

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ROY FICK,

Defendant-Appellant.

UNPUBLISHED

September 17, 1996

No. 183097

L.C.No. 94-000785

Before: Marilyn Kelly, P.J., and Gribbs and W.E. Collette,* JJ.

PER CURIAM.

Defendant pled nolo contendere to the reduced charge of assault with intent to commit criminal sexual conduct, MCL 750.520g(1); MSA 28.788(7). Under the terms of the plea bargain agreement, several other charges were dismissed. He was sentenced to a term of six to ten years', an upward departure from the sentencing guidelines. We affirm defendant's conviction and remand for resentencing.

First, defendant contends that the trial court abused its discretion in admitting evidence of a lengthy pattern of uncharged similar misconduct for consideration at sentencing. MCR 6.425(D)(2)(c). We do not agree. Defendant was given ample opportunity to cross examine and refute the witnesses. See *People v Granderson*, 212 Mich App 673, 679; 538 NW2d 471 (1995). Defendant's history of sexually inappropriate behavior was not reflected by the guidelines and was properly considered.

Defendant also argues that the trial court erred in scoring fifteen points for Offense Variable (OV) 7, exploitation of victim vulnerability. We agree. In scoring OV7, the trial court relied on the "incestuous" nature of the crime against the twenty-eight year old complainant, who was allegedly defendant's daughter. However, defendant disputed paternity at the plea hearing and, in any case, had

* Circuit judge, sitting on the Court of Appeals by assignment.

apparently never met complainant until she was twenty-four years old. We do not believe the unique facts of this case support the trial court's scoring of OV7.

Properly scored, the sentencing guidelines in this case are 0 to 24 months. However, we note that the trial court expressly stated that its sentence of six to ten years' would remain the same even if the scoring of OV7 was improper. The trial court's reason for the lengthy sentence was the "mode of operation" apparent in evidence of defendant's long uncharged history of sexually abusing teenage girls. While we agree that defendant's uncharged prior acts are relevant to the trial court's decision to depart from the guidelines, we believe the departure in this case was disproportionate to the individual crime at issue. Although we agree that departure may be warranted, defendant cannot be sentenced here for prior bad acts. Accordingly, we remand for resentencing.

Affirmed, remanded for resentencing.

/s/ Marilyn Kelly

/s/ Roman S. Gibbs

/s/ William E. Collette