

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 15, 2013

v

DENNIS ELIOT MILLER,
Defendant-Appellant.

No. 311267
Grand Traverse Circuit Court
LC No. 11-011261-FC

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

A jury found defendant guilty of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b. The trial court sentenced defendant to concurrent terms of 15 to 40 years' imprisonment. For the reasons set forth below, we affirm.

The jury found that defendant digitally penetrated his step-daughter while shaving her pubic region. Defendant was acquitted of a third count of CSC I and two counts of second-degree criminal sexual conduct, MCL 750.520c, for charges that he sexually touched the victim on other occasions.

I. ADMISSION OF FORENSIC INTERVIEWS

The trial court did not deny defendant due process by admitting two forensic interviews of the victim. This Court reviews evidentiary decisions for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). An abuse of discretion occurs when the trial court "chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 589; 739 NW2d 385 (2007). A trial court has broad discretion in controlling trial proceedings. *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002). "[A] trial court's decision on a close evidentiary question . . . ordinarily cannot be an abuse of discretion." *People v Sabin*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Further, the admission of rebuttal evidence is within the sound discretion of the trial court. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). Rebuttal evidence is evidence offered to dispel or contradict evidence produced by the other party. *Id.* at 399. It is properly admitted when it is responsive to a theory developed by the defendant. *Id.*

The trial court admitted the forensic interviews to rebut defense counsel's cross-examination of the detective who interviewed the victim, during which counsel suggested that the detective's manner of interviewing the victim violated proper protocol and may have improperly influenced the victim's answers. The trial court acknowledged that the interviews were hearsay and carefully considered whether they were more prejudicial than probative. The court ultimately concluded that their admission was the only way to rebut the implication raised by defense counsel.

Moreover, on two occasions, the trial court specifically instructed the jury *not* to consider the victim's statements in the interviews as evidence, but only to consider whether the interviewer's technique contributed to the allegations of the victim. It is presumed that jurors follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, the trial court properly admitted the forensic interviews as rebuttal evidence, and did not abuse its discretion.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant's claim of ineffective assistance of counsel is without merit. Claims of ineffective assistance of counsel are mixed questions of law and fact. The trial court's findings of fact are reviewed for clear error. Whether those facts constitute ineffective assistance of counsel is a question of law, which we review *de novo*. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). Ineffective assistance of counsel requires a showing that counsel's performance was deficient, and there is a reasonable probability that it changed the outcome of the trial. *Strickland v Washington*, 466 US 668, 689, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Here, defense counsel's decision to attack the protocol of the forensic interviewer was a trial strategy that was not unreasonable under prevailing professional norms. It was not, therefore, constitutionally deficient. *Strickland*, 466 US at 688. Moreover, defendant cannot show a reasonable probability that the admission of the forensic interviews affected the outcome of his trial. Defendant points to no evidence contained in the interviews that was not also in the victim's trial testimony. In addition, defendant was acquitted of three counts of sexual abuse that the victim also recounted in both her forensic interviews and trial testimony. Defendant was convicted of only the counts to which he testified and largely admitted. Therefore, the record does not suggest that the admission of the interviews bolstered the victim's credibility or changed the outcome of the trial. *Strickland*, 466 US at 694.

III. HEARSAY TESTIMONY

We also reject defendant's claim that he was denied a fair trial by the hearsay testimony of the victim's grandmother. We review claims of unpreserved errors for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is required when the error "results in a conviction of an actually innocent defendant or when the error seriously affects the fairness, integrity, or public reputation of judicial proceedings independently of a defendant's innocence." *People v Dobek*, 274 Mich App 58, 87; 732 NW2d 546 (2007).

The victim's grandmother testified that the victim told her about two specific instances of sexual abuse by defendant. While it was hearsay, this testimony did not add any evidence that the victim had not already stated during her trial testimony. Moreover, defendant was acquitted of the charges to which the grandmother's statement referred. Accordingly, this testimony cannot be said to have resulted in defendant's convictions or affected the integrity of the proceedings. For these reasons, defendant has not shown plain error that affected his substantial rights. *Dobek*, 274 Mich App at 87.

IV. OV 13

Defendant contends that the trial court erroneously scored OV 13 at 25 points. We review the scoring of offense variables for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). A scoring decision will be upheld if there is "any evidence" to support it. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

OV 13 is scored at 25 points for a pattern of felonious activity involving three or more crimes against a person. MCL 777.43(1)(c). All crimes within a five-year period are counted, regardless of whether the offense resulted in a conviction. MCL 777.43(2)(a). The trial court counted the two crimes of which defendant was convicted. In addition, it is undisputed that defendant shaved the victim's pubic region on 20 to 25 occasions while she was between the ages of 13 and 15, at times while she was fully undressed, and the victim testified to other incidents of digital penetration and other sexual touching by defendant. The trial court's conclusion that defendant engaged in other "felonious activity" is supported by the trial testimony of the victim, and to a great extent, defendant's trial testimony. Therefore, we hold that the trial court did not err in scoring OV 13 at 25 points. *Endres*, 269 Mich App at 417.

V. DEPARTURE FROM THE SENTENCING GUIDELINES

Defendant was not denied due process of law by the trial court's departure from the sentencing guidelines. We review a departure from the sentencing guidelines for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). An abuse of discretion exists when the sentence is outside the range of principled outcomes. *Id.*

The sentencing guidelines provided for a minimum sentence in this case of just over 11 years. The trial court sentenced defendant to concurrent sentences of 15 to 40 years in prison. The court stated that the reason for departure was the numerous incidents of shaving the victim's pubic region that were not adequately weighted by the guidelines.

A trial court may depart from the sentencing guidelines for a "substantial and compelling" reason. MCL 769.34(3). A substantial and compelling reason exists only in exceptional cases, and is an objective and verifiable reason that "keenly or irresistibly grabs" the attention of the reviewing court. *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003), citing *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). In determining whether to depart, the sentencing court may consider all the evidence at trial, including other criminal activities. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). The court may also consider the facts underlying uncharged offenses, pending charges, and even acquittals. *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994). The fact that sexual abuse

occurred over a long period of time may constitute a substantial and compelling reason for departure from the sentencing guidelines. *Smith*, 482 Mich at 301.

Here, defendant was convicted of two counts of CSC I for digitally penetrating the victim after shaving her pubic region. While only two counts regarding shaving were brought, defendant's own testimony confirmed that he regularly shaved the victim's pubic region, and that this occurred 20 to 25 times over a period of two years while she was 13 to 15 years old. The victim testified that these incidents also involved defendant fondling her breasts and digitally penetrating her. The trial court reasoned that OV 13 considered only three of these shaving incidents, and that defendant engaged in long-term sexual abuse that was not adequately scored by the guidelines. The trial court provided a substantial and compelling reason for departure. *Smith*, 482 Mich at 301.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly