

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HARRY GETSCHER,

Defendant-Appellant.

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UNPUBLISHED

October 17, 2006

No. 262113

Oakland Circuit Court

LC No. 2003-189544-FC

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under thirteen years of age), and five counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under thirteen years of age), following a jury trial. The charges involved two victims who were related to defendant. Defendant was sentenced to concurrent prison terms of fifteen to thirty years for the CSC I conviction and ten to fifteen years for each CSC II conviction. We affirm.

Defendant first argues that the trial court abused its discretion in admitting other-acts testimony describing three pictures that depicted child pornography and that were downloaded from the Internet. Defendant contends that MRE 404(b) was violated. We disagree. A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion. See *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). An abuse of discretion exists when an unprejudiced person would not find a justification for the decision. *Id.* at 632. "A trial court's decision on a close evidentiary decision does not amount to an abuse of discretion." *Id.*

Under MRE 404(b), evidence of other crimes, wrongs, or acts is admissible if the evidence is (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) not unduly prejudicial under the balancing test of MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994).

We conclude that the trial court did not abuse its discretion in admitting testimony describing the child pornography found on defendant's computer. CSC II requires proof that defendant engaged in "sexual contact" with the complainant. MCL 750.520c(1). "Sexual contact" means, for purposes of this case, the intentional touching of the victim's intimate parts

or of the clothing covering the immediate area of the victim's intimate parts, "if that touching can reasonably be construed as being for the purpose of sexual arousal or gratification . . . ." MCL 750.520a(o). Defendant's general denial of the allegations "put[] the prosecution to its proofs regarding all elements of the crime charged." *VanderVliet, supra* at 78 (internal citation and quotation marks omitted). The evidence was offered for the proper purpose of establishing that the touching underlying the charges was done for the purpose of sexual arousal or gratification. The descriptions of the child pornography taken from the Internet were probative of the intent underlying the touching in issue. Further, the trial court clearly minimized the prejudicial impact of the evidence by not allowing admission of the pictures and limiting the forensic examiner's testimony to explaining the number of downloaded photographs and providing a description of them. Finally, the court clearly instructed the jury on the limited purpose to which this evidence could be put. *Id.* at 75. Under the circumstances, we simply cannot conclude that an abuse of discretion occurred.<sup>1</sup>

Defendant next argues that his trial counsel was ineffective for failing to challenge a juror for cause or for failing to use a peremptory challenge to remove the juror because the juror admitted during voir dire her involvement in a previous sexual assault trial in which her daughter was the victim. No evidentiary hearing occurred below with respect to this issue.<sup>2</sup> See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Therefore, review of this claim is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

To establish a claim of ineffective assistance of counsel, a defendant bears a heavy burden. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Specifically, a defendant must show that counsel's performance was objectively unreasonable and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceedings would have been different. *Id.* at 600. In addition, there is a strong presumption that counsel's performance was sound trial strategy. *Id.*

Here, the record does not support defendant's claim of error. While the juror admitted her involvement in the previous proceedings, she repeatedly stated that her experience did not prevent her from being fair and impartial in this case. Contrary to defendant's claim, it appears from the record that defense counsel's decision was based on trial strategy and made after carefully examining the potential juror. This Court will not substitute its judgment for that of trial counsel on matters involving trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

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<sup>1</sup> We note that we reject defendant's argument that there was an insufficient nexus between the pornography and defendant. The computer containing the pornography was found in the basement of defendant's mother's home, where defendant was residing, and defendant admits in his appellate brief that he "claimed that the pictures were downloaded accidentally, while he was admittedly searching the web for adult pornography."

<sup>2</sup> Defendant filed a motion to remand in this Court, but this Court denied the motion.

Defendant next argues that his constitutional right to confront and cross-examine the victims, US Const, Am VI, and Const 1963, art 1, § 20, was violated. We disagree. Preserved<sup>3</sup> questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Unpreserved<sup>4</sup> constitutional error may warrant relief on appeal if the alleged error was a plain error that affected the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

In support of his argument, defendant relies on *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), in which the United States Supreme Court held that the Sixth Amendment prohibits testimonial statements from a witness *who did not testify at trial* unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination. *Id.* at 53-54. Here, the statements in issue were made by the two victims who did testify at trial and were cross-examined by defendant. In regard to police testimony concerning the prior preliminary examination testimony of one of the victims, her testimony at trial that she could no longer remember the incident described at the preliminary examination did not result in a violation of the confrontation clause because defendant had an *opportunity* to cross-examine the victim before the jury. *United States v Owens*, 484 US 554, 559-560; 108 S Ct 838, 98 L Ed 2d 951 (1988). Thus, defendant’s claim of error is without merit.

Defendant next argues that the sentencing court abused its discretion in scoring fifteen points for OV 8 (victim asportation or captivity). See MCL 777.38. We disagree. A sentencing court’s scoring decision is reviewed for an abuse of discretion and for whether the record evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A trial court’s scoring decision will be upheld if there is any evidence in the record to support it. *Id.* “The proper construction or application of statutory sentencing guidelines [is] . . . reviewed de novo.” *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

In calculating OV 8 of the sentencing guidelines, a court must assess 15 points if “[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” MCL 777.38(1)(a). Asporting a victim can be accomplished even if the victim is *voluntarily* moved to the defendant’s home where the criminal conduct occurs. *People v Spanke*, 254 Mich App 642, 645-648; 658 NW2d

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<sup>3</sup> Defendant objected to Dr. Annamarie Church’s anticipated testimony concerning what one of the victims had told her as being a violation of defendant’s constitutional right of confrontation. Defendant also argued below that the prior preliminary examination testimony of one of the victims was inadmissible during trial because it would violate defendant’s right of confrontation. While the trial court allowed both sets of testimony without addressing defendant’s arguments under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), review under *Crawford* is nevertheless appropriate because the arguments were adequately raised in the trial court and pursued on appeal. *Peterman v Dep’t of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

<sup>4</sup> Defendant failed to object below on confrontation grounds to testimony elicited from three Carehouse employees. Therefore, defendant has failed to preserve these claims of constitutional error. *Geno, supra* at 626.

504 (2003). A sentencing court may consider all record evidence before it, including the contents of a presentence investigation report or testimony taken at a preliminary examination or trial. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

Here, there was sufficient evidence to support the sentencing court's scoring of OV 8. Specifically, one of the victims testified that, on one occasion, defendant invited her into his room and molested her. Similar to the defendant in *Spanke*, in which the victims were voluntarily moved to the defendant's home, *Spanke, supra* at 648, defendant in the case at hand invited the victim to and in effect moved her to a place of greater danger that was secluded from the common areas of his home. Thus, the sentencing court did not abuse its discretion.

Defendant finally argues that his CSC II sentences were improper because they exceeded the sentencing guidelines. However, defendant has abandoned this argument because he has failed to provide any precise authority to support his proposition that his CSC II convictions should have been scored. *Terzano v Wayne Co*, 216 Mich App 522, 533; 549 NW2d 606 (1996). In any event, under *Mack, supra* at 126-128, defendant's claim of error is without merit.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Patrick M. Meter  
/s/ Pat M. Donofrio