

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH RICHARD GOURLAY,

Defendant-Appellant.

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UNPUBLISHED  
February 17, 2009

No. 281376  
Wayne Circuit Court  
LC No. 06-010876-01

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of 13 counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (sexual penetration with a person at least 13 but under 16 years of age), and sentenced to concurrent prison terms of 10 to 15 years for each conviction. He appeals as of right. We affirm.

Defendant was convicted of sexually assaulting “CB” on numerous occasions in 2004 and 2005, when CB was 14 years of age. Defendant met CB on the Internet in December 2004. They communicated via instant messaging for one or two weeks before they met in person. Thereafter, they spent time together on a regular basis and engaged in a sexual relationship that involved anal penetration. CB ended the relationship with defendant in May 2005. At trial, defendant admitted befriending CB, but denied engaging in a sexual relationship with him.

Defendant first argues that the trial court clearly erred by admitting as evidence statements that he made in a journal from 1999 to 2001. This Court reviews a trial court’s decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). If the decision to admit evidence involves a preliminary question of law, however, such as whether a rule of evidence precludes the admissibility of proffered evidence, we review the preliminary question of law de novo. *Lukity, supra* at 488.

Defendant initially challenges the trial court’s determination that the admissibility of the journal statements does not implicate MRE 404(b) because the statements do not involve defendant’s admission to a completed crime. However, the trial court determined that the statements did not implicate MRE 404(b) because they were not evidence of prior bad acts, but instead represented defendant’s thought processes, intent, and state of mind.

MRE 404(b) precludes the admission of “other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith.” A prior statement is not a prior act that implicates MRE 404(b) because it is a statement rather than a prior bad act. *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988). The trial court properly determined that the journal entries evidenced defendant’s thought processes and state of mind when they were made, as the overwhelming majority of journal entries involve defendant’s internal struggle between his Christian religion and his sexual attraction to and desire for underage boys. Therefore, because the journal entries involve statements and not prior acts, MRE 404(b) is not implicated.

Defendant argues that some of the journal entries refer to acts that could be considered “wrongs” or “bad acts,” implicating MRE 404(b). Defendant relies on two entries in particular. One involves reference to an incident in which defendant had an erection while giving his 11-year-old nephew a foot massage. The other entry refers to defendant’s unrealized plan to engage in sexual activity with a 17-year-old named “Mike” who lived in Chicago. We note, however, that defendant did not isolate these particular journal entries from the remainder of the journal in the trial court. Rather, the prosecutor argued for and defendant argued against the admission of all 100 pages of the journal as a whole. Defendant did not rely on any particular entry in support of his argument that MRE 404(b) was applicable. In fact, once the trial court determined that the journal was admissible, defendant insisted that the entire journal be admitted, citing the rule of completeness. Therefore, to the extent that defendant now argues that certain isolated journal entries referred to incidents that encompassed prior bad acts, he did not articulate this argument in the trial court. In any event, although some journal entries may reference acts that could arguably be considered “wrongs” or “bad acts,” our review of the record shows that the overwhelming majority of the journal entries pertain to defendant’s thoughts regarding his internal struggle between his religion and his attraction to underage boys. Therefore, the trial court did not err by determining that the journal, as a whole, did not implicate MRE 404(b).

Having determined that 404(b) is not applicable, we next address whether the journal entries were properly admitted. Because the statements were admissions of a party opponent, they were not hearsay and were admissible under MRE 801(d)(2). The appropriate analysis is whether the journal entries were relevant and, if so, whether their probative value outweighed their potential prejudicial effect. *Goddard, supra* at 518. “Relevant evidence” is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Even if relevant, evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. MRE 403.

The trial court determined that the journal entries were relevant because they reflected defendant’s state of mind and intent, and tended to undercut his claim that his relationship with CB was innocent. The trial court further determined, and the prosecutor argues, that defendant placed his intent in issue by denying any sexual activity with CB. It is undisputed that sexual penetration with a victim at least 13 but less than 16 years of age is a strict liability offense. MCL 750.520d(1)(a); *People v Apgar*, 264 Mich App 321, 328-329; 690 NW2d 312 (2004). Accordingly, an accused’s criminal intent or lack thereof is irrelevant. *People v Cash*, 419 Mich 230, 239-240; 351 NW2d 822 (1984). It appears from the trial court record, however, that the court determined that the journal entries were probative not of defendant’s intent at the time that

the sexual penetration occurred, but rather, of his intent to befriend CB for the purpose of engaging in a future sexual relationship with him.

Because MCL 750.520d(1)(a) is a strict liability offense, the sole issue for the jury to determine was whether sexual penetration occurred. The journal entries in which defendant repeatedly expresses his sexual attraction to and desire for young boys ranging from ages 12 to 15 are generally probative of whether defendant engaged in sexual penetration with CB. In the journal, defendant frequently indicates his desire to engage in sexual activity with underage boys, although he never admits having done so. The journal entries were made in 1999 and 2000, and CB did not meet defendant until December 2004. Therefore, defendant obviously did not refer to CB in particular in the journal. Thus, at most, the journal entries are probative of defendant's sexual attraction to and desire to engage in sexual activity with underage boys generally.

Assuming, without deciding, that the admission of the journal was erroneous, reversal is not required. After an examination of the entire case, it does not affirmatively appear that any error more probably than not was outcome determinative. *Lukity, supra* at 495-496. CB testified that he met defendant on the Internet when he was 14 years old. They sent instant messages to each other and met face-to-face approximately one or two weeks later. CB testified that their relationship soon progressed into a sexual relationship that involved anal penetration. Moreover, "TH" testified that he engaged in a sexual relationship with defendant, whom he also met on the Internet when he was 14 years old. The circumstances involving defendant's acquaintance with CB and TH are remarkably similar and evidenced defendant's scheme, plan and intent to befriend CB for the specific purpose of engaging in sexual activity with him. As discussed below, TH's testimony was properly admitted during trial. The jury chose to believe CB's testimony rather than defendant's testimony that no sexual relationship existed. Therefore, it does not affirmatively appear more probable than not that the erroneous admission of the journal was outcome determinative. *Id.* at 495-496.

We next address defendant's argument that the introduction of the journal entries violated his right to freedom of thought and expression. Because defendant did not object to the admission of the journal entries on this basis in the trial court, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Defendant cites no authority directly supporting his argument that the admission of the journal entries violated his right to freedom of thought and expression. Moreover the prosecutor did not rely on defendant's *assertion* of a constitutional right as evidence of a crime, but instead utilized evidence of his thoughts and words in part to establish the elements of the crime. In *Wisconsin v Mitchell*, 508 US 476, 489; 113 S Ct 2194; 124 L Ed 2d 436 (1993), the United States Supreme Court recognized the proper evidentiary use of a defendant's speech. The Court stated:

The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence

of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.

Therefore, admission of the journal entries did not violate defendant's First Amendment protections. Defendant has failed to establish plain error in this regard. Further, because the admission of the journal entries did not violate defendant's constitutional protections, defense counsel was not ineffective for failing to raise and preserve this issue during trial and sentencing. Counsel does not render ineffective assistance for failing to raise a meritless argument. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant next argues that the trial court clearly erred by admitting the testimony of TH, who claimed to have had a sexual relationship with defendant beginning when TH was 15 years old. Whether other acts evidence is admissible under MRE 404(b)(1) depends on four factors. First, the evidence must be offered for a permissible purpose, i.e., one other than showing character or a propensity to commit the charged crime. *Knox, supra* at 509. Second, the evidence must be relevant under MRE 402. *Id.* Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403. *Id.* Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105. *Id.*

The trial court properly admitted TH's testimony regarding his sexual relationship with defendant on the basis that the evidence established defendant's state of mind, scheme, plan, and intent to engage in sexual activity with underage boys he met on the Internet. The evidence established that defendant met TH on the Internet when TH was 14 years old. Defendant and TH developed a friendship and regularly conversed online for five or six months before meeting in person. When they finally met in person, they went out to dinner and watched a movie together before engaging in oral penetration in defendant's car. This incident was TH's first sexual experience. Thereafter, they regularly engaged in oral penetration. Similar to TH, defendant met CB on the Internet when CB was 14 years old. Defendant took CB to see a movie the first time they met face-to-face, and defendant and CB kissed in the car afterward. Soon thereafter, defendant developed a sexual relationship with CB that involved anal penetration. Considering the similarities between defendant's relationships with CB and TH, the trial court did not abuse its discretion by admitting TH's testimony to show defendant's intent, plan, or scheme.

Defendant argues that although his relationships with TH and CB were generally similar, there existed no "special quality or circumstance" that rendered TH's testimony admissible under MRE 404(b). "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. . . . [I]t need only exist to support the inference that the defendant employed that plan in committing the charged offense." *People v Sabin (After Remand)*, 463 Mich 43, 65-66; 614 NW2d 888 (2000), quoting *People v Ewoldt*, 7 Cal 4th 380, 403; 867 P2d 757 (1994). Further, in order to be admissible, there need not exist an impermissibly high level of similarity between proffered other acts evidence and the charged acts as long as the evidence is probative of something other than the defendant's character or propensity to commit the charged offense. *Knox, supra* at 511.

Here, TH's testimony tended to show that defendant used the Internet to befriend CB for the purpose of developing a sexual relationship with him, similar to his relationship with TH.

Although Internet communication is pervasive in today's society, as defendant argues, evidence establishing a common plan or scheme need not be distinctive or unusual. *Sabin, supra* at 65-66. Further, although defendant argues that the sexual acts involved with each boy were not similar, there need not exist an impermissibly high level of similarity between the acts. *Knox, supra* at 511. The conduct was sufficiently similar to support the inference that defendant used the Internet as a means of developing sexual relationships with underage boys in accordance with his plan and scheme. *Sabin, supra* at 63. Moreover, it was not necessary that the sexual activity arise out of a single plan encompassing both victims as defendant contends. As our Supreme Court stated, "[l]ogical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot." *Id.* at 64.

Defendant further contends that the prejudicial effect of the evidence far outweighed its probative value. "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 Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). "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). The probative value of the other acts evidence was relevant to the complainant's credibility and to rebut defendant's theory that the allegations were fabricated. *Sabin, supra* at 71; *People v Layher*, 238 Mich App 573, 586; 607 NW2d 91 (1999), *aff'd* on other grounds 464 Mich 756 (2001). Thus, the evidence was not merely marginally probative, but was probative of the ultimate issue, i.e., whether defendant committed the offenses alleged. See *Sabin, supra* at 71. Further, the trial court's limiting instruction directed the jury not to consider the evidence as showing that defendant is a bad person and instructed the jury not to convict defendant based on a determination that he committed other bad conduct. Such an instruction generally protects a defendant's right to a fair trial. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Therefore, the prejudicial effect of the evidence did not substantially outweigh its probative value, and it was properly admitted under MRE 404(b).<sup>1</sup>

Defendant next argues that he is entitled to resentencing because the trial court erroneously departed upward from the sentencing guidelines range.

Under MCL 769.34(3), a trial court may depart from the sentencing guidelines range "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." "Substantial and compelling reasons for departure exist only in exceptional cases." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). A substantial and compelling reason must be objective and verifiable, must "'keenly'" or "'irresistibly'" grab the court's attention, and must be recognized as being "'of considerable worth' in deciding the

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<sup>1</sup> Because the trial court did not abuse its discretion by admitting TH's testimony under MRE 404(b), we need not address the prosecutor's argument that the evidence was also admissible under MCL 768.27a. In any event, we note that the prosecutor did not seek to admit the evidence under MCL 768.27a in the trial court, and the court did not address this statute in determining the admissibility of the evidence.

length of a sentence.” *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003), quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). The “objective and verifiable” requirement “mean[s] 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.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Further, a departure may not be based on characteristics already taken into account in determining the appropriate sentencing guidelines range unless the court determines from facts in the record that the particular characteristic at issue has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Abramski*, *supra* at 74. “In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.” *Smith*, *supra* at 299-300, quoting *Babcock*, *supra* at 262.

In reviewing a departure from the sentencing guidelines range, we review the existence of a particular factor supporting a departure for clear error, the determination whether the factor is objective and verifiable de novo, and whether a reason is substantial and compelling for an abuse of discretion. *Babcock*, *supra* at 264-265. We also review the extent of a departure for an abuse of discretion. *Smith*, *supra* at 300. “A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes.” *Id.*

Here, the trial court departed from the sentencing guidelines range of 51 to 85 months, articulating the following reasons on the record:

1. Offense variable (OV 4) does not adequately account for the psychological injury to CB;
2. OV 10 does not adequately account for defendant’s predatory conduct;
3. Prior record variable 7 does not adequately account for the seriousness, vulgarity, and heinousness of defendant’s conduct;
4. Defendant’s lack of a constructive and productive support system and, by contrast, his support from family and friends who fail to acknowledge his pedophilia, demonstrates his poor prospects for rehabilitation.

Defendant argues that the trial court erroneously departed upward from the sentencing guidelines based on reasons 1 and 4. He also contends that the trial court’s departure was erroneous for other reasons that the trial court did not articulate in support of its decision.

Defendant first argues that the trial court’s determination that his strong family support is counterproductive to rehabilitation is not an objective and verifiable reason supporting an upward departure. As the trial court recognized, strong family support has previously been regarded as a substantial and compelling reason supporting a *downward* departure. See, e.g., *People v Harvey*, 203 Mich App 445, 448-449; 513 NW2d 185 (1994). Here, the trial court opined that defendant’s family support denoted his poor prospects for rehabilitation because his family was in denial of the fact that he is a pedophile. Thus, it appears that the trial court’s reason for departure was based more on defendant’s potential for rehabilitation than on his strong

family support. A trial court's determination that a defendant's prospects for rehabilitation are poor constitutes a substantial and compelling reason for deviating from the sentencing guidelines if that determination is supported by objective and verifiable facts. *People v Daniel*, 462 Mich 1, 7 n 8; 609 NW2d 557 (2000). The trial court relied on numerous letters from defendant's family and friends that were favorable to defendant, but which failed to acknowledge defendant's guilt. Although the letters are objective and verifiable, they do not support the trial court's determination that defendant's prospects for rehabilitation are poor. The fact that defendant's family and friends fail to acknowledge and appreciate his guilt speaks little on his prospects of rehabilitation while in prison. Accordingly, because the trial court's determination regarding defendant's potential for rehabilitation is not supported by objective and verifiable facts, this factor is not substantial and compelling. *Id.*

Defendant also argues that the trial court erred by scoring ten points for OV 4 and departing upward based on CB's need for psychological treatment and his failed adoption. The record reveals that the trial court did not score ten points for OV 4 or depart from the sentencing guidelines based on CB's failed adoption. Thus, defendant's argument in this regard is misplaced. Defendant's contention that CB's psychological treatment should not have been scored under OV 4 or considered as a reason for departing from the guidelines is based on his assertion that CB's psychological injury resulted from CB's participation in the trial rather than from defendant's conduct. Defendant's argument lacks merit.

MCL 777.34(1) allows a trial court to score ten points under OV 4 for "psychological injury" if "[s]erious psychological injury requiring professional treatment occurred to a victim." At the sentencing hearing, CB's foster mother testified that after CB testified at trial, he experienced an emotional, mental, and physical breakdown. He was very anxious, cried constantly, and lost a lot of weight. He was placed in a residential treatment facility and prescribed medication. CB's psychiatrist recommended that CB not attend defendant's sentencing. CB's foster mother testified that "he can't handle anymore of it" and "basically it's come to a head for him[.]"

We reject defendant's assertion that CB's psychological injury resulted from his participation in defendant's trial rather than from defendant's conduct. CB's testimony at trial forced him to recount the abuse and victimization that he suffered at defendant's hands and relive the intimate experiences of his inappropriate relationship with defendant. The fact that CB's testimony and participation in defendant's trial may have resulted in him fully comprehending defendant's conduct does not mean that the conduct did not cause CB's psychological injury. Further, CB's trial testimony showed that he suffered psychological injury as a result of defendant's conduct. CB testified that he became extremely upset when his relationship with defendant ended. CB testified, "every time I met some, I felt like they gave up on me. Everyone just disappearing out of my life that I cared about." CB further testified that following his relationship with defendant, he became really depressed, attempted suicide, and started cutting his wrists. Therefore, the trial court's scoring of ten points for OV 4 was not erroneous. "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Similarly, defendant's argument that the trial court should not have departed upward based on CB's psychological injury fails. The trial court determined that OV 4 failed to adequately account for this factor, stating:

Offense variable four scores an offender for the psychological injury to a victim.

Ten points is the maximum amount awarded. You are scored a ten. The trial evidence in this case from the victim regarding the [e]ffect of his relationship and even the way it was perpetrated on him was extremely compelling and extremely tragic.

There are no points under OV-4 that could adequately address the tremendous damage that you did to that boy.

Upon review of the evidence, we conclude that the trial court did not abuse its discretion in determining that CB's psychological injury constituted a substantial and compelling factor supporting a departure from the sentencing guidelines.

If a trial court articulates multiple reasons supporting a departure, and this Court determines that some of the reasons are substantial and compelling and some are not, this Court must determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons alone. *Babcock, supra* at 260. The trial court articulated four reasons for departing from the sentencing guidelines, two of which defendant challenges in this appeal. Because we have held that one of those reasons is not substantial and compelling, we must determine whether the trial court would have departed to the same extent based on the remaining three reasons.

At sentencing, the trial court recognized that it articulated four reasons for departing from the sentencing guidelines and opined that any one of the four reasons supports a departure. Three out of four of the reasons remain intact. In addition, at sentencing and at the hearing on defendant's motion for resentencing, the trial court opined that the sentence imposed is proportionate to the crime.<sup>2</sup> Thus, although the trial court did not indicate that it would impose "the" same departure (as opposed to "a" departure) if any of its articulated reasons were determined not to constitute a substantial and compelling reason, for the reasons just expressed we believe that the trial court would have done so. Accordingly, we affirm defendant's sentences.<sup>3</sup>

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<sup>2</sup> We also hold that, based upon the evidence, defendant's sentence was proportionate to the seriousness of defendant's conduct and criminal record. *Babcock, supra* at 264.

<sup>3</sup> Further, to the extent that defendant maintains that the trial court upwardly departed based on defendant's status as a homosexual, the record fails to support this contention. The trial court did not rely on defendant's homosexuality as a reason supporting its departure, and, at the hearing on defendant's motion for resentencing, the court specifically stated that its upward departure had nothing to do with defendant's homosexuality. Likewise, the record does not support defendant's contentions that the trial court's sentence was based in part on defendant's admissions in his journal or that the court upwardly departed based on defendant's status as a pedophile.



Affirmed.

/s/ Kurtis T. Wilder

/s/ Mark J. Cavanagh

/s/ Christopher M. Murray