STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2012
v	No. 301435 Monroe Circuit Court
RICHARD ALAN NEFF, Defendant-Appellant.	LC No. 10-038319-FC

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b (multiple variables), one count of second-degree CSC, MCL 750.520c (multiple variables), and one count of accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a. Defendant was sentenced to 15 to 25 years' imprisonment for each count of first-degree CSC, 4 to 15 years' imprisonment for second-degree CSC, and one to four years' imprisonment for accosting, enticing, or soliciting a child for immoral purposes. Defendant appeals by right. We affirm.

I. SENTENCING

Defendant first argues that the trial court erred in departing upward from the sentencing guidelines range. We disagree.

A trial court may depart from the sentencing guidelines range if it finds a "substantial and compelling reason for the departure and states on the record the reasons for departure." *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003), quoting MCL 769.34(3). A court's stated reasons for the departure must be "objective and verifiable. . . . of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). A trial court's basis for a departure is objective and verifiable if it is based upon "actions or occurrences which are external to the mind of the judge . . . [that are] capable of being confirmed." *People v Fields*, 448 Mich 58, 66; 528 NW2d 176 (1995) (internal citations omitted). Further, a departure from the sentencing guidelines may not be based on an offense characteristic or offender characteristic already considered in calculating the guidelines 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." *Smith*, 482 Mich at 300, quoting MCL 769.34(3)(b).

This Court reviews for clear error the trial court's reasons for an upward departure from the sentencing guidelines range, but reviews de novo whether the reasons are objective and verifiable. *People v Petri*, 279 Mich App 407, 420-421; 760 NW2d 882 (2008). "Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure." *Smith*, 482 Mich 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 upward from the guidelines range, sentencing defendant to 15 to 25 years' imprisonment for each count of first-degree CSC. In its sentencing memorandum, the trial court cited four reasons for its departure: (1) defendant's actions in preying upon the victim through significant steps to pursue her to engage in sexual acts, (2) defendant's defiance of the victim's parents who sought to cut off communication between the two, (3) defendant's contribution to the victim's delinquency, and finally (4) the violation of trust of the victim's family by performing such criminal acts at her home and in school. These reasons were sufficient to justify the trial court's upward departure.

The trial court's first three reasons for departing upward are arguably covered through Offense Variable 10 (OV 10), which addresses exploitation of a vulnerable victim. MCL 777.40. However, the trial court found that the sentencing guidelines did not give adequate weight to defendant's relentless pursuit of the victim in light of the victim's parents' mandate that defendant not contact the victim. In assessing OV 10, courts assess 15 points if predatory conduct was involved. MCL 777.40(1)(a). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a).

Defendant was assessed 15 points for OV 10. The trial court determined that even if the sentencing guidelines considered defendant's pursuit of the victim, that behavior was not given appropriate weight. OV 10 makes no mention of parental involvement or violation of parental authority. Additionally, defendant's pursuit of the victim is objective and verifiable, as it existed outside of the mind of the judge, and was capable of being confirmed. Indeed, here, defendant's pursuit of the victim was confirmed: the trial court emphasized that defendant violated the victim's parents' mandate not to have contact with her and the sheer quantity of text messages defendant sent to the victim.[1] Accordingly, although OV 10 addresses predatory conduct, the trial court's finding that the particular circumstances of defendant's pursuit of the victim was inadequately represented by the scoring of OV 10 is not outside the range of principled outcomes.

[1] Defendant and the victim exchanged over 150 text messages within a 72 hour period covering April 19, 20, and 22, 2010.

Defendant argues that the trial court's first three reasons for departing upward were improper because they relied upon factors already taken into account by the elements of first-degree CSC and accosting, enticing, or soliciting a child for immoral purposes. We disagree.

Although the victim's youth and defendant's position of authority as a school employee are addressed by first-degree CSC under MCL 750.520b(v), the trial court noted in its sentencing memorandum that the basis for its departure was the "exceptional and significant steps [defendant took] to pursue her in order to accomplish the sexual acts." Although defendant's "exceptional and significant steps" occurred while the victim was 14 years old and defendant was her basketball coach, it is clear from the sentencing memorandum that the victim's youth and defendant's position of authority were themselves not the bases for the trial court's departure, but were rather the context in which the bases for departure arose. Similarly, although MCL 750.145a addresses soliciting a minor for purposes of inducing the minor to commit an act of sexual intercourse or gross indecency, the trial court's first three bases for departure addressed the manner and context in which defendant solicited the victim. Specifically, the trial court noted that defendant continued to contact the victim in spite of her parents' mandate that he not do so, that he did so repeatedly through dozens of text messages, and that he did so both in her home and at school. In sum, although the crimes for which defendant was convicted took into account defendant's conduct, the trial court's first three reasons for departure took into account the nature, character, and context of defendant's conduct. These reasons are accordingly substantial and compelling, and the trial court did not abuse its discretion when it relied on them in departing upward.

Regarding the trial court's fourth reason for departure, defendant argues that a harmonious reading of MCL 777.21(1)(a) and MCL 777.22(1) reveals that the Legislature deliberately excluded Offense Variable Five (OV 5), which addresses psychological harm to the victim's family, from qualifying as an aggravating factor in calculating minimum sentences for crimes against a person. Therefore, defendant argues, the trial court, when citing a violation of trust as a basis for departing upwards, improperly took psychological harm to the victim's family into account. We disagree.

The trial court wrote in its sentencing memorandum that "[d]efendant violated the trust of the victim's family, and violated their security by demonstrating that their daughter was not safe from his criminal acts in her home or at school." In other words, the trial court held that the fact that defendant took advantage of the victim in places of typical safety—her home and her school—warranted an upward departure. A trial court may consider the effect of the crime if the effect constitutes a deviation from the norm of commonplace repercussions of the crime. See *Smith*, 482 Mich at 302 (holding that the fact that a victim of CSC had to submit to a gynecological exam, although not typically sufficient to support a departure, was sufficient where there was evidence that the exam added to her trauma). Indeed, the violation of trust was not addressed through the lens of psychological injury to the victim's family, but rather, as the effect of the crimes in light of the place and manner of the crimes. The trial court's upward departure, therefore, was not outside of the range of principled outcomes, and did not constitute an abuse of discretion.

II. *MIRANDA* WAIVER

Defendant argues that his waiver of his *Miranda*[2] rights was not knowing or intelligent, and that neither his waiver nor his confession was voluntary. We disagree.

A defendant may waive his *Miranda* rights, but only if the waiver is made voluntarily, knowingly, and intelligently. *People v Daoud*, 462 Mich 621,633; 614 NW2d 152 (2000). We review de novo whether a defendant waived his or her *Miranda* rights knowingly, intelligently, and voluntarily. *People v Tierney*, 266 Mich App 687, 707-708; 703 NW2d 204 (2005). However, "deference is given to the trial court's assessment of the weight of the evidence and the credibility of the witnesses . . . and the trial court's findings will not be reversed unless they are clearly erroneous . . . ." *Id*. at 708.

A. KNOWINGLY AND INTELLIGENTLY

Regarding *Miranda's* "knowing" and "intelligent" prongs, the Michigan Supreme Court has held that "a suspect need not understand the ramifications and consequences of choosing to waive or exercise the [*Miranda*] rights." *People v Cheatham*, 453 Mich 1, 28; 551 NW2d 355 (1996).

> [T]he test is not whether [the defendant] made an intelligent decision in the sense that it was wise or smart to admit his participation in the crime, but whether his decision was made with the full understanding that he need say nothing at all and that he might then consult with a lawyer if he so desired. [*Id*. at 29 (internal citations omitted).]

Defendant knowingly and intelligently waived his *Miranda* rights. Upon entering the interrogation room where defendant was waiting, the following interchange occurred between defendant and Detective Boczar, the investigating officer:

> *DETECTIVE BOCZAR*: I need to read you your *Miranda* rights . . . before we talk about this any further. So you know your rights and so forth. Have you ever had your *Miranda* rights read to you before?
>
> *DEFENDANT:* No sir.

Detective Boczar then read defendant his *Miranda* rights from the *Miranda* form. After detective Boczar was finished reading defendant his *Miranda* rights, the following interchange occurred:

> *DETECTIVE BOCZAR:* Do you have any questions about these?
>
> *DEFENDANT:* Not really. I mean - -

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

DETECTIVE BOCZAR: I mean, if you do, ask.

DEFENDANT: Well, I mean, see I don't know anything about this stuff, so I don't know if I need to have a lawyer sitting here or not.

DETECTIVE BOCZAR: Okay, this is your waiver of rights. . . . What [the waiver statement] means is that you're waiving these [the *Miranda* rights] and you want to talk to me.

DEFENDANT: Which I do, Mike. I really do.

DETECTIVE BOCZAR: Okay. At any time during the interview, you can say, 'Nope, I want to stop, forget about it; I don't want to talk to you no more.' And we'll stop. So these [*Miranda* rights] don't go away. You can use them at any time you wish. Right now, later on, whenever you want to. So, if you want to talk to me now about this, I need a signature. . . .

DEFENDANT: Which I do. I have no problem.

Defendant then signed the *Miranda* form. The trial court reviewed the *Miranda* form and found the statement appropriately reflected defendant's Fifth Amendment rights. This finding was proper, because the form detailed defendant's right to an attorney and the right not to speak with police. As the above interchange makes clear, detective Boczar asked defendant if he understood his rights, and defendant responded that he did. Even after this acknowledgement, Detective Boczar emphasized that defendant need not speak with him and that he could stop questioning at anytime, to which defendant unequivocally stated that he did want to speak. Defendant clearly stated sufficient knowledge to waive *Miranda*. Under these circumstances, we detect no error in the trial court's finding that defendant sufficiently understood his *Miranda* rights to knowingly and intelligently waive them.

Defendant's question regarding whether he should have an attorney did not serve to invoke his right to counsel. A defendant's invocation of his right to counsel must be unequivocal. *Davis v United States*, 512 US 452, 461-462; 114 S Ct 2350; 129 L Ed 2d 362 (1994). An ambiguous request is insufficient. *Id.* As explained above, defendant told Detective Boczar that he did not know if he needed an attorney; defendant did not say that he wanted an attorney present during questioning. Accordingly, he did not invoke his right to counsel. As the trial court noted, it appeared that defendant was "thinking out loud," rather than asking for legal assistance. Defendant's statement, therefore, did not obviate his waiver.

B. VOLUNTARY

Regarding *Miranda's* "voluntary" prong, this Court has held that the "voluntariness of a waiver is determined by examining the police conduct involved." *People v Wells*, 238 Mich App 383, 387; 605 NW2d 374 (1999) (internal citations omitted). The test of voluntariness is whether, "considering the totality of all the surrounding circumstances, the confession [or waiver] was the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically

impaired." *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997) (internal citations omitted). The totality of the circumstances include:

> The age of the accused; his lack of education or his intelligence level; extent of his previous experience with the police; repeated and prolonged nature of the questioning; the length of the pre-statement detention; lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate; whether he was injured, intoxicated or drugged, or in ill health; whether he was deprived of food, sleep, or medical attention; whether he was physically abused; and whether he was threatened with abuse. [*People v Sexton*, 461 Mich 746, 753; 609 NW2d 822 (2000) (internal citations omitted).]

Defendant was asked at his home to come to the police station for questioning regarding his relationship with the victim. Before beginning questioning, Detective Boczar emphasized that defendant need not speak with him regarding his relationship with the victim and read defendant his *Miranda* rights. Repeatedly, defendant stated that he wanted to speak with Detective Boczar. The interview lasted a short period. Although the interview was emotional for defendant, he appeared cognizant of his options, recounting events in a clear and concise manner. There appeared to be no other factors which would indicate defendant's will was overborne, such as lack of food, sleep, or medicinal attention. In fact, police officers brought defendant water during the interview. Accordingly, defendant's waiver was voluntary.

Defendant argues that he was manipulated into confessing by Detective Boczar's offers of leniency. Defendant relies heavily on *People v Givans*, 227 Mich App 113, 119-120; 575 NW2d 84 (1997). Defendant argues that, in *Givans*, this Court held that a confession induced by law enforcement's promise of lenience is a predominant factor in determining whether a confession or waiver is involuntary, and Detective Boczar's promise of therapy indicates his confession was not voluntary. However, this Court in *Givans* emphasized that the offer of leniency was merely one factor out of many to be considered. *Id*. at 120. Further, similar to the facts in *Givans*, the record here is devoid of any mention of leniency on the part of Detective Boczar. Indeed, Detective Boczar merely stated that he felt defendant needed therapy, and when defendant asked whether it would be provided, said that it would. As the trial court stated, the conversation regarding therapy only indicated that Detective Boczar felt defendant needed therapy, not that the only penal consequence would be therapy. Objectively, Detective Boczar's exchange with defendant cannot be read as an offer of leniency, despite whatever defendant asserts was his subjective understanding. See *Givans*, 227 Mich App at 120 (officer's pledge to note defendant's cooperation in a police report could not be reasonably understood as an offer of leniency). Accordingly, defendant's *Miranda* waiver and subsequent confession were voluntary.

III. SUFFICIENCY OF THE EVIDENCE AND GREAT WEIGHT

Defendant next argues that the prosecution presented insufficient evidence of his convictions because the victim's testimony was inherently incredible and the prosecution presented no evidence that he solicited the victim. For these same reasons, defendant argues that his convictions are against the great weight of the evidence. We disagree.

We review de novo a claim of insufficient evidence in a criminal trial. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When reviewing a claim that the evidence presented by the prosecution was insufficient to support the defendant's conviction, we must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). This Court will not "interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *Id*. "All conflicts in the evidence must be resolved in favor of the prosecution." *Id*.

A trial court's grant or denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). "An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes." *Id*.

The prosecution presented sufficient evidence of two counts of first-degree CSC. A defendant may be found guilty of first-degree CSC if he engaged in sexual penetration of the victim when the victim is at least 13 years of age but less than 16 years of age, and the defendant is an employee or contractual service provider in a public school and the defendant uses his or her status to gain access to, or establish a relationship with the victim. MCL 750.520b(1)(b)(v). MCL 750.520a(r) defines "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ."

Defendant was the basketball coach for the victim's middle school basketball team. The victim was 14 years old at the time of the acts; defendant was 48. The prosecution presented evidence of two instances of fellatio and one instance of cunnilingus. The victim's testimony confirmed all three acts. Video surveillance evidence supported the victim's testimony. Further, the prosecution introduced DVD evidence of defendant's confession to all three acts. The prosecution also presented the testimony of a witness, Robert Kominek, who corroborated the victim's testimony regarding one instance of fellatio and cunningulus. Further, the prosecution presented evidence of text messages between defendant and the victim, the contents of which confirmed the instances of fellatio. The prosecution accordingly presented sufficient evidence such that a rational trier of fact could conclude that defendant sexually penetrated the victim.

The prosecution also presented sufficient evidence for a jury to find defendant guilty of second-degree CSC. A defendant may be found guilty of second-degree CSC if he engages in sexual contact with another person who is at least 13 years old, but less than 16 years old, and the actor is an employee or contractual service provider in a public school and uses his status to gain access to, or establish a relationship with, that other person. MCL 750.520c(1)(c)(v). MCL 750.520a(q) defines "sexual contact" as "the intentional touching of the victim's . . . intimate parts or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification . . . ."

The prosecution presented evidence of an ongoing relationship between the victim and defendant which included defendant coming to her home and her grandmother's home for the purposes of touching for sexual gratification. The prosecution presented text messages confirming this relationship. The prosecution also introduced a pillow with the words "I Love You" written on it, given as a gift to the victim by defendant. The victim also testified to the touching, and defendant confessed to the same. The prosecution accordingly presented sufficient evidence such that a rational trier of fact could conclude that defendant inappropriately engaged in sexual contact with the victim.

Finally, the prosecution presented sufficient evidence that defendant solicited the victim with the intent to commit CSC. "A defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) accosted, enticed, or solicited (2) a child (or an individual whom the defendant believed to be a child) (3) with the intent to induce or force that child to commit (4) a proscribed act." *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011). See also MCL 750.145a. Here, the prosecution presented numerous phone calls and text messages in which defendant stated that he missed the victim and wished to see her. Moreover, the defendant and the victim engaged in sexually explicit text messages in which defendant stated he wished he could see her more often. Defendant also gave the victim gifts, which the prosecution entered into evidence. The prosecution therefore presented sufficient evidence for a jury to find defendant guilty of accosting or soliciting a minor.

For the same reasons, the verdicts are not against the great weight of the evidence. A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Lacalamita*, 286 Mich App at 469. "Generally, a verdict may be vacated only when the evidence does not reasonably support it and was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *Id.* Here, the evidence, as described above, reasonably supports the verdicts at which the jury arrived. Accordingly, the verdicts were not against the great weight of the evidence.

Defendant argues that his own witnesses, who testified that defendant was at home or at work during the incidents or that the victim could not describe his genitalia, make the victim's testimony inherently incredible. However, "conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Lacalamita*, 286 Mich App at 469-470 (internal citations omitted) Moreover, "the resolution of credibility questions is within the exclusive province of the jury. *Id*. at 470 (internal citations omitted). That the jury found the victim's testimony credible, and did not find defendant's witnesses' testimony credible is not, without more, grounds for reversal.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher