

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 15, 2011

v

VICTOR LEON WILSON,

Defendant-Appellant.

No. 296307
Wayne Circuit Court
LC No. 09-002410-FC

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his convictions of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 30 to 50 years for each conviction. We affirm.

I. BACKGROUND

Defendant was charged with sexually abusing two minor girls while they lived in the same household as defendant. Initially, the prosecutor charged defendant with engaging in acts of sexual penetration and sexual contact, but the sexual penetration charges were dismissed prior to trial. Several years earlier, defendant had been charged with sexually abusing two other female victims who lived in his household. He was acquitted of those charges in 2003. At the trial in this case, the trial court permitted the prosecutor to introduce evidence relating to the prior charged offenses.

Defendant was originally tried in July 2009, but a mistrial was declared because the jury was unable to reach a verdict. Defendant was retried in December 2009 and convicted of one count of second-degree criminal sexual conduct with respect to each victim.

II. OTHER-ACTS EVIDENCE

Defendant first argues that the admission of the other-acts evidence relating to the prior offenses of which he was acquitted deprived him of a fair trial. Defendant challenged the admissibility of this evidence below under MCL 768.27a, MRE 404(b), and MRE 403, but the trial court determined that the evidence was admissible. We review the trial court's decision for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). We

review any preliminary questions of law affecting admissibility de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Defendant also argues on appeal that the evidence violated his constitutional right to due process. We review this unpreserved constitutional claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Contrary to what defendant argues, the record shows that the trial court considered the relevancy of the other-acts evidence and also considered whether the evidence should be excluded under MRE 403. The trial court found that the other-acts evidence was admissible under MCL 768.27a, as well as under MRE 404(b), to show a common plan, scheme, or system in doing an act, or the absence of mistake or accident, and as bearing on the victims' credibility.

We find no merit to defendant's argument that MCL 768.27a is invalid because it conflicts with MRE 404(b). This Court has previously held that MCL 768.27a is a valid substantive rule of evidence that permits prosecutors to introduce evidence of a defendant's uncharged sexual offenses against a minor without having to justify admission under MRE 404(b). *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). The statute controls over any conflict with MRE 404(b). *People v Watkins*, 277 Mich App 358, 365; 745 NW2d 149 (2007). Further, it is not necessary that a prior act result in a conviction. "When a defendant is charged with second-degree criminal sexual conduct against a minor, evidence that the defendant committed another crime of second-degree criminal sexual conduct against a minor may be admitted under MCL 768.27a, independent of MRE 404(b), even if there was no conviction for the other crime." *People v Petri*, 279 Mich App 407, 411; 760 NW2 882 (2008). Defendant does not dispute that the acts described by the other-acts witnesses qualify as listed offenses that may be admitted under MCL 768.27a. Although a substantial period of time elapsed between the prior acts and the charged offenses in this case, the remoteness of the other acts only affects the weight of the evidence, not its admissibility. *People v Brown*, ___ Mich App ___; ___ NW2d ___ (Docket No. 297728, issued October 20, 2011), slip op at 5. Accordingly, the trial court did not abuse its discretion in finding that the other-acts evidence was admissible under MCL 768.27a.

The trial court's decision to admit the other-acts evidence under MRE 404(b)(1) was also a proper exercise of its discretion. The similarity between the prior acts and the charged offenses established the relevancy of the other-acts evidence to show a plan, scheme, or system in doing an act. The prior acts and the charged offenses all involved sexual contact with minor female children who were residing in the same household as defendant. Common features included defendant entering a bathroom while a child was bathing and defendant engaging in sexual contact with the children while they were attempting to sleep. There were sufficient common features to infer a plan, scheme, or system in doing an act that went beyond the mere commission of sexual contact.¹ *People v Sabin (After Remand)*, 463 Mich 43, 66; 614 NW2d 888 (2000).

¹ At trial, defense counsel acknowledged the similarity of the prior acts and the charged offenses and used that similarity to support the defense argument that the victims' allegations were fabricated. Counsel argued that the alleged prior acts were known within the family, and that the

Accordingly, the trial court did not abuse its discretion in ruling that the evidence was also admissible under MRE 404(b)(1).

Moreover, considering that the jury was instructed on the limited use of the other-acts evidence, we disagree with defendant's argument that the evidence was unduly prejudicial or was likely to cause confusion to warrant exclusion under MRE 403. The trial court's cautionary instruction minimized the potential for any unfair prejudice. Jurors are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Lastly, defendant has not established that admission of the evidence violated his constitutional rights. Evidentiary issues are generally non-constitutional in nature, unless a specific constitutional right is implicated. *People v Blackmon*, 280 Mich App 253, 259-261; 761 NW2d 172 (2008). As previously explained, the evidence was admissible under MCL 768.27a and MRE 404(b)(1). Defendant has not established any constitutional right to exclude the evidence of his prior bad acts.

III. DEFENDANT'S STANDARD 4 BRIEF

Defendant also challenges his convictions in a pro se brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. Defendant first argues that he was denied his right to the effective assistance of counsel. Although defendant raised this issue in a pro se motion for a *Ginther*² hearing in the trial court, the trial court denied the motion without conducting an evidentiary hearing. Therefore, our review is limited to errors apparent from the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). A defendant claiming ineffective assistance of counsel bears the burden of showing both deficient performance and prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "[A] defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Defendant must overcome a strong presumption that counsel engaged in sound trial strategy. *Id.* at 667-668.

Defendant argues that defense counsel was ineffective for failing to adequately attack the victims' credibility. Decisions regarding how to cross-examine or impeach witnesses are matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). In general, trial counsel's failure to call a witness or present other evidence can constitute ineffective assistance only when it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that might have made a difference in the outcome of the trial. *Ayres*, 239 Mich App at 22.

prior allegations were used to provide a "script" for the allegations that led to the charged offenses.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The record discloses that defense counsel used several different means to attack the victims' credibility and impeach their testimony. Although defendant claims that counsel should have sought to admit evidence of various reports and forensic interviews of the victims under MRE 803(8), that rule is a hearsay exception that allows public records and reports to be offered for the truth of the matters asserted. See MRE 801(c) (defining hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"); *People v McDaniel*, 469 Mich 409, 413; 670 NW2d 659 (2003) (discussing the limited admissibility of police reports under MRE 803(8)). Here, defendant was not seeking to admit the evidence for its truth.

With respect to whether counsel should have cross-examined the victims regarding prior inconsistent testimony or statements concerning the nature of the allegations to challenge their credibility, the record indicates that counsel accomplished this purpose through other means. For example, he obtained a stipulation that the original complaint contained allegations of sexual penetration, and that those charges were dismissed at the preliminary examination. Further, the officer in charge testified that there was an allegation of sexual penetration during a Kids Talk interview. Counsel's decision whether to similarly cross-examine the victims on that subject was a matter of trial strategy. Because the information was elicited through other means, counsel's failure to do so through cross-examination of the victims did not deprive defendant of a substantial defense.

In addition, defense counsel was not ineffective for failing to impeach the younger victim with inconsistent testimony concerning whether she was touched above or underneath her clothing. Either type of touching would have been sufficient to establish sexual contact. MCL 750.520a(q). Counsel instead focused on the original unsubstantiated allegations of sexual penetration to support the argument that the younger victim's account was fabricated. He also seized on the victim's testimony that she did not see who touched her to argue that a relative had presented the victim with a "script" to follow, but the victim "did not get it right." Counsel argued that the victim was coerced into saying something, but that she testified she did not see who touched her because she "couldn't tell a falsehood."³ While an additional showing of inconsistent testimony might have also supported the theory that the younger victim's allegations were scripted, counsel's decision to present that theory through other means was a matter of trial strategy. Defendant has not shown either that counsel's strategy was unreasonable, or that he was deprived of a substantial defense.

We also reject defendant's ineffective assistance of counsel claim related to the recorded telephone conversations that were presented at trial. First, the record does not support defendant's claim that the prosecutor withheld exculpatory information regarding the recorded

³ Defendant testified that the charges arose after he had an argument with the victims' aunt with respect to the victims' custody. Other evidence indicated that the charges were brought after Child Protective Services removed the victims from their mother's care because she was unable to provide a stable home for them. The victims were not residing in defendant's household when he was arrested.

calls. Defendant correctly argues that a criminal defendant “has a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment.” *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). But a prosecutor generally does not have a duty to allow access to his or her work product. *People v Holtzman*, 234 Mich App 166, 182; 593 NW2d 617 (1999). Here, the record indicates that defendant had access to the recorded telephone conversations before trial. The only material that was not disclosed was the prosecutor’s work product containing her summary of the telephone conversations and her notes of what she felt was important. The prosecutor voluntarily agreed to provide that information on the third day of trial after defendant accused her of tampering with the evidence. Because defendant was not entitled to disclosure of the prosecutor’s work product, and he has not demonstrated that any other evidence was withheld, his claim that defense counsel was ineffective for not objecting to the prosecutor’s failure to disclose material evidence cannot succeed. Trial counsel was not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). For this same reason, defendant’s unpreserved, independent claim of prosecutorial misconduct related to this issue also lacks merit. There was no error, plain or otherwise. *Carines*, 460 Mich at 763; *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

Defendant also argues that defense counsel was ineffective for failing to adequately investigate the accuracy of the recorded telephone calls. However, defendant has not offered any evidence, apart from his unsupported assertions, that the recorded telephone conversations were inaccurate or incomplete. Defense counsel explored the issue of the accuracy of the conversations in his questioning of defendant at trial, so this issue was presented to the jury. Defense counsel attempted to downplay the significance of the recorded conversations by arguing that, while they revealed some mistakes on minor details, they did not demonstrate any falsehood or lie with respect to whether defendant committed the charged offenses. Defense counsel’s decision to deal with the recorded conversations in this manner was a matter of trial strategy, and defendant has not overcome the presumption of sound strategy. Further, because defendant was allowed to challenge the accuracy of the recordings through his testimony, and he has not identified or offered any additional evidence to support his claim that any conversation was actually inaccurate (e.g., an affidavit from another party to a conversation disputing its accuracy), he has not demonstrated that he was deprived of a substantial defense. Accordingly, this ineffective assistance of counsel claim cannot succeed.

Next, defendant argues that the prosecutor engaged in misconduct by failing to provide a transcript of the victims’ Kids Talk interviews. Defendant did not timely raise this issue in the trial court, leaving it unpreserved. Accordingly, defendant has the burden of showing a plain error affecting his substantial rights. *Carines*, 460 Mich at 763; see also *Brown*, 279 Mich App at 134. The record indicates that before trial the defense was familiar with the victims’ Kids Talk interviews. Thus, there is no basis for concluding that any material exculpatory information was withheld. Defendant has not established a due process right to have exculpatory information disclosed in the form of a transcript.

Defendant also argues that the prosecutor violated his right to due process by using false testimony of the younger victim to obtain a conviction. A prosecutor may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Here, however, the sole basis for defendant’s claim that the younger victim’s trial

testimony was false is that she previously made statements or gave testimony that was inconsistent with her trial testimony. The mere fact that trial testimony is inconsistent with prior testimony or statements does not mean that the trial testimony is false. To establish perjury, “[i]t is not enough simply to contradict it, but evidence of the truth of the contradiction must come from evidence of circumstances bringing strong corroboration of the contradiction.” *People v Cash*, 388 Mich 153, 162; 200 NW2d 83 (1972). Similarly, the mere fact that there are inconsistencies between a witness’s trial testimony and a prior statement does not establish that the prosecutor knowingly used false testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Because defendant has not demonstrated that the victim’s trial testimony was actually false, or that the prosecutor knew which testimony was false, defendant has not established any due process violation.

IV. SENTENCING

Defendant argues through his appellate counsel that he is entitled to resentencing because the trial court improperly exceeded the sentencing guidelines range for reasons that were not substantial and compelling, resulting in disproportionate sentences. MCL 769.34(3) provides that “[a] court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” The reasons for departure must be objective and verifiable. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). Further, “[f]or a departure to be justified, the minimum sentence imposed must be proportionate to the defendant’s conduct and prior criminal history.” *Id.* at 300.

On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. [*Id.*]

We disagree with defendant’s argument that the trial court improperly considered his lack of remorse. Defendant correctly observes that a sentencing court may not punish a defendant for exercising his right to trial or for refusing to admit guilt. *People v Jackson*, 474 Mich 996, 996; 707 NW2d 597 (2006); *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). However, a court properly may consider evidence of a lack of remorse in determining a defendant’s potential for rehabilitation so long as the decision is based on objective and verifiable facts. *Horn*, 279 Mich App at 45-46; *Spanke*, 254 Mich App at 650. In determining whether a sentencing decision was improperly influenced by a defendant’s refusal to admit guilt, a reviewing court should focus on three factors: “(1) the defendant’s maintenance of innocence after conviction, (2) the judge’s attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe.” *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987).

The trial court’s remarks at sentencing do not support defendant’s claim that he was punished for exercising his right to trial or for not admitting his guilt. On the contrary, when defendant apologized at sentencing for “the burden of the trial,” the trial court responded by

stating that “[t]he trial is never a burden.” Further, the trial court’s pretrial remarks do not support defendant’s argument that the court punished him at sentencing for refusing to admit his guilt. Defendant relies on the court’s pretrial remarks when it was asked to give a preliminary evaluation of defendant’s sentence under *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). The court referred to its policy of imposing a sentence at the low end of the guidelines when a defendant pleads guilty “because [the plea] can be construed as accepting responsibility for the offense.” The court’s mere “policy” of inferring remorse from a guilty plea does not establish that the court punished defendant at sentencing for not admitting guilt. The trial court did not attempt to get defendant to admit guilt at sentencing. Its determination that defendant lacked remorse was based on defendant’s statement in which he blamed everyone but himself for his situation. Defendant’s statements were an objective manifestation that he had no remorse for the abuse suffered by the victims. Further, the record demonstrates that the court addressed defendant’s lack of remorse as it related to his rehabilitative potential. Accordingly, defendant has not established that the trial court’s consideration of his lack of remorse was improper or could not be used to justify a departure from the guidelines.

We also disagree with defendant’s argument that it was improper for the trial court to consider the other-acts evidence presented at trial as a basis for exceeding the guidelines because he was acquitted of those prior acts. In fashioning a sentence, a trial court may consider criminal activities established at trial, even where the defendant was acquitted of the charges. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). “A trial court may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence.” *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007).

Defendant also argues that the trial court’s consideration of his criminal record was not a proper reason for departing from the guidelines because his criminal history was reflected in the scoring of the prior record variables of the sentencing information report. We disagree. MCL 769.34(3)(b) provides that a trial court “shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” The extent of a defendant’s criminal history and recidivist behavior is an objective and verifiable factor. *People v Brooks*, ___ Mich App ___; ___ NW2d ___ (Docket No. 298299, issued August 16, 2011), slip op at 12, lv pending. An excessive number of criminal convictions may provide a basis for a court to find that the guidelines do not adequately account for a defendant’s recidivist behavior. *Id.* at 13.

Here, the trial court found that defendant is a “career felon.” The record discloses that defendant has a criminal history that dates back to the 1980s and includes seven prior felony convictions. Further, as the trial court observed, the instant offenses were committed while defendant was on parole. Although defendant received the maximum 30-point score for prior record variable (PRV) 2, MCL 777.52, only four prior low severity felony convictions are required to obtain that score. Thus, the guidelines did not adequately account for defendant’s additional felony convictions. Further, the scoring of the guidelines does not reflect the span of years that defendant has been engaging in criminal activity. Accordingly, the trial court did not

err in finding that defendant's criminal history supported a departure from the sentencing guidelines range.

Further, we find no error in the particular departure imposed by the trial court. A trial court need not justify each and every month by which it departed, but must provide a basis for this Court to understand why it chose that particular departure. *People v Babcock*, 469 Mich 247, 260 n14; 666 NW2d 231 (2003); *Smith*, 482 Mich at 304. Here, the trial court repeatedly indicated why a sentence within the guidelines was not adequate for this defendant, with those reasons comprising the substantial and compelling reasons supporting the departure. The court indicated that the two incidents admitted as "bad acts" evidence were "clearly not included within the guidelines and factored into this particular case." Additionally, although not required to do so, the trial court considered where defendant would fall as a fourth habitual offender on the sentencing grid. See *Smith*, 482 Mich at 309 (noting that in determining the proportionality of a departure, while it may be helpful for the trial court to consider where a defendant's sentence falls within the sentencing grid, it is not required to do so). The record demonstrates that the trial court chose this particular departure because defendant was a dangerous lifetime felon who has shown no ability to conform to society's laws and should therefore remain imprisoned for a time period that would virtually ensure his inability to continue his felonious activity.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio