

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANE NICHOLAS GUTIERREZ,

Defendant-Appellant.

UNPUBLISHED

July 21, 2011

No. 297554

Muskegon Circuit Court

LC No. 08-056190-FC

Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a), and larceny from a person, MCL 750.357. Defendant was sentenced to 9 to 15 years' imprisonment for second-degree CSC and 7 months to 10 years' imprisonment for larceny from a person with credit for 34 days. The sentences are to run concurrently. We affirm.

Defendant argues that offense variables 4, 8, and 13 were not properly scored. We review to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Issues of statutory interpretation are reviewed de novo. *Id.* Defendant specifically argues that offense variable (OV) 4, MCL 777.34, should have been scored at zero instead of ten points because there was no proof that the victim sustained any psychological injury, let alone a serious psychological injury. The record reflects that the victim experienced recurring nightmares and problems sleeping and that she was afraid to walk down the hallway or any place alone. Moreover, the victim clearly testified that she was scared during her encounter with defendant. Thus, it was reasonable to conclude that the victim suffered a serious psychological injury that may require professional treatment. MCL 777.34(1)(a), (2); *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). There was no abuse of discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant also argues that OV 8, MCL 777.38(1)(a), should have been scored at zero instead of 15 points because there was no evidence at trial that defendant took the victim upstairs to his bedroom or that his bedroom was a place of greater danger. In this case, the presentence investigation report reflected that defendant indicated to the probation agent that defendant carried the victim upstairs to his bedroom. Information contained in a presentence report may be

used when sentencing a defendant. *People v Potrafka*, 140 Mich App 749, 751; 366 NW2d 35 (1985). Thus, the trial court could consider the fact that defendant told the probation agent that he carried the victim upstairs to his bedroom when considering the offense variables. *Id.* Moreover, there was evidence to support that the victim's being alone with defendant in his bedroom was a place of greater danger. See *People v Hack*, 219 Mich App 299, 313; 556 NW2d 187 (1996); *People v Piotrowski*, 211 Mich App 527, 529; 536 NW2d 293 (1995). Again, there was no abuse of discretion. *Babcock*, 469 Mich at 269.

Defendant next argues that there were no charges or convictions for defendant's conduct associated with an incident that occurred in 2005 with a five-year-old girl; thus, considering that incident when scoring OV 13, MCL 777.43, was not appropriate. Based on the language of the statute, crimes that were not charged or did not result in a conviction can be counted for OV 13. MCL 777.43(2)(a); *People v Bemar*, 286 Mich App 26, 34; 777 NW2d 464 (2009). Thus, the trial court did not abuse its discretion by scoring 25 points for OV 13. *Babcock*, 469 Mich at 269.

Defendant next argues that the trial court's departure from the sentencing guidelines was improper. Appellate review of a sentence imposed under the guidelines is limited to determining whether the sentence was imposed within the appropriate guidelines range and, if not, whether the departure from the range was based upon a substantial and compelling reason as articulated by the trial court. *Babcock*, 469 Mich at 272-273. In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the amount of the departure is reviewed for an abuse of discretion. *Id.* at 264-265; *People v Uphaus (On Remand)*, 278 Mich App 174; 748 NW2d 899 (2008); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The interpretation and application of the statutory sentencing guidelines are legal questions subject to de novo review. *Babcock*, 469 Mich at 253; *People v Gullett*, 277 Mich App 214, 217; 744 NW2d 200 (2007).

Defendant argues that the trial court improperly considered as factors in its departure that the victim should not have to go through this again and the safety of the public. Defendant argues these were subjective opinions of the trial court, which were not verifiable and thus should not have been considered. Moreover, defendant argues that the safety of the public is already factored into the sentencing guidelines and thus does not warrant departure from the sentencing guidelines. We conclude that, although the trial court mentioned its general concern that the victim should not have to go through this again and the safety of the public, it did not specifically base its departure on them.

The trial court based its departure on three things: 1) a crime not scored under the guidelines; 2) probation had not worked; and 3) a security plan that was in place had not stopped defendant or ensured public safety. With respect to the fact that probation was tried before and did not work, this was not a subjective opinion of the trial court; rather, it was verifiable and properly considered when departing from the sentencing guidelines. Reformation or rehabilitation is a consideration that is necessary when fashioning an appropriate sentence. *People v Daniel*, 462 Mich 1, 7 n 8; 609 NW2d 557 (2000). Therefore, objective and verifiable

factors that go into the determination of whether rehabilitation is viable may be considered in determining whether substantial and compelling reasons to depart from the guidelines exist. *Id.* Here, the fact that probation was tried before and did not work was an objective and verifiable factor in and of itself. *Id.* In addition, when noting that this was a reason for upwardly departing from the guidelines, the trial court specifically mentioned two instances where defendant had violated his probation. These instances were also objective and verifiable factors that supported the trial court's conclusion that probation has not worked. *Id.* Further, the fact that probation was tried before and did not work keenly attracted the trial court's attention and was of considerable worth. *Babcock*, 469 Mich at 257-258. Accordingly, the fact that probation was tried before and did not work was a factor meriting departure. *Id.*

In addition, the trial court observed that a previously implemented security plan had not worked. Moreover, the trial court noted that there was also another incident in 2005 involving a five-year-old girl, which was an uncharged crime that was not considered when scoring OV 13. OV 13 was scored at its maximum for purposes of this case as soon as three crimes against a person were accumulated within a five-year period. MCL 777.43(1). Both of these reasons, the failed security plan and fourth crime involving inappropriate sexual conduct, were objective and verifiable factors. *Id.* Moreover, they keenly attracted the court's attention, were of considerable worth, and warranted an upward departure from the guidelines. *Id.* We note that defendant argues in his statement of questions presented that two uncharged crimes should not have been considered when departing from the guidelines. Because defendant has not explained or rationalized his position with respect to two instances of uncharged crimes, we consider this issue abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (An appellant is required to cite authority in support of propositions). Based on the foregoing, we conclude that although the safety of the public was not in and of itself an objective and verifiable factor, the goals of sentencing as a matter of course include the protection of society, and the trial court did not abuse its discretion when it departed from the guidelines based on objective and verifiable reasons that related back to the goal of protection of society. See *People v Solmonson*, 261 Mich App 657, 669-672; 683 NW2d 761 (2004).

The trial court also articulated as a reason for departure that there was a common plan or scheme involving little girls. Defendant argues that this was a subjective opinion of the trial court, which was not verifiable. Further, defendant argues that whether there was a common plan or scheme involving little girls was considered by the jury when hearing the MRE 404(b) evidence of alleged prior acts and in the scoring for defendant's convictions. Thus, whether there was a common plan or scheme should not have been considered when departing from the guidelines. We conclude that the facts surrounding defendant's common plan or scheme theory were objective and verifiable. *Babcock*, 469 Mich at 257-258. In addition, although the jury considered the incidents involving little girls, which occurred in 2003 and 2005, because such evidence was entered pursuant to MRE 404(b), that evidence was merely considered by the jury in determining whether defendant was guilty of second-degree CSC and thus did not relate to the sentencing part of the proceedings. Further, with regard to defendant's argument that the common plan or scheme evidence was already included when scoring defendant's convictions, it is true that the 2003 incident was scored when considering defendant's previous convictions. However, defendant does not cite any law which reflects that common plan or scheme evidence cannot be considered when determining whether there should be a departure from the guidelines, even if one of the convictions that supported the existence of defendant's scheme was scored.

See *Kelly*, 231 Mich App at 640-641. And, we conclude that although the 2003 incident was scored when considering defendant's previous convictions, the fact that defendant's conduct involved a pattern of targeting little girls and sexually assaulting them when they were near family members was not taken into consideration when scoring defendant's convictions. Accordingly, we conclude that the trial court did not abuse its discretion when it considered defendant's common plan or scheme when upwardly departing from the guidelines. *Babcock*, 469 Mich at 269.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Donald S. Owens