

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 14, 2011

v

ALLAN FORD DAVIDSON,

Defendant-Appellant.

No. 295597
Saginaw Circuit Court
LC No. 08-031614-FC

Before: O'CONNELL, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of, and sentences for, eleven counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1) (multiple variables), and his convictions of three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1) (multiple variables). The trial court imposed concurrent sentences of imprisonment of sixty-five to one hundred years for each CSC I conviction, and eighty-six months to fifteen years for each CSC II conviction. We affirm.

I. FACTS

This case arose from allegations that defendant sexually molested the victim, his daughter, from when she was eight years old until she was seventeen years old. The victim described a long pattern of escalating sexual activity forced upon her, including vaginal and oral sex. The victim further described following orders to have sex with other males while defendant watched through a peephole, and performing oral sex on her younger brother at defendant's direction.

The defense denied that any of the alleged sexual misconduct took place, and suggested that the victim had falsely accused defendant in hopes of accessing her interest in a trust fund and perhaps going off with her then-boyfriend.

On appeal, defendant alleges prosecutorial misconduct, ineffective assistance of counsel, evidentiary error, and, alternatively, sentencing error.

II. PROSECUTORIAL MISCONDUCT

Defendant alleges several instances of prosecutorial misconduct, but concedes that there were no objections to any of the commentary of which he makes issue, thus leaving this issue unpreserved. An unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting substantial rights. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Comporting with this standard is this Court's pronouncement in *People v Unger*, 278 Mich App 210; 749 NW2d 272 (2008) that "[r]eview of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or failure to review the issue would result in a miscarriage of justice." *Id.* at 234-235 (internal quotation marks omitted). A prosecutor's remarks are reviewed as a whole and placed in context. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995).

Defendant confidently states that "Michigan courts disapprove of all forms of inflammatory argument from prosecutors," but defendant oversimplifies the governing principles. Although a prosecuting attorney may not express personal opinions about the defendant's guilt, urge the jury to convict out of civic duty, or appeal to the jurors' fears or prejudices, a prosecuting attorney otherwise enjoys wide latitude in fashioning arguments, and may argue the evidence and all reasonable inferences from it. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). A prosecuting attorney is not restricted to presenting his or her case in the "blandest of all possible terms." *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989) (internal quotation marks omitted), remanded on other grounds sub nom *People v Thomas*, 439 Mich 836 (1991).

In this case, defendant first makes issue of the prosecuting attorney's reference to the terrorist attacks of September 11, 2001, during jury selection:

[P]rior to 9-11, when the planes slammed into the Trade Towers in New York, there was an FBI agent in Arizona that had learned that there were several individuals of a middle eastern descent that had been taking flying lessons. And they were learning how to fly, how to take off. They were not learning how to land. Now, that is a little strange. It was strange enough to him that when he got this data he put it together—several males, common origin, here on visas learning how to fly but not land—I think there is a problem, there is a threat. And he sends that off to the jury, his superiors, and they disbelief [sic] him. They look at it and say that is so outrageous it couldn't possibly happen, and they discount it. And the twin towers fall.

So that is what I'm trying to suggest here. The fact that what you are going to be hearing is so out of line with what you normally hear and experience, are you going to be able to listen to that and say I can't really imagine that this

happens. But I'm going in with an open mind and I will decide yes, it happened. No, it didn't. Yes, he did it. No, he didn't. Can you all do that?

We read these remarks as merely an attempt to ensure that the jurors would be able to believe evidence of a particularly rare and heinous course of criminal behavior. There were no factual parallels between the September 11, 2001 attacks and the criminal conduct alleged against defendant. Moreover, the prosecuting attorney was not suggesting that outrage over September 11 somehow demanded conviction in this case, and, in fact, he urged the jurors to keep an open mind and acknowledged that they might conclude that defendant did, or did not, commit the crimes with which he was charged. With this argument, defendant fails to bring any prosecutorial misconduct to light.

Defendant next complains that the prosecutor also misstated his role in his opening statement when he stated, "I am an attorney representing the victim, representing the People of the State of Michigan." Defendant asserts that in making this claim, the prosecuting attorney elevated his role and denigrated the defense. We disagree.

"A prosecutor may not vouch for the evidence or place the weight of his office behind the prosecution; but, . . . he may argue regarding the credibility of witnesses where the testimony conflicts and the result depends on which of the witnesses is to be believed." *People v Foster*, 77 Mich App 604, 612-613; 259 NW2d 153 (1977). The critical inquiry is whether the prosecution urged the jury to suspend its own judgment out of deference to the prosecutor or police. *Whitfield*, 214 Mich App at 352. In this case, in calling himself the attorney representing the victim along with the rest of the people of this state, the prosecuting attorney did not admonish the jurors to suspend their own judgment and defer to his office, and he did not elevate the prosecutor's role. He was merely stating the obvious. Moreover, before making the challenged statement, the prosecuting attorney reminded the jury that he and defense counsel were not present at the events in question and their statements were not evidence. These remarks fell far short of urging the jury to find defendant guilty in deference to the prestige of the prosecutor's office.

Furthermore, a prosecuting attorney "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *Bahoda*, 448 Mich at 283. We conclude, however, that the statement to the effect that the prosecuting attorney was operating on behalf of the victim along with the rest of the people of this state, coupled with the admonishments that the attorneys were not present and that their statements were not evidence, can hardly be interpreted as denigrating the defense.

Finally, defendant argues that the prosecuting attorney improperly elicited testimony indicating that the district court had approved the addition of ten criminal counts against defendant beyond the original four. This issue arose in connection with the police detective who headed the investigation. On cross-examination, defense counsel asked the detective to confirm that defendant was initially charged with four counts of CSC I. On redirect, the prosecuting attorney elicited from that witness that the investigation continued after those initial four charges were "drawn up," and that after the preliminary examination, the district judge approved ten additional charges. Defendant argues that the latter testimony had the effect of causing the jurors to defer to what they perceived as the learned district judge's conclusion that defendant was in

fact guilty of those additional charges of CSC, thus destroying the presumption of innocence. We disagree.

Defendant relies on *People v Hudson*, 123 Mich App 624; 333 NW2d 12 (1982), where the trial court had informed the jury that a preliminary examination had been conducted to determine that a crime had been committed, and that there was probable cause to believe that the defendant had committed the crime. *Id.* at 625. The trial court then instructed the jury on the distinction between probable cause and proof beyond a reasonable doubt. *Id.* Despite the lack of objection, this Court reversed on the ground that the court effectively informed the jury that there was probable cause to believe that the defendant was guilty, reasoning that “[s]uch an instruction is likely to place the burden of proof on the defendant to prove his innocence.” *Id.*

Hudson is distinguishable on several grounds. In *Hudson*, the court itself informed the jury of the probable cause determination, while in this case, the prosecution, following up on the defense’s cross-examination, elicited testimony from a detective that charges were added after the preliminary examination. Unlike in *Hudson*, there was no specific mention of probable cause, let alone that a judge had determined its existence in this case. Further, the redirect examination at issue included testimony that it is not unusual for charges to be added in connection with a preliminary examination, or for dates to be corrected or expanded to conform to the evidence.

Because defense counsel had elicited testimony about there being only four charges in the first instance, the defense opened the door allowing the prosecuting attorney to elicit testimony concerning how the remaining charges came into existence. A jury is entitled to learn the “complete story” of the matter at issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). In this case, the jurors were unlikely to conclude that the trial court had already determined guilt, but likely regarded what they heard as filling in some missing procedural details.

For these reasons, defendant’s claim of prosecutorial misconduct fails.

III. ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to object to the alleged prosecutorial misconduct, for eliciting damaging testimony, and for making detrimental factual assertions not in evidence. We disagree.

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d

713 (2007). Because defendant did not move for a new trial or a *Ginther*¹ hearing below, our review of the claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

We reject defendant's assertion that trial counsel was ineffective for failing to object in connection with the claims of prosecutorial misconduct discussed above on the ground that there was in fact no prosecutorial misconduct to object to. See *Unger*, 278 Mich app at 256 ("Defense counsel is not ineffective for filing to make a futile objection.").

Defendant next complains that defense counsel elicited testimony from the victim that defendant beat her mother, that she and her mother were afraid of defendant, that defendant threw the victim at a wall, beat her with a belt, and locked her in her room, and that defendant severely beat the family dogs in the victim's presence. Defendant argues that there could be no legitimate strategic purpose behind eliciting such testimony. We disagree. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

In this case, the allegations concerning defendant's sexual abuse of his daughter were of a sort that could be expected to shock the conscience of a typical juror. In light of this, counsel could have reasonably decided to draw attention to other allegations, which other witnesses denied, in order to instill disbelief in the allegations underlying the charges and increase the likelihood that at least one juror would exercise his or her prerogative and acquit defendant. Defense counsel hoped that a juror would, as the court instructed, "conclude that a witness deliberately lied about something that is important to [deciding] the case" and then "choose not to accept anything the witness said."

Defendant also emphasizes that defendant's comments to the jury included mention of misconduct on defendant's part that was never in evidence. In particular, during jury selection, defense counsel stated as follows:

And what is really going to get you sick is that this young lady is going to say that the father made her lick his feet, and lick his asshole. Does that make you sick? Does that say hey, listen, I can't listen to this. I don't care what this guy says, he is guilty

Defense counsel touched on this subject matter again during opening statement, saying, "So when you look at a case of this kind, this kind of flavor, the filth that is suggested, it has to shut your mind down. . . . You don't go around licking anuses." However, neither the victim nor any other witness ever spoke of any oral-anal contact taking place. Further, despite the total lack of evidence on the matter, in closing argument, defense counsel asked whether the evidence of

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

other matters “makes my client guilty of having this child lick his anus[,]” then opined that “that is the most disgusting, disgusting thing a man could do to a child.”

Trial attorneys may not make statements of fact to the jury that are not supported by the evidence. See *Bahoda*, 448 Mich at 282. In this case, defense counsel’s initial suggestion that there would be evidence of oral-anus contact might be excused on the ground that counsel had reason to suppose that such testimony would be elicited. However, no such excuse covers counsel’s mention of such alleged conduct in closing argument.

Nonetheless, even if error, we conclude that defendant suffered no prejudice in the matter, and thus any such error was harmless. Indeed, immediately after raising the specter of defendant’s having forced the victim to engage in oral-anus contact, defense counsel suggested that calm inquiry would raise doubts about the allegation. Further, the prosecuting attorney reminded the jury that no evidence of anus licking had in fact been presented, and the trial court instructed the jury to decide the facts solely on the basis of the evidence, and that the statements of counsel are not evidence. That the jury was correctly informed, and instructed, in these regards mitigates against any conclusion that defense counsel’s strategy of shocking the jury into disbelief actually backfired and in fact inflamed the jury into wanting to convict simply as an emotional response to an allegation of shockingly abusive conduct that came from defense counsel himself.

For these reasons, defendant has failed to show that defense counsel committed any prejudicial error, let alone that better performance on counsel’s part would have produced a different result.

IV. EVIDENTIARY ERROR

This Court reviews a trial court’s evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). An abuse of discretion occurs where the trial court chooses an outcome falling outside a “principled range of outcomes.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, again, unpreserved issues are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Defendant first makes issue of recordings of conversations between defendant and his wife that took place while defendant was incarcerated in the county jail. When the first such recordings were played, defense counsel complained that they were “totally incomprehensible.” The jurors answered affirmatively, but “[b]arely,” when asked if they could hear them. The trial court agreed that the recordings were “very difficult to hear.” But defense counsel never asked that the recordings not be played at all on this ground; instead, after some recordings had been played, counsel repeatedly asked that each conversation to be played thereafter be played in its entirety. Although the record makes plain that the recorded conversations were difficult to hear, the jury was nonetheless able to follow them, even if only “barely” so. As a result, it was not plain error to allow them to be played.

Defendant argues that the of admission certain statements on the recordings amounted to reversible error. As the prosecuting attorney made continued use of the recordings, he apparently returned to an earlier one by mistake, and thus brought out a statement from

defendant to the effect that he did not like his son. The trial court instructed the jury to disregard that statement. Then, later, the jury apparently heard some recorded statement making reference to a disciplinary problem defendant had at the jail. Defense counsel asked that the reference be stricken, the prosecuting attorney agreed, and the trial court instructed the jury to disregard it. Defense counsel sought no additional remedy, and appropriately so. “A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, . . . and impairs his ability to get a fair trial.” *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citation omitted). Accordingly, not every mention of some inappropriate subject matter before a jury warrants a mistrial. *Id.* Further, “[j]urors are presumed to follow instructions, and instructions are presumed to cure most errors.” *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008). Therefore, any error was remedied by the trial court’s instructions to the jury.

Defendant next complains that the trial court erred when it overruled a defense objection to the admission of defendant’s statement on the recording that if the victim did not appear at trial a mistrial would result. Defendant argues that this statement had no bearing on the question of defendant’s guilt or innocence, but that the statement “create[d] a negative impression of [defendant] and [was] thus prejudicial[.]” We conclude that this statement was not highly prejudicial. At worst, the statement suggests that defendant expected unfavorable testimony from the victim. That the victim did in fact appear and provide testimony very unfavorable to defendant shows nothing more than that defendant had correctly surmised that he was vulnerable to such testimony. In light of the slight risk of prejudice, we conclude that the trial court did not abuse its discretion in allowing that evidence to stand.

Finally, defendant contends that the trial court denied him his constitutional right to present a defense by disallowing defense counsel the ability to elicit information concerning the sexual nature of the victim’s relationship with an old boyfriend. Defense counsel argued that the victim had falsely accused defendant in hopes of accessing a trust fund and running off with the boyfriend.² The prosecuting attorney persuaded the trial court that evidence of a sexual relationship in the connection should be excluded by the rape-shield statute. We agree.

The rape-shield statute provides as follows:

Evidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct shall not be admitted . . . unless and only to the extent that the judge finds that the . . . proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value[.] [MCL 750.520j(1).]

The purpose of the rape shield law is to exclude evidence of the victim’s past sexual conduct with persons other than the defendant. *People v Adair*, 452 Mich 473, 480; 550 NW2d 505

² Although the victim denied that she and the young man in question were ever “in an official relationship,” she agreed that she and the fellow were “a couple” for “[a]lmost a year.”

(1996). Conduct refers to “all of one’s personal behavior.” *People v Parks*, 483 Mich 1040, 1044; 766 NW2d 650 (2009) (Young, J., concurring) (internal quotations omitted and emphasis in original). “The prohibitions in the law are also a reflection of the legislative determination that inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury.” *Adair*, 452 Mich at 480, quoting *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982). Moreover, a victim’s sexual history is generally irrelevant to an alleged sexual assault, and has no bearing on the victim’s character for truthfulness. *Adair*, 452 Mich at 481. Finally, “[t]he Michigan statute represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.” *Michigan v Lucas*, 500 US 145, 149-150; 111 S Ct 1743; 114 L Ed 2d 205 (1991).

At the same time, a criminal defendant has a constitutional right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984), citing US Const, Ams VI and XIV; Const 1963, art 1, §§ 13, 17, 20. But that right extends to only relevant and admissible evidence. *People v Hackett*, 421 Mich 338, 354; 365 NW2d 120 (1984). Likewise, the federal and Michigan constitutions afford a defendant the right to confront the witnesses against him, but the right is limited. US Const, Am VI; Const 1963, art 1, § 20; *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). The constitutions guarantee an opportunity for the defendant to cross-examine a witness, but not to the extent or in whatever way the defendant wishes. *Id.*

[M]erely because a statute, such as the rape-shield statute, infringes a defendant’s Sixth Amendment right of confrontation does not make it unconstitutional. The Sixth Amendment right of confrontation is subject to a balancing test involving other legitimate state interests in the criminal trial process, including avoiding, among other things, harassment, prejudice, confusion of the issues, [danger to] the witness, or interrogation that is repetitive or only marginally relevant. [*People v Byrne*, 199 Mich App 674, 679; 502 NW2d 386 (1993), citing *Lucas*, 500 US at 145.]

This Court has held that under a defendant’s right to witness confrontation, the defendant may cross-examine a witness about past sexual conduct, usually prohibited under the rape shield statute, but only for the extremely limited purposes of showing witness bias, a false charge, or past false accusations of rape. *Hackett*, 421 Mich at 348.

In this case, prohibiting defendant from questioning the victim about her past sexual behavior with a boyfriend did not deny defendant a defense. The victim’s sexual relationship with the then-boyfriend is irrelevant to her character for truthfulness. Moreover, evidence of defendant’s defense was otherwise admitted in the record. The victim’s interest in a trust account was in evidence, as was the fact that she obtained access to that money when she turned eighteen. That the victim had developed a close relationship with the young man was also in evidence. Defense counsel was at liberty to ask if the victim had earlier wanted the trust money in hopes of funding some adventure with her then-boyfriend, but apparently elected not to. It is not obvious to us how informing the jury that a state of sexual intimacy existed between the victim and her boyfriend would have added significantly to the defense’s theory of the boyfriend’s being part of her motive to lie about defendant’s conduct. Clearly, defense counsel

was using the defense to investigate the victim's past sexual conduct in violation of the rape shield statute. As a result, the trial court properly prohibited the inquiry.

V. CUMULATIVE ERROR

Defendant argues that even if none of his claims of error discussed above is sufficient to warrant reversal, the cumulative effect of all the alleged error denied defendant a fair trial, and that reversal is thus required. See *People v Skowronski*, 61 Mich App 71, 77; 232 NW2d 306 (1975). However, because defendant has failed to show any prejudicial error at all, his argument concerning the cumulative effect of errors is unavailing. See *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984).

VI. SENTENCING

Alternatively, defendant argues that the trial court erred in departing from the guidelines range in imposing the sixty-five-year minimum sentences for the CSC I convictions, and that the resulting punishment is disproportionate to the crime. Again, we disagree.

In reviewing a trial court's decision to depart from the recommended range under the guidelines, "whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion[.]" *Babcock*, 469 Mich at 265. Where a trial court imposes a minimum sentence outside of the recommended range under the guidelines, that sentence is subject to review under general principles of proportionality. *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008). An abuse of sentencing discretion occurs where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

A sentencing court departing from the guidelines must state on the record its reasons for the departure, and may deviate for only a "substantial and compelling reason." MCL 769.34(3). This legislative language, in light of its statutory and case-law history, indicates the legislative intent that deviations from sentencing recommendations follow from only objective and verifiable factors. *Babcock*, 469 Mich at 257-258, 272. "That is, a substantial and compelling reason must be construed to mean an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases." *Id.* at 257-258 (internal quotation marks omitted), quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). "The court shall not base a departure on an offense characteristic or offender characteristic already taken into account . . . unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

In this case, the trial court explained its decision to depart by referring to the age of the victim, the family relationship between the victim and defendant, and the frequency of acts of sexual aggression that the victim described occurring over a period of years.

Defendant notes that the CSC I statute addresses both age and the relationship between the perpetrator and victim, and implies that that statutory distinction eliminated the trial court's need to account for those things in fashioning the sentence. We find defendant's logic difficult

to follow. Further, defendant cites offense variable (OV) 10 to argue that the guidelines already account for defendant's relationship with the victim. That variable concerns victim vulnerability, where the offender "exploited a victim's physical disability, mental disability, youth or agedness, or a *domestic relationship*, or the offender abused his or her authority status." MCL 777.40(1)(b) (emphasis added). The trial court scored that variable at 10 points, as the guidelines prescribe. *Id.* We think it obvious that a score of 10 points for that variable inadequately accounts for the years-long pattern of sexual abuse that the victim described suffering at the hands of her father.

Defendant further protests that the scoring guidelines already consider the number of sexual penetrations involved under OV 11, OV 12, and OV 13. The trial court scored 50 points for OV 11, as prescribed where two or more criminal sexual penetrations took place, MCL 777.41(1)(a), 25 points for OV 12, as prescribed where three or more contemporaneous felonious criminal acts against a person, MCL 777.42(1)(a), and 50 points for OV 13, as prescribed for a pattern of felonious criminal activity involving three or more sexual penetrations against a persons under thirteen years old, MCL 777.43(1)(a). However, as defendant concedes, "the victim testified that [defendant] molested her daily or several times a week over the course of years." Variable scores that reach their maximums, respectively, at two penetrations, three felonious acts, or three or more penetrations of a person under thirteen may well be deemed inadequate to account for the years-long pattern of nearly daily sexual exploitation that the victim described.

For these reasons, we reject defendant's challenge to the trial court's decision to depart from the sentencing guidelines. We likewise reject defendant's argument that the challenged sentences are not proportional to the crimes.

As noted above, where a trial court imposes a minimum sentence outside of the recommended range under the guidelines, that sentence is reviewed under the general principles of proportionality. *Smith*, 482 Mich at 299-300. "Where a given case does not present a combination of circumstances placing the offender in either the most serious or least threatening class with respect to the particular crime, then the trial court is not justified in imposing the maximum or minimum penalty, respectively." *Milbourn*, 435 Mich at 654.

Citing *Milbourn*, defendant argues that the trial court lacked any "rationale" for the extent of its departure from the guidelines. We disagree. The rape of one's own minor child "represents one of the most egregious forms of the crime of first-degree criminal sexual conduct because of the helplessness and harm to the victim when so abused by a parent," and "represents an act that has been historically viewed by society and this Court as one of the worst types of sexual assault." *People v Sabin (On Second Remand)*, 242 Mich App 656, 662-663; 620 NW2d 19 (2000). CSC taking this particularly pernicious form may thus justify "imposing a sentence approaching the maximum allowed under the law." *Id.* at 663.

Defendant points out that he had no record of any earlier felony, asserts that he "suffered psychological trauma as a child, [and] been in a mental facility and in the foster care system," and argues for those reasons that he "was entitled to at least the possibility of rehabilitation and a return to the community." Significantly, defendant does not suggest that the misconduct of which he was convicted was not of a strikingly egregious nature.

Because this Court has recognized sexual abuse of a child by a parent as among “the worst types of sexual assault,” we recognize the instant case as one calling for imposition of “a sentence approaching the maximum allowed under the law.” *Id.* Accordingly, we conclude that the minimum sentences of sixty-five years each for the CSC I convictions are proportionate to defendant’s crimes.

Affirmed.

/s/ Peter D. O’Connell
/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause