

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
July 19, 2011

v

JAMES AUGUSTUS DUBOIS, JR.,

Defendant-Appellant.

No. 298745
Crawford Circuit Court
LC Nos. 09-2878-FC
09-2894-FC

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of ten counts of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1) (multiple variables) concerning defendant's sexual abuse of his stepdaughters that occurred over a number of years.¹ The sole issue on appeal relates to defendant's sentence of concurrent prison terms of 40 to 60 years' on each count which constituted an upward departure from the applicable judicial sentencing guidelines. Because the trial court's upward departure from the recommended judicial sentencing guidelines range was based on substantial evidence in support of its decision and the sentence is proportionate to the offenses and the offender, defendant is not entitled to resentencing, and we affirm.

I. MAC

MAC, who was born on April 15, 1984, testified she had known defendant since she was two years old. Defendant was her stepfather and she called him "dad." MAC testified that the sexual abuse first occurred when she was ten, before her family moved to Crawford County. MAC testified that she remembered only one incident occurring before her family moved to Crawford County shortly before her eleventh birthday. She stated that defendant first touched her vagina with his finger and his penis, but there was no penetration. MAC testified that when the sexual abuse began, defendant told her that if she told anyone he would get into trouble and go to jail. Later, defendant told MAC that he would kill her family if she told anyone.

¹ Defendant was tried in two separate jury trials.

MAC testified that defendant resumed the sexual abuse when she was 11 years old and that the incidents occurred on many occasions. When she was 12 years old the sexual abuse continued and occurred on nearly a daily basis. Defendant would have sex with MAC when the rest of the family was asleep or not home. MAC recalled that on most occasions defendant penetrated her vagina with his penis and sometimes oral sex occurred. MAC testified that once defendant brought the family dog into the bedroom and had it lick her vagina and then defendant inserted his penis into her vagina.

While each of the counts of CSC I were based on the aggravating factor of the victim being under the age 13, the prosecutor also introduced evidence of sexual abuse against MAC that occurred after she turned 13. MAC testified that when she was 13 or 14 years old, defendant began to bribe her with marijuana and cigarettes to stay awake in order for him to sexually assault her. At times defendant would insert a Popsicle into MAC's vagina and then perform oral sex on her. Defendant also provided sex toys and told MAC to use them on herself before he sexually assaulted her.

MAC testified that the last time defendant sexually assaulted her was in June 2001. MAC stated that defendant threatened to kill himself when she began a relationship with the man who eventually became her husband. When she indicated that she did not care if defendant killed himself, defendant finally discontinued the sexual abuse. According to MAC, defendant routinely sat outside and watched the home she shared with her now husband, and defendant approached her at work. MAC testified that between the ages of 11 and 16 she did not know that anything was wrong with the relationship she had with defendant, continued to refer to him as "dad," and he walked her down the aisle when she married at age 17.

At trial, Christopher Grunow, a former friend of defendant for many years, recalled that defendant was almost always in MAC's company when she was 13 to 14 years old. Grunow also testified that in Summer 2001 defendant confided in him that he was falling in love with his daughter, which Grunow understood meant MAC. Grunow testified that his friendship with defendant ended after defendant told him that the best sex he had ever had was with MAC.

Following a three day trial, the jury convicted defendant on all counts. The trial court's sentencing of defendant for these convictions was delayed until the conclusion of the separate trial concerning MAC's younger sister, MIC.

II. MIC

MIC, MAC's younger sister, was born on January 3, 1986. MIC testified that the first time defendant touched her sexually occurred prior to moving to Crawford County, and that she was under 10 years old at the time. The next time defendant sexually assaulted MIC she was 12 years old. At that time defendant digitally penetrated her vagina and then inserted his penis into her vagina. MIC testified that three weeks later she got into trouble with a friend. For her punishment, defendant gave her the choice of him spanking her 20 times with a belt on her bare bottom or him sexually assaulting her which she referred to as "mak[ing] love to him." MIC initially accepted the spanking, but stated that after being struck ten times it hurt so badly she told him to stop and then defendant sexually assaulted her instead. MIC confirmed that she was still 12 when this occurred. MIC testified that defendant told her that if she told anyone about

the sexual assaults, she would be taken away from her mother and he would go to jail, and he also told her that her family would “kill themselves” if they found out.

MIC testified that the sexual assaults continued. She recalled a particular incident that occurred when she was 13 when she accompanied defendant to his pool league. MIC stated that defendant pulled his vehicle down a side trail on the way home and forced her to perform oral sex and then had sexual intercourse with her. MIC reported that the abuse continued and happened every few weeks. She stated that defendant provided sex toys and forced her to use them. Defendant also videotaped MIC. Defendant bribed MIC with cigarettes in exchange for him having sex with her. MIC testified that defendant would tell her that he was in love with her.

MIC testified that she told her mother that defendant was sexually abusing her when she was 15 years old, but that her mother did not believe her after her mother confronted defendant and he denied it. MIC’s mother confirmed this testimony. MIC testified that the last incident of sexual abuse that occurred in Crawford County was when she was 15 years old. She recounted that defendant had promised to give MAC and MIC a Christmas present they had asked for if they agreed to allow him to do what he wanted. MIC testified that defendant proceeded to digitally penetrate the sisters as they lay side by side next to the Christmas tree. MIC acknowledged that MAC did not recall that particular incident. Defendant denied the incident.

After protective services discovered that defendant and the victims’ mother moved to Arizona and left MIC in Michigan, MIC moved to Arizona. MIC was 16 years old. According to MIC, defendant sexually assaulted her only one week later. Approximately two weeks after MIC moved to Arizona, her mother returned to Michigan leaving MIC with defendant. MIC testified that the sexual assaults then became “nonstop” and defendant treated her more like a girlfriend. According to MIC, defendant wanted to marry her and even obtained a marriage license at one point. The marriage did not occur, but MIC did become pregnant with defendant’s child when she was 21 years old. Throughout her pregnancy, MIC continued to refer to defendant as “dad,” and still does today. MIC testified that she signed her infant daughter over to her mother because she had a difficult time looking at the child knowing that she was defendant’s offspring.

Defendant denied having any sexual contact with either MAC or MIC while living in Crawford County. Defendant asserted that he began dating MIC in late 2004, when she was 18 years old and admitted talking about marriage and obtaining a marriage license. Defendant stated that getting married was MIC’s idea and that he did not really want to marry her. Defendant testified that they began to have problems over the marriage issue and he “moved her out.” Though, he agreed to let MIC move back in, but at that point their relationship could be described as only “friends with benefits.”

Following a four day trial, the jury convicted defendant on all counts. A sentencing hearing followed. The trial court sentenced defendant to ten concurrent prison terms of 40 to 60 years’ imprisonment.

Defendant now appeals as of right.

III. Sentencing

On appeal, defendant argues the sentence imposed was not based on substantial and compelling factors that were objectively verifiable. He also argues the trial court failed to justify the extent of the departure. Because defendant's crimes occurred prior to January 1, 1999, the former judicial sentencing guidelines apply. MCL 769.34. *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).² We review a sentence imposed under the former judicial sentencing guidelines for an abuse of discretion. See *People v Milbourn*, 435 Mich 630, 634; 461 NW2d 1 (1990). When reviewing a trial court's sentencing decision under the judicial guidelines "a given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636. The key test of proportionality is not whether the sentence departs from or adheres to the recommended ranges, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). We will uphold scoring decisions under the judicial sentencing guidelines if evidence exists in the record to support the score. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993) abrogated on other grounds by *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997). "[A] deviation from the guidelines range may be based on factors already considered in the guidelines calculations but such a deviation must be made with caution." *People v Rockey*, 237 Mich App 74, 79; 601 NW2d 887 (1999). If a sentence falls outside the guidelines range, the sentencing court must explain the reason for its departure. *People v Kowalski*, 236 Mich App 470, 473; 601 NW2d 122 (1999).

At the sentencing hearing, the trial court specifically described both of the underlying criminal cases as "exceptional" and concluded that a departure from the recommended guidelines range was warranted. The trial court further stated, "The crimes here are so egregious and off the charts that I believe a departure is still justified." The trial court made the following statements:

In your case, Mr. DuBois, everything else is a weakness. You've been found guilty of ten counts of CSC 1st degree. They involve repeated acts of sexual abuse, child molestation, sexual intercourse, acts of bestiality, sadism and sodomy and cruelty over several years with two separate stepdaughters, who you began abusing when they were under the age of 13. Those are all negative factors. This is not a one single isolate[d] incidence of CSC where the mother's boyfriend as we so often run into in these CSC's or stepfather or whatever gets drunk and has a single unintended incident. These were premeditated, preplanned, repeated, continuous, chronic, and they were done, as I said, with

² During sentencing, the trial court recognized that the guidelines were not mandatory in the instant case, but nevertheless chose to phrase its discussion of the reasons for defendant's sentences in light of the more stringent requirements under the current legislative guidelines. We address the issue in light of the sentencing guidelines in effect at the time of the charged crimes.

premeditation just to satisfy your perversions and your depravity – depravity, excuse me.

So this is a case that does contain facts that keenly and irresistibly grab the attention of the Court, and it has to be one of the top few CSC molestation type cases that I've seen in many years, both as a prosecutor and former defense lawyer and judge, so this case deserves the departure from these guidelines, because this is not a normal case. Now, of course, there's no such thing as a normal CSC. Any kind of molestation of young girls is abnormal, but this is so, as I said, rife with so many acts of molesting of these young girls, his own stepdaughters, that it truly does merit a departure.

And I think the trial testimony alone supports a departure as does the facts of the PSI, so the reasons for departure are found actually in the testimony of the girls. As [the prosecutor] noted at one point in one of his closing arguments, it almost is beyond belief what happened to these girls. And I understand that he's received points scored for the different penetrations, but those don't accurately capture or reflect the reality of what you did, Mr. DuBois. They don't capture it at all. As I said, your acts of molestation were just too many, too frequent, too perverse, and to state it another way, simply off the charts, off the guideline charts.

Defendant's convictions were based on his prolonged, serial, sexual abuse of his two young step-daughters. The trial court based its decision to depart on the extent and duration of the abuse, the close relationship of defendant to the victims, and the shocking details of the abuse. Each victim testified that defendant began sexually molesting her when she was only ten or 11 years old. The sexual molestation escalated to acts of oral and vaginal penetration when the victims were as young as 12 years old. In his victimization of both of his step-daughters, defendant's modus operandi was the same. The sexual abuse was incessant. MIC testified that defendant sexually assaulted her on a daily basis for over three years beginning when she was 12 and a half years old. Over time, not only did the frequency of the sexual assaults increase, but so did defendant's perverse and sadistic behavior. Both victims testified to defendant forcing them to use sex toys on themselves and MAC testified that defendant even penetrated her with a food item. MAC was also forced to endure a horrific act of bestiality with her own family dog. MIC testified that defendant videotaped her.

During the years of constant sexual assaults, defendant also manipulated the victims. Both victims thought of defendant as a father figure and even called him "dad." Defendant took advantage of his special relationship with the victims as their stepfather to sexually and psychologically exploit the victims. Defendant bribed the victims with cigarettes, marijuana, and gifts in exchange for sex. Defendant also threatened the victims if they told anyone about the abuse. Even more unbelievably, defendant somehow made both victims believe that prolonged sexual abuse by their stepfather was "normal." Ultimately, defendant parlayed his years of sexual abuse and manipulation of MIC into a relationship where the two considered marrying and fathered a daughter with MIC.

These are objective and verifiable facts established by the testimony of the victims at trial. These objective and verifiable facts are horrific, appalling, and disgusting. Defendant's behavior was shocking and highly unusual even for a case concerning criminal sexual conduct involving child victims. In the language of review of the current guidelines these facts "keenly and irresistibly" grab our attention and sicken us. We are aware that to some extent some of the circumstances of the case, including the fact that multiple penetrations occurred, were considered in the guidelines. But under these particularly horrific circumstances where defendant was both ruthless and relentless in the sexual abuse of his two stepdaughters, the trial court's analysis that the scoring did not adequately account for defendant's behavior is more than compelling. We conclude that the reasons articulated by the trial court for departure supported its decision.

Defendant also identifies an additional basis for the trial court's departure, namely fear of future recidivism. Defendant argues that this would not be a proper basis for departure in the instant case because such determination was subjective and unverifiable. Defendant's argument is without merit. In *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001), this Court upheld the trial court's decision to depart from the legislative guidelines in part due to finding that the need to protect other children was not adequately considered in the guidelines. Inherent to this reasoning is the conclusion that defendant would be likely to reoffend if released. The record is clear that even as defendant victimized one stepdaughter, MAC, he unrelentingly moved on to his younger stepdaughter and began sexually assaulting her. Defendant exploited his close relationship with the victims for his own repulsive sexual appetite. Defendant even bragged to a friend that the best sex he ever had was with his own stepdaughter. Under the circumstances presented in this case and especially where defendant has a young granddaughter, this was a proper consideration in deciding to depart from the guidelines recommendation.

Defendant also argues that his sentence must be set aside because the trial court failed to justify the extent of the departure. Under the former guidelines, the requirement that the trial court indicate why it chose a particular sentence when imposing an upward departure, see *People v Smith*, 482 Mich 292, 311, 318; 754 NW2d 284 (2008), is arguably inapplicable. Nevertheless, our review of the record demonstrates that the trial court fulfilled this requirement. The trial court explained its sentence as follows:

It's what you deserve. It's what you earned. And it's what ought to be done here common sense wise. The evidence of guilt was overwhelming, and I just want to make sure—I'm not going to be around, I know that. I'm not going to be around, Mr. DuBois, but I want to make sure you don't get out [until] you're 80 plus years old. That's the reason for the sentence.

It's proportional. It's proportional to the seriousness of the offense. There's actually no redeeming qualities in you, and these girls need to have peace of mind that you're not going to be coming after them, their kids, their grandkids or any other girls, any other young girls. So that's the sentence of the [c]ourt.

A trial court has "broad discretion, within limits fixed by law, to tailor a sentence to the circumstances of each case and each offender, in an effort to balance society's need for

protection against its interest in rehabilitation of the offender.” *People v Sabin (After Second Remand)*, 242 Mich App 656, 661; 620 NW2d 219 (2000). The trial court’s statements during sentencing plainly indicate that it was exercising this discretion and considered the circumstances of the offense, while balancing the opposing interests of community safety and defendant’s rehabilitation. On the continuum of sexual abuse cases involving children, we are more than certain that defendant’s extended, incessant abuse of both of his own stepdaughters, the perverse manner of the abuse even involving bestiality, as well as the psychological exploitation of the girls in order for defendant to fulfill his own sexual desires without any regard for the health and welfare of his own stepdaughters, justified the sentence imposed by the trial court as to offense and offender characteristics. That defendant did not have a prior criminal record is of little moment when compared to the circumstances of sexual abuse in this case. Defendant’s sentence is proportionate.

In light of our conclusion that the sentence imposed was not an abuse of discretion, defendant is not entitled to resentencing. We therefore decline to address to defendant’s request that the matter be remanded before a different judge.

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Pat M. Donofrio