessary in order to preserve defendant's right to a fair trial. *Id.* Because it is apparent from the record that any motion for a change of venue would have been futile, defense counsel was not ineffective for failing to make it. See, e.g. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Further, although defense counsel did not ask a lot of questions concerning pretrial publicity during voir dire, defendant has not shown that any juror was exposed to and adversely influenced by pretrial publicity.

B. Witnesses

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); see also *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). To overcome the presumption of sound trial strategy, a defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving the defendant of a substantial defense. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant argues that defense counsel could have called either Muehlenbein or Tleis to testify that the victim consented to having sexual intercourse with them. By the time of defendant's trial, however, Tleis had pleaded nolo contendere to kidnapping and three counts of first-degree CSC and was serving a prison term of 8 to 60 years. Muehlenbein had been convicted by a jury of kidnapping and two counts of first-degree CSC, and was serving a prison sentence of 23 years and 9 months to 60 years. This Court affirmed Muehlenbein's convictions and sentence and, on the first day of defendant's trial, the Supreme Court denied his application for leave to appeal. *People v Muehlenbein*, unpublished opinion per curiam, issued May 18, 2004 (Docket No. 244712), lv den 472 Mich 861 (2005). Thus, Tleis and Muehlenbein both would have had significant credibility problems if they testified in the manner suggested by defendant, and there was a substantial risk that their testimony would have been more damaging. Defendant has not overcome the presumption that defense counsel made a sound strategic decision by not calling them to testify.

Concerning the flight to Pakistan, defendant testified extensively that he went there to get engaged, to start a business, and to get married. He testified that the marriage had been arranged since he was a child, and that he had been to Pakistan many times before to cultivate ties with the bride's family. While defendant contends his father should have been called as a witness to

testify to such matters, the father's proposed testimony would have been cumulative given defendant's testimony. Further, it is not apparent that defendant's father would have supported defendant's version of events, particularly considering that defendant admitted lying to his father concerning why the police were looking for him in Michigan, and admittedly lied at his extradition hearing. Defendant has failed to overcome the presumption of sound trial strategy. Additionally, because (at best) the father's testimony concerning the reason for the trip would have been cumulative of defendant's testimony, defendant has failed to show that his father's absence at trial deprived him of a substantial defense.

C. Evidentiary Objections

Contrary to what defendant argues, defense counsel objected to the introduction of Tleis's statements to the police. Thus, there is no merit to this claim of ineffective assistance.

Although defense counsel did not object to the evidence of defendant's request for a plea bargain, as discussed in part II, *supra*, this evidence was admissible. Similarly, as discussed in part III, *supra*, the prosecutor properly elicited that defendant did not assert his innocence when he spontaneously requested a plea bargain. Thus, defense counsel was not ineffective for failing to object to these matters. *Kulpinski*, *supra,* at 27.

VI

Defendant next raises several issues challenging the validity of his sentences. He argues that the trial court improperly considered facts not found by the jury, that the court erred in its scoring of the sentencing guidelines, that a departure from the guidelines ranges was not justified, and that his sentences are both disproportionate and cruel and unusual. We reject each of these claims of error.

A. Right to Jury Trial

Initially, we reject defendant's claim that the trial violated his Sixth Amendment right to a jury trial by relying at sentencing on facts not found by the jury. Because defendant did not preserve this issue by raising it below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

As defendant recognizes, the United States Supreme Court has held that a court may not use judicially-ascertained facts (beyond the elements of the crime), other than prior convictions, to enhance a defendant's sentence beyond the statutory *maximum* for the offense applicable to the facts found by the jury. *United States v Booker*, 543 US 220, 231-237; 125 S Ct 738; 160 L Ed 2d 621 (2005); *Blakely v Washington*, 542 US 296, 303-304; 124 S Ct 2531; 159 L Ed 2d 403 (2004); *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). However, in *People v Drohan*, 475 Mich 140, 159-164, 156; 715 NW2d 778 (2006), cert pending, our Supreme Court held that Michigan's indeterminate sentencing scheme does not violate the Sixth Amendment because the judicial findings permitted by the legislative guidelines affect only a defendant's *minimum* sentence, not the statutory maximum sentence provided by law. We therefore reject this claim of error.

B. Scoring of the Guidelines

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Scoring decisions for which there is any evidence in support will be upheld. *Id.*

Defendant first argues that there was no evidence that a weapon was used in this offense and, therefore, the trial court erred in scoring ten points for offense variable ("OV") 1.

MCL 777.31(1)(c) instructs the court to score ten points for OV 1 if "[t]he victim was touched by any other type of weapon." For purposes of OV 1, a weapon is any instrumentality used as a weapon, regardless of whether the item is intrinsically dangerous or innocent. *People v Lange*, 251 Mich App 247, 256-257; 650 NW2d 691 (2002) (glass mug found to be a weapon where it was used to hit the victim). In this case, defendant used a car to inflict injury on Kelly, and slammed the victim's head into a tree, thereby using the tree to inflict harm on the victim when assaulting her. Contrary to defendant's assertion otherwise, the above could be construed as instrumentalities used as weapons.

Defendant further asserts that even if the car and the tree could be considered weapons, their use related only to the assaults and, therefore, they could not be scored with respect to the kidnapping and CSC convictions. We disagree. The guidelines contemplate that a criminal episode will be scored as a whole, and facts considered in scoring one offense can be considered in scoring other offenses that are part of the same criminal episode. *People v Cook*, 254 Mich App 635, 640-641; 658 NW2d 184 (2003). Thus, the trial court properly scored ten points for OV 1.

Defendant next argues that OV 7 was improperly scored at 50 points because there was no excessive brutality or sadism. Fifty points may be scored for OV 7 if "a victim was treated with sadism, torture, or excessive brutality or conduct that is designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Sadism is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). The evidence in this case showed that defendant ran over Kelly's leg with a car and repeatedly kicked him for no reason. Defendant hit the victim, sexually assaulted her repeatedly, cheered while his codefendants sexually assaulted her, taunted her about becoming pregnant, taunted her with her cellular telephone, threw her against a tree, and left her in the cold on Belle Isle, without a coat. The evidence establishes that defendant treated Kelly with excessive brutality, and subjected him to extreme pain for the sake of producing suffering. Similarly, defendant treated the victim with excessive brutality and subjected her to conduct designed to substantially increase her fear and anxiety during the offense. He also subjected her to extreme and prolonged humiliation for the sake of causing suffering, and for his own gratification. OV 7 was properly scored at 50 points.

Defendant argues that OV 8 was erroneously scored at 15 points for the CSC convictions because kidnapping was an aggravating circumstance used to establish the convictions. We disagree. Fifteen points are to be scored for OV 8 if "a victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). Although the statute expressly provides that OV 8 is not to be scored where the sentencing offense is kidnapping, MCL 777.38(2)(b), the statute

does not prohibit a score of 15 points where the sentencing offense is other than kidnapping. Further, there were other aggravating circumstances supporting defendant's CSC convictions in this case, namely, force or coercion was used to accomplish the penetration, and defendant was aided and abetted by one or more persons and also caused personal injury. MCL 750.520b(1)(d)(ii) and (f). We find no error in the trial court's scoring of 15 points for OV.

Defendant next argues that OV 11 was improperly scored at 50 points because the trial court considered each of the penetrations that formed the basis for the six first-degree CSC convictions. Because defendant did not object below to the scoring of OV 11, we review this unpreserved issue for plain error. *Carines*, *supra*. Fifty points are to be scored for OV 11 when "two or more criminal sexual penetrations occurred." MCL 777.41(1)(a). The court is to "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). The court may "not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777.41(2)(c).

Where a defendant is convicted of multiple counts of first-degree CSC, the trial court may score points for sexual penetrations forming the basis of convictions other than the sentencing offense being scored. *People v Cox*, 268 Mich App 440, 455-456; 709 NW2d 152 (2005). Thus, the trial court here could properly consider defendant's additional CSC convictions in its scoring of OV 11. Furthermore, the victim testified that defendant had vaginal intercourse with her at least four times, that there were two separate acts of oral penetration, and that the co-defendants sexually penetrated her at least twice each. Thus, there is record support for at least two criminal sexual penetrations beyond the six conviction offenses. The trial court did not commit plain error in scoring 50 points for OV 11.

Defendant next argues that 25 points were improperly scored for OV 13 on the basis that "the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). In determining the appropriate points under this variable, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction," MCL 777.43(2)(a), but conduct scored in offense variable 11 or 12 should not be scored, MCL 777.43(2)(c). Defendant argues that the additional penetrations in this case may not be considered for purposes of scoring OV 13.

We agree that where the sentencing offense is first-degree CSC, that offense may not be considered in the scoring of OV 11, but it can be scored under OV 13. See MCL 777.41(2)(c) and MCL 777.43(2)(a). Similarly, OV 12 instructs the court to score only an "act [that] has not and will not result in a separate conviction." MCL 777.42(2)(a)(ii). Therefore, none of the acts that resulted in convictions in this case can be scored under OV 12, but they can be scored under OV 13. See MCL 777.43(2)(c). According to defendant's presentence report, however, defendant was convicted in January, 2000 of third-degree CSC for having intercourse with a minor. Because that offense occurred within a five-year period preceding the present offense, it can be scored under OV 13. MCL 777.43(2)(a).

As a result, in scoring OV 13 for the first-degree CSC convictions, the sentencing offense is counted (but not the additional penetrations), the third-degree CSC conviction is counted, the kidnapping offense is counted, and the two assaults are counted, for a total of five offenses. When scoring the kidnapping conviction, that offense is counted, one of the first-degree CSC

convictions may be counted (because it was not scored under OV 11), and the two assaults and the prior third-degree CSC conviction may be counted, for a total of five offenses. When scoring the assault convictions, the particular sentencing offense assault counts, one of the first-degree CSC convictions counts, the kidnapping counts, the other assault counts, and the prior third-degree CSC conviction counts, for a total of five offenses. Thus, for each of the sentencing offenses, defendant committed three or more felonies against a person that meet all the criteria of this variable. OV 13 was properly scored at 25 points.

Defendant next argues that ten points should not have been scored for OV 14, because he was not a leader. Ten points should be scored for OV 14 if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). In scoring this offense variable, the entire criminal transaction should be considered. MCL 777.44(2)(a). "If 3 or more offenders were involved, more than 1 offender may be determined to have been a leader." MCL 777.44(2)(b). In this case, the evidence at trial showed that defendant took the initiative to lure the victims into Muehlenbein's car, that it was defendant who jerked the car forward causing Kelly to fall out, ran over Kelly with the car, and initially began to kick him. He also took the initiative in both physically and sexually assaulting the victim. There was thus sufficient evidence to support the trial court's scoring of OV 14.

Defendant lastly argues that the trial court erred in scoring OV 19 at 10 points for interfering with the administration of justice. This offense variable instructs the court to score 25 points if the offender threatened the security of a penal institution, and 15 points if the offender used force or the threat of force to interfere or attempt to interfere with the administration of justice or the rendering of emergency services. MCL 777.49(a) and (b). Ten points are to be scored if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Interfering or attempting to interfere with the administration of justice includes acts that constitute obstruction of justice, but is not limited to such acts. *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004). The interference addressed by OV 19 "encompasses more than just the actual judicial process." *Id*. at 287-288. For example, because the investigation of a crime is critical to the administration of justice, providing a false name to the police constitutes interference with the administration of justice that can be scored under OV 19. *Id*. at 288. In the present case, there was evidence that defendant lied during an FBI interview and during his extradition hearing. This evidence supported a score of ten points for OV 19.

C. Substantial and Compelling Reasons for Departure

Defendant next argues that the trial court erred in finding that there were substantial and compelling reasons to justify a departure from the sentencing guidelines ranges of 171 to 356 months for the CSC and kidnapping convictions. We disagree.

"A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). A "substantial and compelling" reason for departure must be an "objective and verifiable" reason that "keenly" or "irresistibly" grabs a court's attention, is of "considerable worth" in deciding the length of a sentence," and "exists only in exceptional cases." *People v Babcock*, 469 Mich 247, 257-258;

666 NW2d 231 (2003), quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). "The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). The determination whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion. *Babcock*, *supra*, at 265.

In this case, the trial court determined that the sentencing guidelines did not adequately account for the true seriousness of this offense, particularly the serious psychological injury to the victim. The court noted that OV 4 attempts to account for the presence of psychological injury to a victim, but concluded that the victim's objective circumstances in this case were not adequately reflected in the scoring of this variable. In particular, apart from the horrifying details of the crime itself, the victim had to undergo several months of HIV and Hepatitis testing. She also sought professional counseling but was unable to continue with the counseling because she could not endure the emotional pain she felt when attempting to discuss the incident. Additionally, since the offense, the victim had become a recluse in her own home. At trial, the victim testified that she was a working college student before the offense, but no longer worked, socialized, or attended school because she is afraid to leave her home.

The trial court did not clearly err in finding that the objective circumstances showed that the victim had suffered an exceptional psychological injury. The differences between the way the victim lived before and after her attack are clearly documented in the record, and the victim attributed these differences directly to the horrifying offenses committed by defendant. The trial judge characterized defendant's conduct as "barbaric" and "the most odious and offensive" he had heard in his 14 years on the bench.

As the trial court observed, it is apparent that the sentencing guidelines were not capable of adequately accounting for the true seriousness of this offense. Defendant received total offense variable scores of 206 points each for his CSC and assault convictions, more than double the 100 points necessary to place defendant in offense variable level VI, the highest level of offense severity. Similarly, his total offense variable score for the kidnapping conviction was 191, almost double the minimum score necessary to place him in level VI. Defendant's "off-the-chart" scores provide ample support for the trial court's determination that the offense characteristics reflected in the guidelines, including the substantial psychological injury to the victim, were given inadequate or disproportionate weight, thereby justifying a departure from the guidelines for substantial and compelling reasons. Contrary to what defendant asserts, the trial court did not base its departure decision on the fact that defendant contested his extradition.

In sum, the trial court did not abuse its discretion in finding that there were substantial and compelling reasons to depart from the guidelines ranges for defendant's CSC and kidnapping convictions.

D. Proportionality and Cruel and Unusual Punishment

Defendant finally argues that his kidnapping and CSC sentences were not individualized, are not proportionate to the offense and the offender, and are cruel and unusual. We disagree.

Even where a departure from the sentencing guidelines is justified, the substantial and compelling circumstances articulated by the trial court must justify the particular departure imposed in the case. *Babcock*, *supra,* at 259-260. "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality--that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record--defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." *Id*. at 262, 264. The principle of proportionality requires that a sentence "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636, 651; 461 NW2d 1 (1990).

In this case, defendant preyed upon two vulnerable victims and lured them into co-defendant Muehlenbein's car. He caused Kelly to fall out of the vehicle, ran over him with the car, kicked him savagely, robbed him, and left him for dead out in the cold. He forced the victim back into the car and drove her to his house in River Rouge, where she was repeatedly sexually assaulted, beaten, and humiliated. She was then taken to Belle Isle where she was again taunted, beaten, and left for dead in the cold, without a coat. In addition, defendant has a prior conviction for third-degree CSC involving sexual intercourse with a minor and also has a misdemeanor conviction for domestic violence upon a family member, and at least six additional arrests for acts of violence on his family. In his prior cases, defendant violated the terms of sentencing programs.

Given the above, defendant's sentences are proportionate to the seriousness of the circumstances surrounding his crimes and his prior criminal record. Therefore, the sentences do not amount to an abuse of the trial court's sentencing discretion.

Because defendant's sentences are proportionate, they are not cruel or unusual. *People v Bullock*, 440 Mich 15, 30-37; 485 NW2d 866 (1992).

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot