STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2010
v	No. 292876 St. Joseph Circuit Court
STEPHNEE LYNN SMITH, Defendant-Appellant.	LC No. 08-014948-FC

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

Defendant Stephnee Lynn Smith appeals as of right her jury convictions of six counts of criminal sexual conduct in the first degree involving the sexual penetration of a child under the age of 13 (CSC I). See MCL 750.520b(1)(a). The trial court departed from the minimum sentencing recommendation and sentenced defendant to serve concurrent sentences of 30 to 50 years in prison for each conviction. On appeal, defendant argues that, because the prosecutor deprived her of a fair trial by making improper remarks, she is entitled to a new trial. She also argues that the trial court erred in calculating her sentence variables and in departing from the recommended minimum sentence range. Accordingly, even if she is not entitled to a new trial, she contends that she is nevertheless entitled to be resentenced. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant moved in with Dennis Smith in 1999 and married him in 2001. She had three boys by two previous relationships: JF, MS, and DS. At the time of the trial in 2009, JF was 18, MS was 15, and DS was 10. Defendant's convictions stem from MS's allegations that defendant forced him to sexually penetrate her and that she performed fellatio on him at various times. He alleged that she committed these acts at three different residences. The prosecutor charged defendant with having committed two counts of CSC I at each residence—one each for acts of vaginal penetration and one each for acts of fellatio—for a total of six counts of CSC I. At trial, the case essentially came down to a credibility contest between MS and defendant.

MS testified that he was born in March 1994. He said that his mother abused him for about two years at the home where they first lived with Dennis Smith. He said that she would approach him with her clothes off and tell him to take his clothes off. She was always "drunk" or "high" when she approached him—she would never do it when she was "like her normal

self," only when "she was acting weird." He complied because he was afraid she would beat him and she told him that if he told anyone she would beat him. He said she would rub up and down on him and would take her teeth out and suck his penis. Sometimes he would get on top of her and put his penis in her vagina. He said it happed about once every month and that it happened at each of the three residences identified. He indicated that the events at the first home all happened before he was eight-years-old. He stated that it stopped when they took him away.

Lonnie Palmer testified that he was a detective with the St. Joseph County Sheriff's department. Palmer stated that he conducted a forensic interview with MS. After the interview, he drove MS to the various homes where MS had resided and MS identified three homes where he remembered that abuse had occurred. Palmer said he spoke with defendant and she indicated that they resided at the first home from 1999 to 2003, the second home from 2003 to 2004, and at the last of the identified homes from 2004 to 2005. Palmer said that MS told him at the interview that he had already revealed the abuse to three people: Alice Easterday, Dennis Smith, and Rachel Drumm. MS also told him that the abuse happened twice per week.

Diana Kamphues testified that she was a counselor at the elementary school attended by MS and DS. She stated that, in December 2006, she became involved with defendant's children after it was reported that DS had made some inappropriate sexual comments in the cafeteria. She spoke to DS after she called defendant and defendant indicated that she should speak to DS to determine why he would make such remarks. Kamphues said DS informed her that his older brother, JF, had been molesting him.

After DS's revelation, Kamphues had MS, who was in the sixth grade, called down to her office. She asked him about inappropriate touching and he too revealed that JF had touched his private areas and had forced him to touch JF's private areas. Kamphues testified that she asked MS whether anyone else had molested him and he said, "no." She then contacted Alice Easterday about JF.

Alice Easterday testified that she had previously worked for the St. Joseph County Juvenile Court and was the caseworker assigned to JF. She stated that she was in the home working with JF quite a lot and had a cordial relationship with MS. She testified that MS never revealed that he was being sexually abused by his mother.

Donna Claar testified that she knew MS and DS through their paternal grandmother and that she was currently caring for them. She stated that the boys never revealed any sexual abuse to her. She said that, at a conference concerning whether defendant would have visitation with the boys, she referred to the boys' allegations against defendant and defendant did not respond: "She looked down. She sat on her hands and kind of squirmed a little."

Rachel Drumm testified that she was defendant's neighbor. Drumm testified that defendant's boys played with her children nearly every day. She said that the boys were at her home often after defendant broke her leg and that MS never said that he was being abused. Drumm also stated that she never saw defendant use drugs.

Dennis Smith testified that he married defendant in October 2001. He testified that he and defendant had a baby in February 2003, but that the baby died of pneumonia five weeks later. Smith said that, although MS does not like his rules, he thought they had a good relationship. He stated that MS never revealed any abuse to him. Smith also testified that, although defendant drinks on occasion, she never used any other drugs. On cross examination he admitted that they had had marital problems and that they had had fights after defendant began to stay out all night and come home drunk. He stated that the problems occurred after the baby's death. Smith said that defendant had a nervous breakdown in the summer of 2006.

Defendant testified on her own behalf and denied having done any of the things that MS accused her of doing. She stated that MS is lying in order to get out of the house. Defendant stated that she lost her teeth because the boys' father knocked them out. She said the boys went to live with their father for a time after the baby died. She admitted that she used marijuana on a weekly basis, but stated that she never uses it in front of the boys.

In closing, defendant's trial counsel argued that MS was not credible because his story was inconsistent—all the people that he claimed he told testified that he did not actually tell them. He also argued that MS was lying in order to get out of the house. However, the jury ultimately believed MS and found defendant guilty on each of the six counts of CSC I.

This appeal followed.

II. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Defendant first argues that the prosecutor improperly tried to get the jury to have sympathy for MS by referring to him as a kid, a "tiny little boy," a "little guy," and a young child. She also argues that the prosecutor improperly referred to his expert witness by his first name and improperly bolstered MS's credibility by telling the jury that MS's characteristics fit the characteristics of an abused child. This Court reviews de novo claims of prosecutorial misconduct as a constitutional issue. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). To the extent that the claims of prosecutorial misconduct are unpreserved, this court reviews those claims for plain error affecting the defendant's substantial rights. *Id.* Improper conduct by the prosecutor will not warrant relief unless the conduct deprived the defendant of a fair trial. See *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). The defendant bears the burden of demonstrating that the prosecutor engaged in misconduct and that the misconduct deprived him of a fair trial. *Brown*, 279 Mich App at 134.

B. ANALYSIS

Before summarizing the testimony that he expected from MS, the prosecutor warned the jury that MS would not look like a typical fifteen-year-old boy:

> [MS is] going to talk about the chaos, what was going on in the home at the time, I'm assuming. [MS is] going to . . . present as [a] kid that looks like he's probably about 13, and he's 15. He's a tiny, tiny little boy. And until he actually

> gets up there and starts talking with all these people in this courtroom, not sure how the little guy's going to react.

The prosecutor further suggested that MS might not be the most capable witness by stating: "We'll see how he does," "if he can come across today," and "He's ready—at least I think ready to get up there and tell you his story."

Defendant's trial counsel did not object to any of these statements and we do not agree that they amounted to plain error that affected defendant's substantial rights. See *id.* It is common usage to refer to a fifteen-year-old male as a boy or a kid and it is not uncommon to refer to a teenager who is small for his age as a "little guy." On this record, it is also not clear that the prosecutor was incorrect in characterizing MS as particularly small for his age. Moreover, the prosecutor could properly warn the jury about MS's appearance and admit that MS might not be an ideal witness—that is, the prosecutor's statements can be read as an attempt to limit the bias that the jury might have against MS based on his appearance and timid demeanor. Indeed, during his closing statement, the prosecutor reminded the jury that he had warned them that he "didn't know how [MS] was going to act" when he testified and acknowledged that MS put his head down, cried, and seemed to lock up, but argued that the emotions were genuine and indicative of the fact that he was telling the truth. Thus, it is not clear that these opening remarks were made to elicit sympathy. Even if we were to conclude that the remarks were improper, any prejudice was minimal and could readily have been cured by an instruction had defendant's trial counsel objected. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (noting that curative instructions are sufficient to cure most inappropriate prosecutorial statements). Accordingly, these remarks do not warrant a new trial. *Id.* (stating that this Court will not reverse where a curative instruction could have alleviated any prejudice).

We also do not agree that the prosecutor engaged in misconduct warranting relief by improperly using his expert to bolster MS's credibility. In his opening statement, the prosecutor explained that he would be calling Dr. James Henry to testify as an expert on child abuse victims: "He's going to—I guess for lack of [a] better term—give you a little bit of an education about things that—that sex abuse victims might do that to you as a layman might seem odd." Specifically, he noted that Henry would explain why children who have been sexually abused might not divulge the abuse. After summarizing MS's testimony, the prosecutor then asked the jury to pay close attention to Henry's testimony: "Because I think you're going to see some thing[s] that go right along that fit this—these characteristics of a child that's had this happen to him." After the prosecutor finished his arguments, defendant's trial counsel objected to the last statement out of the presence of the jury. Defendant's trial counsel argued that it amounted to improper vouching. The prosecutor retorted that defendant's trial counsel was mischaracterizing his statement and defendant's trial counsel agreed that he might have misspoken, but maintained that the comment was improper. In response, the trial court stated that it planned to give a limiting instruction before Henry's testimony and again at the close of proofs, which it did.

A prosecutor may not imply that he or she has special knowledge that a witness is truthful or otherwise vouch for a witness' credibility. *Bahoda*, 448 Mich at 276. However, although poorly phrased, the prosecutor's statement that he believed that the jury was going to see some things "that fit" the characteristics of a child "that's had this happen" was not an attempt to argue that the jury should believe MS because Henry will testify that MS has the characteristics of a

child that has been sexually abused. Rather, the statement appears to have been an attempt to advise the jury that it will need Henry's testimony in order to better understand and evaluate MS's testimony. That is, the prosecutor suggested that the jury is going to see that MS's reports of abuse involved the kinds of characteristic problems that frequently occur with child victims: he did not divulge the abuse until years after it had begun, he did not divulge it all right away, and he did not have a clear grasp of the dates that specific acts of abuse occurred. Accordingly, we cannot conclude that this remark was made in an attempt to improperly vouch for MS's credibility.

Even if this statement could be said to have been made for an improper purpose, right before Henry testified, the trial court instructed the jury concerning the proper use of expert testimony of this nature:

> [Y]ou're about to hear the testimony of Doctor James Henry and his opinion about the behavior of sexually abused children. You should consider that evidence only for the limited purpose of deciding whether [MS's] acts and words after the alleged crime are consistent with those of other sexually abused children.
>
> The evidence can not be used to show that the crime here charged was committed or that the Defendant committed it. Nor can it be considered as an opinion by Doctor Henry that [MS] is telling the truth.

The trial court repeated this instruction at the close of the proofs and the prosecutor referred to the limited use of this testimony during his rebuttal. These instructions cured any minimal prejudice that may have occurred as a result of the ambiguous nature of the prosecutor's comment in his opening statements. *Unger*, 278 Mich App at 235.

We also do not agree that the prosecutor improperly used Henry's testimony in his closing remarks. Defendant does not cite to any improper remarks during the prosecutor's closing statement other than the fact that the prosecutor referred to Henry by his first name; rather, she merely states that "Dr. Henry was referenced frequently" and the prosecutor "spent the majority of his argument shuffling Henry's testimony into the alleged facts of this case." Defendant's failure to explain how the prosecutor's comments were improper in light of the record and relevant authority constitutes the abandonment of this claim of error on appeal. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

Moreover, after reviewing the prosecutor's closing statements, we conclude that the prosecutor did not improperly use Henry's testimony. Throughout his closing remarks, the prosecutor used Henry's testimony to shed light on apparent inconsistencies and problems with MS's testimony. He noted that MS testified that he did not report the abuse until years after it had begun and that this testimony was consistent with Henry's testimony about the fear and guilt that keeps children from reporting abuse. He also admitted that MS's testimony showed some level of confusion about the details of the abuse, but suggested that that too was consistent with what Henry stated about child victims. This use of Henry's testimony was proper. See *People v Peterson*, 450 Mich 349, 373; 537 NW2d 857 (1995) ("An expert may testify regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim *or* to

rebut an attack on the victim's credibility."). Likewise, we do not agree that the prosecutor's use of Henry's first name somehow prejudiced defendant; there is simply no evidence that the jury would not evaluate Henry's testimony fairly because the prosecutor apparently felt comfortable using his first name.

There were no acts of prosecutorial misconduct that warrant relief.

III. SENTENCING ISSUES

A. STANDARDS OF REVIEW

Defendant next argues that the trial court erred in calculating her sentence. Specifically, she argues that the trial court erred in scoring offense variable (OV) 10 and improperly departed from the recommended minimum sentencing range without a substantial and compelling reason to do so. This Court reviews de novo the proper interpretation of the sentencing guidelines. *People v Bemer*, 286 Mich App 26, 31; 777 NW2d 464 (2009). This Court reviews a trial court's factual findings at sentencing for clear error. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). With regard to a trial court's decision to depart from the guidelines, this Court reviews de novo whether a particular factor for departure is objective and verifiable, and reviews the trial court's determination that a particular factor constitutes a substantial and compelling reason for departure for an abuse of discretion. *Id.*

B. OFFENSE VARIABLE 10

When sentencing a defendant for an offense against a person, the trial court must sentence OV-10 on the basis of the defendant's exploitation of a vulnerable victim. See MCL 777.40. At sentencing, defendant's trial counsel argued that defendant's conduct did not amount to predatory conduct and, for that reason, OV-10 should not have been scored at 15 points. Instead, he argued that OV-10 should be scored at 10 points on the basis of defendant's relationship to MS.

If the defendant engaged in predatory conduct—that is, preoffense conduct directed at the victim for the primary purpose of victimization—then the trial court must score OV-10 at 15 points. MCL 777.40(1)(a); MCL 777.40(3)(a). If, however, there is no predatory conduct, but the defendant "exploited a victim's . . . youth or agedness, or a domestic relationship, or the offender abused his or her authority status," the trial court must score OV-10 at 10 points. MCL 777.40(1)(b). In defendant's presentence report, the presentence investigator noted that MS stated that defendant only engaged him in sexual contact when his siblings and her husband were not at home and usually when he had just exited from the shower. The trial court determined that this was preoffense conduct directed at MS for the purpose of victimizing him.

In construing MCL 777.40, our Supreme Court has held that the offender's conduct must exploit a vulnerable victim. *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008). Further, to meet the definition of predatory conduct under MCL 777.40(3)(a), the defendant must engage in conduct before the offense that is directed at a potential victim for the primary purpose of making the potential victim an actual victim. *Id.* at 160-161.

In this case, the evidence clearly established that MS was a vulnerable victim; he was under eight-years-old when the abuse began, he was in a domestic relationship with defendant, he was significantly smaller than defendant in both size and strength, and defendant was in position of authority over him. See *id.* (listing the factors that are relevant for determining whether a victim was vulnerable). There is also record evidence that defendant ordered MS to engage in the sexual activity and that he complied out of fear; thus, it is evident that defendant exploited her position of authority and strength over her son in order to effect her assaults. Hence, the only question is whether she engaged in preoffense conduct directed at victimizing MS. See MCL 777.40(3)(a); *Cannon*, 481 Mich at 161.

Our Supreme Court has explained that merely waiting for a victim at a particular location does not amount to preoffense conduct that is directed at a specific victim. *Cannon*, 481 Mich at 160 ("A lion that waits near a watering hole hoping that a herd of antelope will come to drink is not engaging in conduct directed at a victim.") However, the act of identifying a weak target and then stalking the target is preoffense conduct directed at a victim. *Id.* Further, the preoffense conduct must be directed at making the target a victim. *Id.* at 161. Here, there is evidence that, in addition to taking advantage of her authority over MS and her difference in size, defendant specifically waited for the other members of her household to leave before assaulting MS. Indeed, there was evidence that she would confront him in the bedroom or wait until he was exiting the shower. This conduct is not the same as merely awaiting for a random victim to happen by; defendant had ready access to a vulnerable victim, but had to wait until the victim was in a position where she would have the opportunity to safely assault him. Likewise, once the conditions were ripe for her assault, the evidence showed that she would corner him in a location that was suitable for her assault. This conduct is more akin to stalking a potential victim that the stalker recognizes as vulnerable, than to awaiting the arrival of a random vulnerable victim. Further, there is evidence that defendant would disrobe, approach MS, and then order him to disrobe. Accordingly, there was record evidence that defendant engaged in preoffense conduct—waiting until the other members of her household left, disrobing, and positioning herself in a place to confront MS—and that the conduct was directed at MS in order to make him a victim.

The trial court did not err in scoring OV-10 at 15 points.

B. SENTENCING DEPARTURE

Defendant also argues that the trial court improperly departed from the recommended minimum sentence. Normally, a trial court must impose a minimum sentence that is within the range recommended under the sentencing guidelines. MCL 769.34(2); *Young*, 276 Mich App at 448. However, a trial court may depart from the recommended sentence "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). When determining whether to depart, a substantial and compelling reason may not be based on a factor that was taken into consideration in the scoring of the sentencing variables unless the trial court determines that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b).

At sentencing, the trial court recognized that the guidelines covered the factors involved in the offense, but determined that the guidelines did not adequately reflect the severity of the offenses:

> The Defendant maxes out on her points by matching only, for example, in OV-13, there only has to be three other penetrations in a five year period. Here, the jury found the Defendant guilty of the six violations charged, but there was testimony that far more occurred. So does that adequately reflect the severity of this case?
>
> Predatory conduct was found, but I believe this is the only case I've ever had with a mother and son allegation. I don't know—I'm not any expert. I don't know if it's better to be a victim of a stranger or a victim of your mother.
>
> I can say that I would think . . . that it's far more difficult to accept that your mother would do this to you and deal with that than a stranger. You might be able to reconcile a stranger over years, but your mother, I doubt it. I don't think that the guidelines adequately reflect that.

A substantial and compelling reason for departing from the recommended sentence is an objective and verifiable reason that keenly or irresistibly grabs one's attention, is of considerable worth in deciding the length of a sentence and exists only in exceptional cases. *Young*, 276 Mich App at 449-450. Further, when evaluating whether a characteristic that has been covered by the sentencing guidelines was given inadequate or disproportionate weight, the trial court must normally first determine how the characteristic affected the recommended sentencing range and then state how that characteristic should have affected the sentencing range. *Id.* at 451.

We agree that the sentencing guidelines did not adequately cover the number and extent of defendant's acts of abuse against MS. Under MCL 777.43(1)(a), the trial court had to score OV-13 at 50 points, which is the maximum number of points for that variable, if the defendant sexually penetrated a person less than 13 years of age three or more times. Here, there was evidence that defendant sexually penetrated her son far more than three times in the five year period including the date of the offense. We also agree that the sentencing guidelines do not adequately reflect the gravity of the harm occasioned when a parent sexually abuses a child. Although the sentencing variables reflect psychological harm to a victim, see MCL 777.34, the variables do not differentiate between psychological harms caused by a parent or that arise from sexual abuse as opposed to some other form of abuse. We also agree that the relationship between defendant and MS and the fact that further uncharged penetrations occurred over a span of years are objective and verifiable facts. And these characteristics keenly and irresistibly grab one's attention, are of considerable worth in determining a sentence, and appear in only

exceptional cases. *Young*, 276 Mich App at 449-450. Therefore, the trial court did not abuse its discretion when it determined that these were substantial and compelling reasons to depart.[1]

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello

[1] On review of the trial court's remarks at sentencing, we believe that it is clear that the trial court would have departed to the same extent on these bases alone. Therefore, we decline to address whether the alternative reasons for departure adopted by the trial court from the prosecution were also valid bases for departure. *People v Babcock*, 469 Mich 247, 260; 666 NW2d 231 (2003).