DA 16-0671

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 17N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID LAMONT CROSBY,

Defendant and Appellant.

APPEAL FROM: District Court of the Sixteenth Judicial District,
In and For the County of Rosebud, Cause No. DC 15-36
Honorable Nickolas C. Murnion, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Danny Tenenbaum, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Roy Brown, Assistant Attorney General, Helena, Montana

C. Kristine White, Rosebud County Attorney, Forsyth, Montana

Submitted on Briefs: December 19, 2018

Decided: January 22, 2019

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 David Crosby appeals from the judgment entered by the Sixteenth Judicial District Court, Rosebud County, sentencing him to fifty years' incarceration with twenty-five years suspended. We affirm Crosby's sentence, except to remand for correction of the technology fee imposed upon Crosby, which the State concedes was imposed in error.

¶3 In 2015, Crosby lived with his wife, Luanne Crosby (Luanne), his 13-year-old daughter, L.R., and infant daughter, A.C. Crosby touched L.R. with his erect penis and frequently masturbated in L.R.'s presence while watching pornography in the living room of the family's home. Luanne suspected that Crosby was spying on L.R. while she bathed, and confronted Crosby about this behavior. An argument ensued, during which Crosby threatened to kill Luanne while wielding a knife above her head. Following the assault, Luanne discovered a video on Crosby's phone of L.R. taking a shower. The video depicted Crosby setting up the phone in the family's bathroom and partially covering it with a towel, followed by L.R. getting into and out of the shower while nude. L.R. was not aware she was being filmed.

¶4 Crosby was arrested and charged with one count of Assault with a Weapon in violation of § 45-5-213(1)(b), MCA, and one count of Sexual Abuse of Children in

violation of § 45-5-625(1)(b), MCA. He requested a bench trial and was convicted of both felony counts. During his pre-sentence investigation, Crosby refused to answer any specific questions related to his convictions. The Montana Department of Corrections prepared a Pre-Sentence Investigation Report (PSI) that noted Crosby's refusal to answer questions, and recommended he receive a sixty-year sentence with twenty years suspended. Victim impact statements and a psychosexual evaluation, which classified Crosby as a "Level 3 (High Risk-Sexually Violent Predator)," were provided to the District Court prior to sentencing. Departing downward from the PSI's recommended sentence, the District Court sentenced Crosby to imprisonment for a term of ten years for the assault conviction, and for a term of fifty years with twenty-five years suspended for the child abuse conviction, with the sentences to run concurrently.

¶5 Crosby maintained his innocence throughout the sentencing process. He argues on appeal that the District Court imposed a sentence erroneously influenced by his continued claim of innocence, which violated his constitutional right to remain silent and avoid self-incrimination. He also argues the District Court impermissibly inferred a lack of remorse from his silence, that is, his failure to admit guilt to the crimes.

¶6 A sentencing court "may not punish a defendant for failing to accept responsibility for the crime when that defendant has expressly maintained his innocence and has a right to appeal his conviction." *State v. Morris*, 2010 MT 259, ¶ 22, 358 Mont. 307, 245 P.3d 512 (citation omitted). In *State v. Cesnik*, 2005 MT 257, 329 Mont. 63, 122 P.3d 456, we held that a trial court unconstitutionally punished a defendant who maintained his innocence during the sentencing process by imposing a sentence "so that acceptance of responsibility

occurs." *Cesnik*, ¶ 10. And, "[i]f a court chooses to sentence a defendant based upon lack of remorse, it cannot infer lack of remorse from a defendant's silence. Rather, it must point to affirmative evidence in the record demonstrating lack of remorse." *State v. Rennaker*, 2007 MT 10, ¶ 51, 335 Mont. 274, 150 P.3d 960.

¶7 The District Court engaged in a lengthy oral pronouncement of Crosby's sentence, detailing multiple reasons for the sentence. Crosby's arguments focus on several sentences of the oral pronouncement in which the District Court commented on his attitudes, including that Crosby "has shown no remorse for the offenses, he continues to deny the offense, has little empathy for his victims. He continues to deny the offenses even in light of a video shown to the Court of him placing a camera and displaying a [] 13-year-old getting out of a shower." However, the District Court, declaring that "the Defendant must be held accountable" for his "very serious" offenses, provided extensive further reasoning for Crosby's sentence, including: 1) Crosby's sexual contact with a minor victim and his increasingly sexual behavior toward her, which included Crosby regularly masturbating in her presence and culminating in his placement of a cell phone to surreptitiously record her while bathing; 2) Crosby's designation as a "level 3, high risk sexual and violent offender" and his legal status in Colorado as a "sexual predator"; 3) Crosby's "significant prior history" of violent felony convictions, including his 2006 Colorado conviction of sexual assault of a child in a position of trust; 4) Crosby's failure to register as a sex offender in both Washington and Montana after leaving Colorado; 5) Crosby's personality disorder revealed through the psychosexual evaluation, which contributes to him being "a high risk sexual offender" whose "highest [] area of sexual interest is elementary age females"; 6) the

District Court's doubt that Crosby "can be rehabilitated," given his deviant, antisocial behavior, and his history of both sexual and non-sexual crimes; 7) the suffering endured by L.R. and Luanne; and 8) the need to "protect future victims" and provide sufficient time for Crosby to participate in a sexual addiction program at the State Prison.[1] The District Court issued a written order detailing the same sentencing factors orally stated during the hearing.

¶8 In determining an appropriate sentence, a sentencing court may consider "evidence relating to the crime, the defendant's character, background history, mental and physical condition, and any other evidence the court considers of probative force," as long as it does not "punish a defendant for refusal to admit guilt." *State v. Howard*, 2011 MT 246, ¶ 46, 362 Mont. 196, 265 P.3d 606 (citation omitted). Citing these permissible considerations, this Court reversed the sentence imposed in *State v. Shreves*, 2002 MT 333, 313 Mont. 252, 60 P.3d 991, explaining the sentence imposed there was "not based on the evidence presented to the District Court, but rather on the District Court's decision to base its sentence in large part specifically on Shreves' refusal to admit to the crime." *Shreves*, ¶ 13. In our written opinion, we noted five times that Shreves' sentence had been based "in large part" on his refusal to admit his crime and show remorse, concluding that "[t]he District Court violated Shreves' right against self incrimination when it based its sentence in large

[1] Probation officer and author of the PSI, Kristi Moore, testified at the sentencing hearing that "sex offender treatment can sometimes take 7 years" or longer, "depending on how amenable somebody is to treatment."

part on Shreves' refusal to admit to his crime and show remorse at sentencing." *Shreves*, ¶ 24.

¶9 In contrast, in a case very similar to this one, *State v. Champagne*, 2013 MT 190, 371 Mont. 35, 305 P.3d 61, the Defendant maintained his innocence throughout the proceeding of a charge of child sexual assault. During the sentencing hearing, the court noted that Champagne "'has no empathy for the victim[,] . . . projected blame on to the victim,'" and "'does not feel genuine remorse for his socially deviant and criminal acts.'" *Champagne*, ¶ 49. However, the district court also cited Champagne's criminal history, his psychopathic tendencies, his chemical dependency issues, and his "'slim'" prospect of rehabilitation. *Champagne*, ¶¶ 49-50. After review, we concluded, citing *Shreves* and *Morris*, that the district court had not "based its sentencing decision 'in large part' on Champagne's denial of guilt under these circumstances." *Champagne*, ¶ 49.

¶10 Here, the District Court likewise briefly mentioned Crosby's lack of remorse and failure to accept guilt, but also detailed extensive, significant reasons for its sentencing determination, as delineated above. The District Court's citation to Crosby's lack of remorse was supported by "affirmative evidence in the record demonstrating lack of remorse." *Rennaker*, ¶ 51. The District Court's sentence was less burdensome than recommended by the PSI. As in *Champagne*, "[w]e cannot say that the District Court based its sentencing decision 'in large part' on [Crosby's] denial of guilt under these circumstances." *Champagne*, ¶ 49. Therefore, on these grounds, the sentence was not erroneously imposed.

¶11 Crosby also challenges the technology fee imposed on him, arguing that it was improper for a $10 fee to be imposed for each of his two charged offenses, instead of just one fee. Section 3-1-317(1)(a), MCA; *State v. Pope,* 2017 MT 12, 386 Mont. 194, 387 P.3d 870. The State concedes this issue.

¶12 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶13 Affirmed in part, reversed in part, and remanded for entry of an amended judgment to correct the imposition of the technology fee.

/S/ JIM RICE

We concur:

/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON