

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 27, 2013

v

ROBERT K. BRANNON,
Defendant-Appellant.

No. 303267
Monroe Circuit Court
LC No. 06-035769-FC

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

In October 2008, a jury convicted defendant of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a). Before defendant was sentenced, he filed a motion for a new trial on the ground that he was denied the effective assistance of counsel. Following a *Ginther*¹ hearing, the trial court granted defendant's motion in June 2009. The prosecution appealed and this Court affirmed the trial court's decision in *People v Brannon*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2010 (Docket No. 292617). However, in lieu of granting leave to appeal, our Supreme Court reversed this Court's decision, vacated the trial court's order granting defendant a new trial, and remanded the case to the trial court for reinstatement of defendant's conviction and further proceedings. *People v Brannon*, 486 Mich 1070; 784 NW2d 205 (2010). On remand, the trial court sentenced defendant to 20 to 40 years' imprisonment, with credit for time served. Defendant now appeals as of right, and we affirm.

I. BACKGROUND

Defendant was convicted of engaging in sexual penetration with a six-year-old niece in the summer of 1995, at the home of the victim's maternal grandparents in Temperance, Michigan. The alleged act of penetration involved defendant's insertion of a crayon into the victim's anal opening. The victim did not tell anyone else about the incident until approximately ten years later, after she learned that defendant had sexually molested one of her aunts (defendant's sister-in-law). That aunt testified that she was 15 years old when defendant first sexually assaulted her and that defendant engaged in inappropriate sexual contact with her on

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

several subsequent occasions. Like the victim, the aunt delayed telling anyone about the sexual assaults. The aunt testified that she did not tell anyone because defendant threatened to leave her sister if she told. The aunt additionally testified that she did not want to disrupt the family and that defendant assured her that he was not engaging in inappropriate conduct with anyone else. Defendant argued at trial that the victim's² testimony was not credible, and he also presented an alibi defense to show that he was never at the home of the victim's grandparents during the summer of 1995.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues on appeal that he was denied the effective assistance of counsel at trial because defense counsel failed to conduct a reasonable investigation before deciding not to present expert testimony regarding the effect of the victim's delayed reporting on the reliability of her trial testimony.

A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). To establish ineffective assistance of counsel, a defendant bears the burden of showing both deficient performance and prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel's performance is deficient if it falls below an objective standard of professional reasonableness. *People v Fyda*, 288 Mich App 446, 450; 793 NW2d 712 (2010). To establish prejudice, defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Here, defendant's claim regarding the presentation of expert testimony was the subject of a prior appeal. We agree with the trial court that our Supreme Court's prior decision with respect to this matter precludes appellate relief in this appeal. Although the trial court's reliance on res judicata was misplaced, inasmuch as there was no prior final judgment, see *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006), the law of the case doctrine precludes this Court from revisiting this specific issue. The law of the case doctrine provides that if an appellate court decides a legal question and remands for further proceedings, the legal question will not be determined differently by the appellate court in a subsequent appeal where the facts are materially the same. *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000). "[T]he appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court." *Id.* at 260; see also *People v Whisenant*, 384 Mich 693, 702; 187 NW2d 229 (1971). The doctrine applies to issues that were decided in the prior appeal, either implicitly or explicitly. *Grievance Administrator*, 462 Mich at 260. Stated otherwise, "[t]he law of the case doctrine applies only to questions actually decided in the prior decision and to those questions necessary to the court's prior determination." *City of Kalamazoo v Dep't of Corrections*, 229 Mich App 132, 135; 580 NW2d 475 (1998).

² Our reference to the "victim" throughout this opinion pertains to defendant's niece, not the aunt.

To avoid application of the law of the case doctrine, defendant attempts to separate defense counsel's strategic decisions from the adequacy of his investigation. But as our Supreme Court explained in *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012), counsel's investigation is not a separate component from strategy, but rather a product of the investigation:

In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy. *Strickland [v Washington]*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984)]. Yet a court cannot insulate the review of counsel's performance by calling it trial strategy. Initially, a court must determine whether the "strategic choices [were] made after less than complete investigation," and any choice is "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-691. Counsel always retains the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*

The essence of the trial court's June 1, 2009, order granting defendant a new trial on the basis of ineffective assistance of counsel was that defense counsel failed to fully investigate the benefit of expert witnesses. This Court affirmed on this same ground, stating, "As the trial court concluded, under the specific facts of this case, defense counsel failed to adequately investigate the benefit of expert witnesses, denying defendant the effective assistance of counsel." *Brannon*, slip op at 3. Our Supreme Court expressly reversed this Court's judgment and vacated the trial court's order granting the new trial. *Brannon*, 486 Mich at 1070. The Supreme Court reasoned that "[t]he record clearly established that defense counsel discussed issues of delayed reporting of sexual assault by a child witness with a potential expert witness, and made a reasonable strategic decision to forego expert testimony in light of the possibility that the witness might also provide testimony favorable to the prosecution." *Id.* Although the Supreme Court did not provide a detailed discussion of the investigation conducted by trial counsel, it clearly considered both the investigation and its impact on the strategic decision to forego expert testimony, and it reversed this Court's determination that counsel did not reasonably investigate the benefit of expert witnesses. Because there was no change in the material facts, the trial court reached the correct result in declining to revisit this issue, and we too are bound by our Supreme Court's prior decision. Thus, the law of the case doctrine precludes relief with respect to this matter.

Defendant presents additional ineffective assistance of counsel claims that were not raised in the prior appeal. He argues that defense counsel was ineffective for not raising a hearsay objection to the victim's testimony on direct examination by the prosecutor that she knew that her aunt had claimed to have been sexually assaulted by defendant. We disagree. Hearsay is "a statement, other than one made by declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). A statement offered to show an individual's state of mind is not precluded by the hearsay rule. *People v Fisher*, 449 Mich 441, 449; 537 NW2d 577 (1995). It is apparent from the record that the purpose of the victim's testimony regarding her knowledge of defendant's sexual assault against the victim's aunt was to show its effect on the victim's decision to come forward after several years to report the crayon incident. Indeed, defense counsel testified at the *Ginther* hearing that he was aware that evidence regarding what the victim learned about her aunt was part of the reason for her

decision to report the crayon incident. As the trial court found when denying defendant's posttrial motion for a new trial with respect to this issue, the evidence was admissible to explain the victim's motivation for her delayed report of the charged sexual assault, a nonhearsay purpose. Because a hearsay objection would have been futile, defense counsel was not ineffective for failing to object. Counsel is not required to make a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Moreover, given that the aunt herself testified to the sexual assaults committed against her by defendant, the requisite prejudice has not been established.

Defendant also argues that defense counsel was ineffective for failing to challenge the admissibility of the victim's aunt's testimony under MRE 404(b)(1). We again disagree. The aunt's testimony was admitted under MCL 768.27a, which governs over MRE 404(b). See *People v Watkins*, 491 Mich 450, 475; 818 NW2d 296 (2012); *People v Watkins*, 277 Mich App 358, 365; 745 NW2d 149 (2007). Because any challenge to the admissibility of the evidence under MRE 404(b) would not have precluded its admissibility under MCL 768.27a, defense counsel was not ineffective for failing to advance a challenge based on MRE 404(b). *Ericksen*, 288 Mich App at 201.

Defendant additionally argues that defense counsel was ineffective for failing to argue that the aunt's testimony should have been excluded under MRE 403, notwithstanding that it was subject to admission under MCL 768.27a. We agree with defendant that evidence admissible under MCL 768.27a is still subject to exclusion under MRE 403. *Watkins*, 491 Mich at 482-485; *People v Pattison*, 276 Mich App 613, 620-621; 741 NW2d 558 (2007). Under MRE 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" However, when applying MRE 403 to evidence that is admissible under MCL 768.27a, "courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Watkins*, 491 Mich at 487. Considerations that might lead a court to exclude the evidence as overly prejudicial include the following:

(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Id.* at 487-488.]

The aunt's testimony that defendant began sexually molesting her at age 15 was admissible under MCL 768.27a "for its bearing on any matter to which it is relevant." The aunt's testimony was probative of the credibility of the victim's testimony that defendant, her adult relative, engaged in an act of sexual penetration with her when she was a minor. The victim's credibility was a principal issue at trial. Weighing the propensity inference in favor of the evidence's probative value rather than its prejudicial effect, we agree with the trial court that MRE 403 would not have required exclusion of the aunt's testimony. Therefore, defense counsel was not ineffective for failing to raise an MRE 403 objection.

Next, defendant argues that defense counsel was ineffective for not attempting to obtain the victim's medical and psychological records. Although defendant raised this claim below, he

failed to proffer any medical or psychological records for the court to review. Defendant bears the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *Carbin*, 463 Mich at 600. Because defendant has not established any factual basis for concluding that the victim's medical and psychological records contained any information helpful to the defense, this ineffective assistance of counsel claim cannot succeed.

In sum, defendant has not established any errors by trial counsel, whether considered singularly or cumulatively, that deprived him of the effective assistance of counsel. *Carbin*, 463 Mich at 599-600; *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995); *People v Brown*, 279 Mich App 116, 145-146; 755 NW2d 664 (2008).

III. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor violated his Fifth Amendment rights during rebuttal argument by improperly directing the jury's attention to his failure to testify at trial. Defendant did not object to the prosecutor's argument at trial, leaving this issue unpreserved. *Brown*, 279 Mich App at 134. Therefore, our review is limited to determining whether plain error affected defendant's substantial rights. *Id.*; see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Error requiring reversal will not be found where a curative instruction could have cured any prejudice from a prosecutor's remarks. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Issues of constitutional law are reviewed de novo. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

A prosecutor's remarks are reviewed as a whole and evaluated in light of defense arguments and their relationship to the evidence admitted at trial. *Brown*, 279 Mich App at 135. A prosecutor's remark that infringes on the defendant's right not to testify may constitute error. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). But a distinction exists between remarks suggesting to the jury that a defendant's silence should be treated as substantive evidence of guilt and remarks that respond to a claim made by the defendant. *Id.* at 111. A prosecutor properly may comment on the weakness of an alibi defense, and may observe that inculpatory evidence is uncontroverted, even if the defendant is the only person who could have contradicted the evidence. *Id.* at 115.

Viewed in context, the prosecutor's rebuttal argument did not violate defendant's right to remain silent. The prosecutor remarked, "Defendant doesn't challenge that it occurred. He simply has a question about when it occurred." The prosecutor's comment was plainly directed at the fact that defendant had presented an alibi defense, which had to account for the victim's determination before trial that the charged incident occurred in 1995, and not 1996. Further, the prosecutor's earlier use of the word "uncontroverted" was simply for the purpose of expressing the belief that no contradictory evidence had been presented. Thus, there was no plain error. Moreover, to the extent defendant believes that the jury could have interpreted the prosecutor's

remarks as a comment on his failure to testify, appellate relief is not warranted because a curative instruction could have cured any perceived prejudice.³ *Unger*, 278 Mich App at 235.

IV. GREAT WEIGHT OF THE EVIDENCE

Defendant argues that he is entitled to a new trial because the jury's verdict is against the great weight of the evidence. The trial court denied defendant's motion for a new trial on this basis. A trial court's grant of a new trial on this ground is permissive in nature. *People v Lemmon*, 456 Mich 625, 634-635; 576 NW2d 129 (1998). Thus, we review the trial court's decision for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). We reject defendant's argument that the expert opinion evidence that he offered in support of his motion for a new trial is relevant to this issue. Because that evidence was not offered at trial, it has no bearing on whether the jury's verdict was against the great weight of the evidence. Defendant's reliance on *People v Mechura*, 205 Mich App 481; 517 NW2d 797 (1994), is misplaced because that case did not involve a motion for a new trial based on the great weight of the evidence. Rather, the defendant in that case sought a new trial on the basis of newly discovered evidence. Defendant does not argue that the proffered expert opinion evidence satisfies the requirements for a new trial based on newly discovered evidence. See *Mechura*, 205 Mich App 483.

Defendant's additional great-weight arguments essentially consist of an attack on the victim's credibility; however, the credibility of a witness is generally not a sufficient ground to grant a new trial. *Lemmon*, 456 Mich at 643. Here, defendant's conviction is supported by the victim's testimony, and that testimony was not so far impeached that it was deprived of all probative value or that the jury could not believe it. *Id.* at 645-646; *Musser*, 259 Mich App at 219. We further note that "[t]he testimony of a victim need not be corroborated in prosecutions under sections 520b [applicable here] to 520g." MCL 750.520h. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

V. MCL 768.27A EVIDENCE

Defendant next challenges the admissibility of the aunt's testimony under MCL 768.27a. Although defendant argues that the statute is unconstitutional because it infringes on our Supreme Court's rule-making authority, he acknowledges that our Supreme Court expressly rejected this argument in *Watkins*, 491 Mich at 475, in which it held that MCL 768.27a is a valid

³ Although defendant alternatively asserts that defense counsel was ineffective for failing to object to the prosecutor's argument, he fails to address this claim in the body of his brief, and thus has abandoned this alternative claim. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Regardless, counsel's failure to object did not constitute deficient performance.

enactment of substantive law. Thus, we reject defendant's challenge to the constitutionality of MCL 768.27a.

Next, we agree with defendant that evidence admissible under MCL 768.27a is still subject to exclusion under MRE 403. As discussed previously, however, MRE 403 did not require exclusion of the aunt's testimony in this case.

Defendant also argues that the trial court violated his right to due process by failing to conduct an evidentiary hearing to determine the scope of the aunt's allowable testimony under MCL 768.27a. Defendant's position is that the aunt's testimony referred to some sexual acts that did not qualify as a "listed offense" for purposes of MCL 768.27a and, therefore, were not admissible under that statute. We consider this evidentiary claim unpreserved because there is no indication in the record that defendant requested an evidentiary hearing to determine the scope of the aunt's testimony. See MRE 103(a)(1). Indeed, defendant asserts that defense counsel was ineffective for failing to ensure that the aunt's testimony would be limited to acts described by MCL 768.27a. Because this issue is unpreserved, defendant has the burden of showing a plain error affecting his substantial rights. *Carines*, 460 Mich at 763; *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

Although defendant frames this issue as implicating constitutional due process concerns, absent a claim that evidence implicates a specific constitutional right, evidentiary errors are generally considered nonconstitutional in nature. *People v Blackmon*, 280 Mich App 253, 260-261; 761 NW2d 172 (2008). Defendant's argument does not refer to any specific constitutional right, but rather relates to the scope of MCL 768.27a. We conclude that, absent a request, the trial court did not have a duty to conduct an evidentiary hearing to determine the scope of testimony admissible under MCL 768.27a. Moreover, defendant has failed to establish any testimony by the victim's aunt that was clearly inadmissible under MCL 768.27a.

MCL 768.27a provides that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." MCL 768.27a(1). A listed offense includes acts of criminal sexual conduct proscribed by MCL 750.520b – MCL 750.520e. See MCL 768.27a(1) and MCL 28.722(k), (s)(iv), (w)(iv). Defendant concedes that the aunt's testimony regarding defendant's sexual conduct toward her when she was 15 years old was admissible under MCL 768.27a, but argues that any testimony involving sexual acts committed when she was 16 or 17 years old was inadmissible because she was beyond the age of consent. We disagree.

First, for purposes of MCL 768.27a, the term "minor" is defined as "an individual less than 18 years old." MCL 768.27a(2)(b). Second, it is not at all apparent from the aunt's testimony that the sexual acts she described were consensual. The criminal sexual conduct statutes prohibit a person from engaging in sexual contact or penetration accomplished by force or coercion. MCL 750.520d(1)(b); MCL 750.520e(1)(b). Force or coercion is determined in light of all circumstances. *People v Premo*, 213 Mich App 406, 410; 540 NW2d 715 (1995). Coercion "may be actual, direct, or positive, as where physical force is used to compel [an] act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse." *Id.* at 410-411, quoting Black's Law

Dictionary (5th ed), p 234). The aunt's testimony indicated that she submitted to defendant's sexual conduct, which began when she was 15 years old, because defendant was married to her sister (who had several children), and he threatened to leave her sister if she said anything, so she did what she thought had to be done. The aunt's testimony supports a finding that defendant accomplished the sexual acts through the use of coercion. Thus, defendant has not shown that any testimony regarding his sexual acts toward the victim's aunt were clearly outside the scope of MCL 768.27a. Moreover, assuming that testimony regarding some of the sexual acts involving the aunt should have been excluded, the presumed error was harmless, as those acts were simply in addition to the acts of sexual assault committed against the aunt that were the proper subject of testimony. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999) (reversal only required if it affirmatively appears that it is more probable than not that the error was outcome determinative).

Although defendant also presents a cursory claim that defense counsel was ineffective for failing to ensure that the aunt's testimony was limited in scope, given his failure to establish that any testimony clearly exceeded the scope of MCL 768.27a and was prejudicial, this ineffective assistance of counsel claim cannot succeed.

VI. DISQUALIFICATION OF TRIAL PROSECUTOR

Defendant next argues that the trial court erred in denying his motion to disqualify the assistant prosecutor. We disagree.

We review a trial court's findings of fact on a motion to disqualify a prosecutor for clear error and review the court's application of relevant law to the facts de novo. *People v Tesen*, 276 Mich App 134, 141; 739 NW2d 689 (2007). The party seeking to disqualify a prosecutor as a necessary witness has the burden of showing the need for the prosecutor's testimony. *Id.* at 144. The trial court conducted an evidentiary hearing on this issue and found no basis for disqualification.

Defendant argues that the prosecutor should have been disqualified because she was an essential witness. A prosecutor is not a necessary witness if the substance of the testimony can be elicited from other witnesses and the party seeking disqualification did not previously state an intent to call the prosecutor as a witness. *Id.*; see also *People v Petri*, 279 Mich App 407, 417; 760 NW2d 882 (2008).

The evidence at the pretrial evidentiary hearing did not establish that the prosecutor's pretrial involvement in the case made her a necessary witness. This case is distinguishable from *Tesen*, 276 Mich App at 136, in which an assistant prosecutor took a lead role in interviewing a child to investigate a complaint that the child was sexually abused by his father before authorizing a warrant charging the father with multiple counts of first-degree CSC and other charges. In this case, the evidence did not show that the prosecutor had any role in investigating the charges. Defendant's reliance on the victim's preliminary examination testimony to support his claim that the prosecutor took an investigative role is misplaced. It is apparent from the victim's testimony that she had difficulty distinguishing between actions by herself and her mother. Ultimately, however, the victim clarified that it was her mother who telephoned the prosecutor and, based on that discussion, was directed to go to the police to make a report. This

was consistent with the prosecutor's testimony at the evidentiary hearing that she spoke with an individual with the same name as the victim's mother, but did not talk directly with the victim. This brief discussion does not establish that the prosecutor assumed an investigative role in the case or would otherwise be a necessary witness.

Accordingly, the trial court did not clearly err in finding that the prosecutor was not a necessary witness, nor did it err in denying defendant's motion for disqualification.

VII. SENTENCING

Defendant lastly raises several claims of sentencing error. Because defendant was convicted of an offense committed before January 1, 1999, the trial court properly declined to use the legislative sentencing guidelines and instead used the former judicial sentencing guidelines. MCL 769.34(2); see also *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

Defendant argues that the trial court erred in scoring 25 points for offense variable 2 (OV 2) of the judicial sentencing guidelines. The scoring of the judicial sentencing guidelines was not an end in itself but rather a means to arrive at a proportionate sentence. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998). Because the judicial guidelines did not have a legislative mandate, adherence to the guidelines was not required, and given that the judicial guidelines lacked the force of law, a guidelines error or miscalculated variable did not violate the law nor constitute legal error. *Id.* There was no cognizable claim for relief "based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables." *Id.* at 497 (citation omitted). "Thus, application of the guidelines state[d] a cognizable claim on appeal only where (1) a factual predicate [was] wholly unsupported, (2) a factual predicate [was] materially false, and (3) the sentence [was] disproportionate." *Id.* at 497-498 (citation omitted; emphasis added).

In this case, the trial scored 25 points for OV 2, which permitted a 25-point score where the victim sustains a "bodily injury." See Michigan Sentencing Guidelines (2d ed, 1988), p 26; see also *People v Cathey*, 261 Mich App 506, 511; 681 NW2d 661 (2004). The trial court relied on the victim's trial testimony that she received a bump on her head during the offense when defendant spun her over and put her onto the floor, causing her head to hit a screen dividing the bedroom. Because defendant does not dispute the facts determined by the trial court, but only the trial court's interpretation of, and the application of the facts to, OV 2, he has not established a cognizable basis for appellate relief.

Defendant also challenges the trial court's decision to depart from the guidelines range of 96 to 180 months and impose a minimum sentence of 20 years. A trial court was not obligated to impose a sentence within the judicial sentencing guidelines range, but it was required to articulate a basis for departure from the recommended range. *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). We reviewed imposed sentences for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A given sentence constituted an abuse of discretion where it violated the principle of proportionality, requiring sentences to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*

Where there was a departure from the guidelines, an appellate court's first inquiry was whether the case involved circumstances that were inadequately embodied within variables used to score the guidelines. *Id.* at 659-660. In the absence of such circumstances or factors, the appellate court was alerted "to the possibility that the trial court . . . violated the principle of proportionality[.]" *Id.* at 660. "A court [could] justify an upward departure by reference to factors considered, but adjudged inadequately weighed, within the guidelines, as well as by introducing legitimate factors not considered by the guidelines." *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998). Ultimately, however, "the key test [was] whether the sentence [was] proportionate to the seriousness of the matter, not whether it depart[ed] from or adhere[d] to the guidelines' recommended range." *Milbourn*, 435 Mich at 661.

In this case, the trial court considered the factors set forth in *People v Oliver*, 242 Mich App 92, 98, 617 NW2d 721 (2000), in deciding whether to exceed the guidelines range. Those factors included "the severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant's attitude toward his criminal behavior, the defendant's social and personal history, and the defendant's criminal history, including subsequent offenses." *Id.*

The trial court discounted defendant's attitude toward his criminal behavior based on his right to maintain his innocence, but found that the severity and nature of the defendant's crime was reflected by both the legislative penalty and the victim's need for counseling. The trial court found that the offense was committed against a minor child, who was also a relative, in a secluded area. The court also determined that the crime partially fit the modus operandi used by defendant against the victim's aunt, and considered defendant's sexual offenses against the aunt in evaluating defendant's recidivist tendencies.

This case is distinguishable from *People v Fisher (After Remand)*, 176 Mich App 316, 317-318; 439 NW2d 343 (1989), in which the trial court attempted to tailor a sentence to prevent the defendant's release from prison until after he exceeded the "age of violence." This Court found that such reasoning was an inappropriate basis for departure under *People v Fleming* 428 Mich 408, 423 n 17; 410 NW2d 266 (1987), in which our Supreme Court disapproved of the use of status characteristics, such as age, as alone being used to depart from the guidelines. *Fisher*, 176 Mich App at 318. In this case, defendant's chance of recidivism was evaluated in light of his multiple offenses involving minors. See *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001) (upward departure from legislative guidelines affirmed where the trial court did not err in finding that the need to protect children was a proper factor to consider in fashioning sentence).

We conclude that the trial court did not abuse its discretion in imposing a minimum sentence of 20 years. Considering the seriousness of the circumstances surrounding the offense and the offender, the sentence does not violate the principle of proportionality.

Lastly, we reject defendant's claim that the trial court was required to state substantial and compelling reasons for its departure from the guidelines range, or explain the extent of its departure. These obligations apply to a departure sentence under the legislative guidelines. MCL 769.34(3); *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008). Under the former judicial guidelines, a trial court was only required to state "the aspects of the case that . . . persuaded the judge to impose a sentence outside the recommended minimum range." Michigan

Sentencing Guidelines Manual (2d ed, 1988), p 7. In this case, the trial court explained its reasons for departing from the guidelines. Because defendant has not demonstrated that the sentence imposed is disproportionate, he is not entitled to resentencing. *Raby*, 456 Mich at 497-498.

Affirmed.

/s/ William B. Murphy

/s/ Jane E. Markey

/s/ Michael J. Riordan