

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERON JAY OUTWIN,

Defendant-Appellant.

UNPUBLISHED

February 3, 1998

No. 188793

Muskegon Circuit Court

LC No. 95-037954-FC

Before: Neff, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and sentenced to concurrent terms of thirteen to forty years' imprisonment for each count. Defendant appeals from his convictions and sentences as of right. We affirm.

I

Defendant first argues that the prosecutor improperly presented evidence in his case-in-chief and on cross-examination that defendant and a defense witness had engaged together in homosexual sex. To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection which it asserts on appeal. MRE 103(a)(1), *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). In the instant case, defendant failed to preserve this issue for review. We thus review the issue for whether the admission of the evidence was error that could have affected the outcome of the trial. *Id.* at 553. Because we find no error in the admission of the challenged evidence, we need not review this issue further.

II

Defendant next argues that the trial court erred in not suppressing defendant's confession because the evidence at the suppression hearing revealed that defendant suffered from a dependent personality disorder which caused him to confess to a crime that he did not commit. Further, defendant contends that his confession resulted from a promise of leniency. We disagree.

We review a defendant's claim that he was psychologically predisposed toward confessing no differently than any other claim relating to the voluntariness of a confession. See *People v Hughey*, 186 Mich App 585, 592; 464 NW2d 914 (1990). We review a trial court's determination as to the voluntariness of a confession by examining the entire record and making an independent determination. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). However, deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *Id.* After a careful examination of the record in this case, we are satisfied that defendant's confession was voluntary.

III

Defendant next argues that he is entitled to an evidentiary hearing because the prosecutor failed to disclose the name of the physician or nurse who examined the victim following the allegation of sexual assault. Defendant neither objected at trial nor moved the trial court for an evidentiary hearing or a new trial; therefore, the issue has not been preserved for appeal. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Further, the victim's mother testified that the medical personnel found no physical evidence of a sexual assault. Consequently, any testimony from the examining physician or nurse would have been merely cumulative to testimony already in evidence. No manifest injustice will result if we withhold review of this issue. *People v Feldscher*, 146 Mich App 49, 54; 380 NW2d 50 (1985).

IV

Defendant next argues that the prosecutor engaged in misconduct during closing argument by appealing to the sympathy of the jury, vouching for the credibility of witnesses, and improperly using other acts evidence against defendant. By failing to timely object to any of the remarks he now claims were improper, defendant failed to preserve his allegations of prosecutorial misconduct for review. We will not review an unpreserved allegation of prosecutorial misconduct unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). We have reviewed each of the alleged instances of prosecutorial misconduct and find them to fall within the bounds of proper argument.

V

Defendant also challenges his sentences, arguing that the trial court erred in departing upward from the sentencing guidelines because defendant had support from family and friends, the case against defendant was not strong, the prosecutor elicited improper testimony, and the trial court itself acknowledged that defendant was not a worst case offender. We review a trial court's decision to depart upward from the sentencing guidelines for abuse of discretion. *People v Milbourn*, 435 Mich 630, 636, 657 n 25; 461 NW2d 1 (1990).

The sentencing information report prepared on defendant's behalf indicated a recommended sentencing guidelines range of three to eight years' imprisonment. The trial court scored offense variable (OV) 7 (offender exploitation of victim vulnerability) at fifteen because the victim was eight months old

at the time of the offense. Ultimately, however, the trial court elected to depart from the guidelines recommendation and sentence defendant to thirteen to forty years' imprisonment because it believed that the circumstances of this case, particularly the victim's young age, were not adequately embodied within the sentencing guidelines. We agree.

A trial court may deviate from the guidelines range when the range is disproportionate to the seriousness of the crime. *Milbourn, supra* at 657. Further, a trial court may base a deviation from the guidelines on factors already considered in the guidelines calculations, albeit with caution. *Id.* at 660 n 27. When a trial court departs from the sentencing guidelines, this Court should inquire whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. *Id.* at 659-660. Here, defendant was convicted of penetrating an eight-month-old infant, orally and vaginally, with his penis. Although OV 7 allows for a guidelines score of fifteen points if a defendant exploits a victim due to his or her youth, defendant's conduct in the instant case "is extraordinary in its degree, and thus beyond the anticipated range of behavior treated in the guidelines." *Id.* at 660 n 27. We find that the trial court appropriately departed from the guidelines and that defendant's sentence does not violate the principle of proportionality.

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ William B. Murphy