

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EVANS KARSON, JR.,

Defendant-Appellant.

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UNPUBLISHED

October 9, 2014

No. 316485

Wayne Circuit Court

LC No. 11-006337-FC

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree criminal sexual conduct, MCL 750.520c(1)(b) (sexual contact with a blood relative or household member between the ages of 13 and 16), disseminating sexually explicit material to a minor, MCL 722.675, and using a computer to commit a crime, MCL 752.796(1). Defendant was sentenced, as a second offense habitual offender, MCL 769.10, to concurrent sentences of 10 to 22 1/2 years for second-degree criminal sexual conduct, one to three years for disseminating sexually explicit material to a minor, and two to six years for using a computer to commit a crime. Defendant also was ordered to submit to lifetime electronic monitoring.

We affirm defendant's convictions and sentences, but vacate the portion of defendant's judgment of sentence requiring him to submit to lifetime electronic monitoring. We also remand for the ministerial task of correcting defendant's judgment of sentence and Presentence Investigation Report (PSIR) to reflect that he was convicted of second-degree criminal sexual conduct based on MCL 750.520c(1)(b) (sexual contact with a blood relative or household member between the ages of 13 and 16), not MCL 750.520c(2)(b) (criminal sexual conduct when the victim is less than 13 years of age).

**I. FACTUAL BACKGROUND**

Defendant and his wife adopted the victim when she was approximately 16 months old. At age 10, the victim began hiding pornography for defendant on his computer. She did so because defendant said that he loved her and he would get violent. Defendant began showing pornographic videos to the victim in his bedroom, first on television, and later on his computer. While watching these videos, defendant would masturbate in the victim's view. The victim testified that her mother would be in the next room. The victim did not discuss this with her mother because defendant threatened to kill the family if she did.

The first physical contact between the victim and defendant occurred when she was 11 years old. Defendant, while watching pornography and masturbating in front of the victim in his bedroom, made contact between his genitals and the victim's. After this incident, defendant began molesting the victim while she showered, groping her breasts and buttocks. Defendant also penetrated the victim's anus with his finger, and penetrated her vagina with his mouth and fingers. Defendant eventually escalated to penetrating the victim's vagina and anus with his penis. The victim claimed that she had sex with defendant several times and enjoyed it.

The victim testified that she eventually began to self-mutilate, cutting and burning herself, and had stomach problems and rectal bleeding. The victim's mother and defendant eventually separated, and the mother filed for divorce on August 17, 2010. After defendant moved out of the home, the victim disclosed what defendant had been doing to her mother and psychiatrist.

At trial, the prosecution presented a witness, Annette Grzebyk (Grzebyk), who testified that she witnessed inappropriate contact between defendant and the victim during the summer of 2010. Grzebyk testified that she saw defendant caress the victim's thigh and inner leg, which Grzebyk thought was inappropriate. Defendant presented three witnesses, each of who denied observing such conduct.

Despite the significant testimony of sexual abuse, the jury found defendant guilty of only one count of second-degree criminal sexual conduct for acts committed against a household member between the ages of 13 and 16, distributing sexually explicit material to a minor, and using a computer to commit a crime. The jury acquitted defendant of all other charges.<sup>1</sup> Defendant now appeals on several grounds.

## II. OTHER ACTS EVIDENCE

Defendant first argues that the trial court erred when it allowed Grzebyk to testify regarding her observations. Defendant has waived this issue. Waiver is the intentional relinquishment or abandonment of a known right. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id.* (quotation marks and citation omitted).

Defendant sought to adjourn the proceedings after learning of the prosecution's intention to introduce Grzebyk's testimony. However, in his motion for adjournment, defendant conceded that Grzebyk's "testimony was admissible." At trial, defendant only objected to Grzebyk's characterization of whether what she witnessed was normal, but stated that Grzebyk could "testify as to what she saw." Nor did defendant raise any objection to the trial court's jury

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<sup>1</sup> Defendant was acquitted of three counts of first-degree criminal sexual conduct and one additional count of second-degree criminal sexual conduct.

instruction regarding Grzebyk's testimony. Further, defendant sought to expand on Grzebyk's testimony when he cross-examined her about her observations.<sup>2</sup>

Therefore, we find that defendant affirmatively waived any argument that Grzebyk's testimony was inadmissible. See *Kowalski*, 489 Mich at 503. Defendant's waiver has extinguished any error. *Id.* Moreover, even if no waiver existed, defendant would not be entitled to relief. Defendant's argument on appeal amounts to nothing more than an assertion that this evidence was damaging, so should have been excluded. The mere fact that evidence is damaging does not transform it into unfairly prejudicial evidence. *People v Murphy (On Remand)*, 282 Mich App 571, 582-583; 766 NW2d 303 (2009). Further, the jury was instructed on the proper consideration of other acts evidence, and "[i]t is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

### III. LIFETIME ELECTRONIC MONITORING

#### A. STANDARD OF REVIEW

Defendant next argues that the trial court erred when it sentenced him to lifetime electronic monitoring. "For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Because defendant did not raise this issue below, our review is limited to "plain error affecting substantial rights." *People v King*, 297 Mich App 465, 481; 824 NW2d 258 (2012).

#### B. ANALYSIS

Defendant was convicted of one count of second-degree criminal sexual conduct for engaging in sexual contact against a person who is a household member who is at least 13 years old but less than 16 years old. See MCL 750.520c(1)(b)(i)-(ii).<sup>3</sup> Pursuant to MCL 750.520c(2):

Criminal sexual conduct in the second degree is a felony punishable as follows:

- (a) By imprisonment for not more than 15 years.

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<sup>2</sup> Defendant claims that this issue on appeal is preserved. At the pretrial hearing held on January 31, 2012, defendant objected to this evidence based on the timeliness of the prosecution's disclosure, and indicated that he would file a motion detailing his reasons. His subsequent motion was a motion to adjourn trial to afford him additional time to prepare and respond to this evidence. In that motion, defendant conceded the evidence was admissible. The subsequent hearings on this matter involved defendant's request for an adjournment, not a challenge to the admissibility of this evidence based on substantive grounds.

<sup>3</sup> Defendant was acquitted of three counts of first-degree criminal sexual conduct and an additional count of second-degree criminal sexual conduct—all of which alleged that the victim was less than 13 years old at the time of the alleged act.

(b) In addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under [MCL 750.]520n if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age.

MCL 750.520n(1), in turn, states: “A person convicted under [MCL 750.]520b or [MCL 750.]520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under . . . MCL 791.285.” We have interpreted these statutes “as requiring the trial court to impose lifetime electronic monitoring in either of two different circumstances: (1) when any defendant is convicted of CSC–I under MCL 750.520b, and (2) when a defendant who is 17 years old or older is convicted of CSC–II under MCL 750.520c against a victim who is less than 13 years old.” *People v Brantley*, 296 Mich App 546, 558-559; 823 NW2d 290 (2012).

In the instant case, the only criminal sexual conduct conviction was count IV, second-degree criminal sexual conduct based on defendant engaging in sexual contact with the victim while she was between the ages of 13 and 16. Thus, defendant is correct that the imposition of lifetime electronic monitoring was not warranted because his victim was not under the age of 13. *Brantley*, 296 Mich App at 558-559. We also find this constituted plain error affecting substantial rights, as the statutes and law cited *supra* plainly do not allow for lifetime electronic monitoring in this case.<sup>4</sup> Furthermore, this error seriously affected the fairness of the judicial proceedings, as defendant was erroneously sentenced to lifetime electronic monitoring when such a punishment is not authorized by statute. MCL 750.520c(2)(b); MCL 750.520n(1); *Brantley*, 296 Mich App at 558-559; see also *People v Kimble*, 470 Mich 305, 313; 684 NW2d 669 (2004).

Accordingly, we vacate the portion of defendant’s sentence requiring him to submit to lifetime electronic monitoring.<sup>5</sup>

#### IV. SENTENCING DEPARTURE

##### A. STANDARD OF REVIEW

Lastly, defendant argues that the trial court departed from the sentencing guidelines for reasons that are not substantial or compelling. We review the reasons for a departure for clear error, but we review *de novo* the trial court’s conclusion that a reason is objective and verifiable. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). “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.*

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<sup>4</sup> *Brantley*, *supra*, was decided prior to defendant’s sentencing.

<sup>5</sup> Given our resolution of this issue, we decline to address defendant’s alternative argument that trial counsel was ineffective, as defendant has acquired the requested relief.

## B. DEPARTURE STANDARDS

As our Supreme Court explained in *Smith*, 482 Mich at 299-300:

Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, the Court has concluded that the reasons relied on must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases. In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed. For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history.

The trial court may 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. [Quotation marks and citations omitted.]

Furthermore, “[t]here are several reasons [we] may determine that a reason is not” substantial and compelling, such as that it is not objective and verifiable, it does not “keenly or irresistibly grab our attention,” “it is not of considerable worth in deciding the length of a sentence[,]” or it is based on an offense or offender characteristic that is already accounted for in the guidelines range. *People v Babcock*, 469 Mich 247, 261 n 17; 666 NW2d 231 (2003).

## C. TRIAL COURT'S REASONS

In the instant case, the trial court assessed 25 points for defendant's offense variables (OVs), and 35 points for defendant's prior record variables (PRV). This resulted in a minimum sentence range under the sentencing guidelines of 29 to 71 months. However, the trial court departed from the guidelines range and sentenced defendant to 10 to 22 1/2 years of imprisonment.

The trial court cited several reasons for departure. First, it focused on the psychological injuries the victim suffered. The trial court assessed the maximum number of points allowed under OV 4 (psychological injury to a victim), which was 10 points for serious psychological injury requiring professional treatment. MCL 777.34(a). However, the trial court may base a departure on an offense characteristic that has been given inadequate or disproportionate weight. *Smith*, 482 Mich at 300 (quotation marks and citation omitted). Here, the trial court observed that 10 points was inadequate in light of the fact that the victim was forced to learn about sex at a such a young age, testified that she was a willing participant because it felt good, and subsequently engaged in self-mutilation. These facts are objective and verifiable, and were

reflected in the victim’s testimony and in defendant’s PSIR. While defendant argues that the psychological trauma in this case was not exceptional, that ignores evidence that defendant—the victim’s adopted father—molested and raped her vaginally and anally over the course of her entire childhood. She experienced such psychological trauma that she began to self-mutilate, cutting and burning herself. Given the degree of sexual conduct and psychological trauma, we agree that this reason is substantial and compelling. See *People v Anderson*, 298 Mich App 178, 188-189; 825 NW2d 678 (2012) (“OV 4 . . . does not . . . always account for the unique psychological injuries suffered by individual victims[.]”).

Next, the trial court focused on the damage inflicted upon the victim’s family unit. This was objective and verifiable, as defendant’s crime significantly impacted the victim’s family relationships. Defendant isolated the victim from her mother, telling the victim that her mother did not love her and that her mother only cared for the victim’s sister. Defendant then used the victim’s trust in him—her father—against her. The victim and her mother both testified that, while the abuse was ongoing, they had a strained relationship. These facts are specific to this case, and this particular harm to the family unit was not addressed in defendant’s sentencing guidelines. As such, the trial court did not abuse its discretion when it found that this was a substantial and compelling reason to depart. See *Anderson*, 298 Mich App at 189 (“OV 4 . . . does not adequately consider the ways in which an offense affects familial relationships . . .”).

The trial court next focused on the psychological harm inflicted upon the victim’s mother and sister, analogous to OV 5. This was objective and verifiable, as the PSIR indicates that as a result of defendant’s conduct the victim’s mother felt significant guilt for not recognizing what was happening with her daughter. Further, the victim, her mother, and sister all were participating in counseling. This harm is not accounted for in the sentencing guidelines, as OV 5 is limited to cases involving murder situations. MCL 777.35; MCL 777.22(1).<sup>6</sup> The trial court did not abuse its discretion when it found that the psychological harm caused to the victim’s family was a substantial and compelling reason to depart. See *Anderson*, 298 Mich App at 188-189.

Further, the trial court justified the extent of the departure imposed in this case. The trial court hypothesized where defendant’s sentence would fall on the sentencing grid based on OV scores that were not properly accounted for in this case. That is precisely what our Supreme Court has instructed trial courts to do. See *Smith*, 482 Mich at 309 (“a trial court that is contemplating a departure” may “consider where a defendant’s sentence falls in the sentencing range grid” as “reference to the grid can be helpful, because it provides objective factual guideposts that can assist sentencing courts in ensuring that the offenders with similar offense and offender characteristics receive substantially similar sentences.”). We find no error in the trial court’s ruling.

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<sup>6</sup> MCL 777.22(1) states: “Score offense variables 5 and 6 for homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder.”

## V. CONCLUSION

We affirm defendant's convictions and sentences, but vacate the portion of defendant's judgment of sentence requiring him to submit to lifetime electronic monitoring. We remand for the trial court to correct defendant's judgment of sentence to reflect his second-degree criminal sexual conduct conviction, MCL 750.520c(1)(b) (sexual contact with a blood relative or household member between the ages of 13 and 16). We do not retain jurisdiction.

/s/ Michael J. Riordan

/s/ Mark J. Cavanagh

/s/ Michael J. Talbot