

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL R. ALLEN,

Defendant-Appellant.

UNPUBLISHED

August 14, 2003

No. 239990

Wayne Circuit Court

LC No. 01-004594

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of second-degree criminal sexual conduct (victim under thirteen) (CSC-II), MCL 750.520c(1)(a) and two counts of first-degree criminal sexual conduct (victim under thirteen) (CSC-I), MCL 750.520b(1)(a). The trial court sentenced defendant to concurrent sentences of ten to fifteen years in prison for each count of CSC-II and thirty to sixty years in prison for each count of CSC-I.¹ We affirm.

I. Basic Facts

At a *Walker* hearing,² Canton Police Detective Debra Newsome testified that she and Detective Steve Miller responded to a complaint that defendant sexually assaulted his nine-year old and five-year old daughters. The detectives went to defendant's apartment. After defendant permitted them to enter, the detectives questioned defendant about his relationship with his wife and the allegations. Defendant never asked the detectives to leave or asserted that he did not want to talk with them. Defendant asked what was going to happen to him and if he was going to jail. Detective Newsome responded that they would not take him to jail, but a warrant request could be forthcoming. Defendant continued to talk with them, eventually admitting that he

¹ Defendant was originally charged with six counts of CSC-I (person under thirteen). With regard to the older daughter, all counts involved digital penetration of the vaginal opening. With regard to the younger daughter, the three counts alleged penile penetration of the vaginal opening, digital penetration of the vaginal opening, and penile penetration of the mouth.

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

sexually abused his daughters. At the end of the interview, defendant produced a written statement. The detectives left the apartment without arresting defendant.

At the conclusion of the *Walker* hearing, defense counsel argued that defendant's nervousness indicated his statements were obtained through coercion.³ The trial court found that defendant was not in custody when the statements were made and there was no indication of coercion. Accordingly, the trial court declined to suppress the statements.

At trial, the older daughter testified that something happened involving her father and it started when she was five-years old. She testified, "He touched me in a bad spot," and pointed at her "crotch area." Defendant touched her with his hand while they were sitting on the couch. He did that every time her mother went out; she went out a lot. Another time, the girls were showering when defendant rubbed the younger daughter hard with a washcloth in her "crotch area."

The girls' mother, Christine Allen, also testified that she and defendant were involved in divorce proceedings at the time of trial. She testified that, before the allegations arose, she obtained a personal protection order (PPO) against defendant because he had become abusive with her. Yet, she did not interfere with defendant's parenting time with the girls. Elaine Pomeranz, a medical expert, testified that a physical examination of the victims revealed no evidence of sexual abuse.

After the prosecution rested, defense counsel moved for directed verdict arguing there was insufficient evidence. Defense counsel argued that defendant's admission alone could not provide corpus delicti. He also argued that the older daughter's testimony did not establish penetration, only that he touched the outside of her clothing. The trial court denied defendant's motion indicating that once a body of wrong has been established by other evidence, a defendant's statement can be used to elevate an offense. The jury found defendant guilty and the trial court sentenced defendant as noted above.

II. Defendant's Statements

Defendant first argues that the trial court erred in admitting the statements he made to police while they questioned him at his apartment. We disagree. This Court's review of a lower court's factual findings in a suppression hearing is limited to clear error and those findings will be affirmed unless we are left with a definite and firm conviction that a mistake was made. *People v Custer*, 465 Mich 319, 325-326; 630 NW2d 870 (2001). This Court reviews de novo the lower court's ultimate ruling on a motion to suppress. *Id.*; *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999).

³ Notably, although defendant made an oral statement and a written statement, the parties and the trial court referred indiscriminately to "the statement" in the singular form and "the statements" plural. On appeal, the parties similarly refer to "the statement" and "the statements" without apparent distinction. At trial, Detective Newsome testified about an oral and written statement. For the purpose of consistency and because it is clear that defendant objected to admission of both statements, we refer to "the statements" plural.

A statement made by an accused during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A custodial interrogation is questioning initiated by law enforcement officers after the accused has been taken into custody or deprived of his freedom in a significant way. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave. *Id.* The determination of custody depends on objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officer or person being questioned. *Id.*

We find that defendant was not in custody when he made the statements. Although defendant appeared nervous, the totality of the circumstances viewed objectively indicates that defendant was not in custody at his apartment when he gave his oral and written statements. *People v Coomer*, 245 Mich App 206, 220; 627 NW2d 612 (2001). After the detectives identified themselves, defendant permitted the detectives to enter his apartment building. After they announced the purpose of their visit, defendant permitted them to enter his apartment. Inside the apartment, the detectives indicated that defendant was not under arrest, but that a warrant might be forthcoming. Although detective Newsome stated that defendant appeared nervous while talking about the allegations, custody does not depend on subjective views. Defendant never asked the detectives to leave or indicated that he did not wish to talk with them. Based on the record, the trial court's finding that defendant was not in custody was not clear error. Therefore, the trial court did not err in denying defendant's motion to suppress his statements.

Within defendant's analysis of this issue, he also asserts that he was denied effective assistance of counsel. The appellant must identify his issues in his brief in the statement of questions presented. MCR 7.212(C)(5). Ordinarily, no point will be considered which is not set forth in the statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Further, defendant has failed to present any argument in regard to this issue. A party may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Because of these deficiencies, we need not address this issue. However, we find the defendant's argument to be without merit.

Because defendant did not raise his ineffective assistance of counsel claim below, this Court's review is limited to the mistakes apparent from the existing record. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001). To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceeding would have been different but for the errors. *People v Pickens*, 446 Mich 298, 302-327; 521 NW2d 797 (1994); *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001).

Here, defendant states that defense counsel was ineffective with regard to his statements, but does not present any argument as to what defense counsel should have done. Defense counsel challenged the admission of the statements and a *Walker* hearing was held. After the hearing, the trial court denied defense counsel's motion to suppress. Based on the analysis

above, the trial court's ruling was correct. Therefore, defendant has failed to show how defense counsel's performance was below an objective standard of reasonableness.

III. MRE 404(b)

Defendant next argues that the trial court erred in admitting other acts evidence and defendant counsel was ineffective for failing to object. We disagree. If a defendant fails to object to the admission of testimony, the admission is reviewed for plain error. *People v Pasquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . ., 3) and the plain error affected substantial rights . . . The third requirement general requires a showing of prejudice . . ." *Id.*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be logically relevant to a matter at issue at trial, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Crawford*, 458 Mich 376, 391; 397; 582 NW2d 785 (1998), quoting *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

Defendant argues that Allen's testimony regarding her obtaining a PPO against the defendant was inadmissible and that the prosecutor did not articulate the purpose for which the evidence was offered. However, because defendant did not object to admission of the testimony, the prosecutor did not have an opportunity to state his purpose. On appeal, the prosecutor argues that the evidence was offered for the purpose of presenting a complete picture of the relationship between defendant and Allen.

Our review of the record indicates that the prosecutor used the evidence for a proper purpose; to show that before the charges resulting in this case were brought, Allen obtained a PPO against defendant but nonetheless, did not preclude defendant from parenting time with the girls. This was a proper purpose because, rather than establishing defendant's character to show his propensity to commit the offense, it showed that Allen was not motivated by a custody/visitation dispute in initiating the CSC complaint.

The evidence was also relevant. MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In opening statement, defense counsel argued, "The evidence will show that only after the divorce started, only after there was a dispute as to custody did these allegations surface again." The evidence that Allen had obtained a PPO against defendant, yet did not interfere with his parenting time with the girls, addressed defendant's theory that this case was initiated by Allen to influence the custody proceedings. Therefore, the evidence was relevant to a fact of consequence to the determination of the action. This value was not outweighed by unfair prejudice because the testimony was minimal, not detailed, and argued solely for this purpose described above.

Defendant argues that defense counsel was ineffective for (1) failing to object to the testimony and (2) failing to request a limiting instruction. First, defense counsel was not ineffective for failing to object to the testimony because, as discussed above, the testimony was properly admitted. A defendant cannot base a claim of ineffective assistance of counsel on his attorney's failure to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). With regard to the limiting instruction, there is a legitimate argument that one should have been requested. However, we must presume that this was a matter of trial strategy. Furthermore, defendant has not shown a reasonable probability that, but for the admission of this evidence, the result of the trial would have been different. Regardless of this testimony, which did not directly prove any of the elements of the charges against defendant, there was ample evidence to prove that defendant was guilty beyond a reasonable doubt of the crimes of which he was convicted.

IV. Directed Verdict

Defendant next argues the trial court erred in denying his motion for a directed verdict when there was no evidence, other than his statements, to prove the element of penetration.⁴ In reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). It is not permissible for this Court to determine the credibility of witnesses in reviewing a trial court's ruling on a motion for directed verdict. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Rather, questions regarding witness credibility are left to the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991).

In *People v McMahan*, 451 Mich 543, 548; 548 NW2d 1999 (1996), our Supreme Court reaffirmed that "proof of the corpus delicti is required before the prosecution is allowed to introduce the inculpatory statements of an accused." The prosecutor need not present independent proof of each element of the particular crime charged as a condition of admissibility

⁴ We note that defendant did not object to admission based on the corpus delicti rule. Instead, defendant argued, in a motion for directed verdict, that his statements could not be used alone to prove the charges against him. In *People v Konrad*, 449 Mich 263; 536 NW2d 517 (1995), our Supreme Court addressed the defendant's argument that the trial court erred in denying his motion for directed verdict where there was insufficient evidence that he possessed cocaine when the argument was premised on another argument that the defendant's statement should have been excluded under the corpus delicti rule. *Id.* at 269. Although the Court addressed the defendant's argument, it stated that the argument was "not well taken" because it raised a question of admissibility rather than of the propriety of a directed verdict ruling despite the latter being sanctioned by the Court's grant order. Thus, following our Supreme Court's example, we address defendant's argument even though it encompasses the underlying admissibility issue.

of a defendant's confession. *People v Williams*, 422 Mich 381, 391; 373 NW2d 567 (1985). The rule is satisfied in any criminal case if there is direct or circumstantial evidence independent of the confession establishing the occurrence of a specific injury or loss and that some person's criminality was the cause of the injury. *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995); *People v Cotton*, 191 Mich App 377; 478 NW2d 681 (1991).

At trial, the older daughter testified that something happened involving her father and it started when she was five-years old. She testified, "He touched me in a bad spot," and pointed at her "crotch area." Defendant touched her with his hand while they were sitting on the couch. He did that every time her mother went out; she went out a lot. Another time, the girls were showering when defendant rubbed the younger daughter hard with a washcloth in her "crotch area."

Here, the corpus delicti of criminal sexual conduct is the criminal sexual assault, and that which elevates it to a certain degree is provable by the defendant's confession. 1 Gillespie, Michigan Criminal Law and Procedure (2d ed), § 20.50, pp 85-86; *Williams, supra* at 391-392; *Cotton, supra* at 388-389; see also 65 Am Jur 2d, Rape, § 89, p 806. Independent proof of the corpus delicti of criminal sexual conduct was presented in this case before defendant's confession was admitted into evidence. The occurrence of a specific injury, sexual assault, and the agency of defendant as the source of this injury was established by the older daughter's testimony. She testified that defendant touched her and the younger daughter in their "crotch area." This satisfies the elements of CSC-II which are that the defendant engages in sexual contact with another person and that other person is under thirteen years of age. MCL 750.520c(1)(a); *People v Lemons*, 454 Mich 234, 252; 562 NW2d 447 (1997). At the time of the alleged incident, MCL 750.520a(k) defined "sexual contact" as including "intentional touching [that could] reasonably be construed as being for the purpose of sexual arousal or gratification."⁵ *People v Piper*, 223 Mich App 642, 645; 567 NW2d 4823 (1997).

Because defendant's confession was used to elevate the offense to first degree, no error occurred in the admission of defendant's confession as proof of the aggravating circumstances that constituted the crime of CSC-I and CSC-II. Because defendant's statements were properly admitted, the trial court did not err in denying defendant's motion for directed verdict which was premised on the argument that, without defendant's statements, there was insufficient evidence of the alleged crimes.

V. Sentence

Defendant next argues the trial court erred in sentencing defendant over the guidelines minimum sentencing range without a substantial and compelling reason not reflected in the scored factors.

⁵ On March 28, 2001, the current definition became effective providing: "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification."

A trial court's decision that substantial and compelling factors merit a departure from the statutory⁶ minimum sentence is reviewed for an abuse of discretion. *People v Izarraras-Placante*, 246 Mich App 490, 497; 633 NW2d 18 (2001). "To the extent that review requires statutory interpretation and application, our review is de novo." *Id.*

Under the sentencing guidelines statute, the trial court generally must impose a minimum sentence in accordance with the calculated guidelines range. MCL 769.34(2); *People v Babcock (After Remand)* 250 Mich App 463, 465; 648 NW2d 221 (2002). A court may depart from the appropriate sentence range if it "has a substantial and compelling reason for the departure and states on the record the reasons for departure." MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). A court may not depart from the sentencing guidelines range based on certain specified factors, including gender, race, ethnicity, national origin, or lack of employment, MCL 769.34(3)(a), nor may it base a departure on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds based on the facts of the case, that the characteristic was given inadequate or disproportionate weight, MCL 769.34(3)(b). This Court has explained the terms "substantial and compelling" as constituting strong language intended only to exist in exceptional cases. *Babcock, supra* at 466. The reasons justifying departure should "keenly and irresistibly grab" the court's attention and be recognized as having considerable worth in determining the length of a sentence. *Id.* at 466-467.

Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Babcock, supra* at 467. This means that the facts considered must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991). If there are adequate reasons for departure, the extent of the departure is subject to review for proportionality. *Babcock, supra* at 468-469. Generally, a sentence must be proportionate to the severity of the crime. *Hegwood, supra* at 437, n 10; *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

At the sentencing hearing, the trial court determined that the guidelines recommended minimum sentence range was 135 to 225 months in prison. The trial court stated:

I think the guidelines are woefully inadequate and even with the changes that I have made, it doesn't change the bottom line and that means that your guidelines are a hundred and thirty-five months to two hundred and twenty-five months and that means I can give you a minimum range within the guidelines between eleven years and eighteen years and that's inadequate.

⁶ Because defendant committed the offenses after January 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

It's inadequate for what you did to your daughters and the prosecutor is right. Your daughters are going to have to live with that for the rest of their lives and nine times out of ten they're going to either fall into abusive relationships themselves or be abusive themselves.

The trial court then sentenced defendant to concurrent sentences of ten to fifteen years in prison for each count of CSC-II and thirty to sixty years in prison for each count of CSC-I. After sentencing defendant, the trial court further stated:

Oh, wait a minute. I have to state my reasons for going way above the guidelines. I think I stated my reasons already, but if anyone who reviews this has any doubt all they have to do is take a look at the testimony of Detective Newsome as I indicated was compelling and the circumstances surrounding that testimony and the totality of the testimony in general and there's no doubt in my mind that anyone that reviews my sentence will find that it's a just a fair sentence. All right.

Based on the record, it appears that the trial court's reason for the departure was the impact defendant's conduct had and will have on the victims. The trial court scored points for offense variables 4, 9, 10, 11, and 13 which are respectively psychological injury to the victim, two victims, exploitation of a vulnerable victim, criminal sexual penetration, and continuing pattern of criminal behavior. MCL 777.34; MCL 777.39; MCL 777.40; MCL 777.41; MCL 777.43. The extent of the past and future impact on the victims was not encompassed by these factors. Even though psychological impact was covered, the trial court is permitted to consider a factor that is not given enough weight in the scoring. The lifelong impact on the young victims, when the abuse was inflicted by their own father, is a substantial and compelling reason that is objective and verifiable. The evidence presented at trial exhibited how defendant's actions traumatized the victims and disrupted their family life. For the same reasons, the extent of the departure is proportionate to the severity of the crime.

Affirmed.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Kirsten Frank Kelly