

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY GERARD MOORE,

Defendant-Appellant.

UNPUBLISHED

April 19, 2007

No. 267663

Monroe Circuit Court

LC No. 05-034568-FH

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

A jury convicted defendant of five counts of second-degree criminal sexual conduct under MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age) and one count of second-degree CSC under MCL 750.520c(1)(b) (sexual contact with related victim at least 13 but less than 16 years of age), two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(d) (incest), two counts of accosting a child for an immoral purpose, MCL 750.145a, and two counts of disseminating sexually explicit matter to a minor, MCL 722.675. The trial court sentenced defendant to concurrent prison terms of 119 to 180 months for each of the second-degree CSC and third-degree CSC convictions, 32 to 48 months for each of the accosting a child for an immoral purpose convictions, and 16 to 24 months for each of the disseminating sexually explicit matter to a minor convictions. Defendant appeals as of right. We affirm in part, vacate in part, and remand for resentencing consistent with this opinion.

I

Defendant's convictions arise from the sexual abuse of his adopted daughter. Defendant and his wife, Loretta Moore, married in 1988 when the victim, who believed that defendant was her biological father, was two years old. Four more daughters were born during the marriage. The family moved to Harrison Street in Monroe when the victim was seven years old. According to the victim, defendant touched and squeezed the victim's breasts and buttocks over the top of her clothing approximately every other day, and while doing so would say, "How good it should feel." The family moved to East Eighth Street in Monroe in December 1995. Defendant continued to fondle the victim's breasts and buttocks nearly every day. On one occasion, the victim walked in on defendant masturbating in the kitchen. Defendant was sitting in a chair with a mirror at his feet so that he could see anyone entering through the door behind him.

The family moved to a residence located on North Monroe Avenue in September 1996. Defendant continued to grab and squeeze the victim's breasts and buttocks over her clothes approximately every other day. Late one night during the middle of summer the victim and the rest of her sisters were sleeping in the basement. The victim woke up to defendant rubbing and touching her vagina through her underwear. Defendant also masturbated in the victim's presence. The victim testified regarding two occasions where she witnessed defendant masturbate and then ejaculate "into a kitchen pot" while he was in the living room. Defendant would often make sexually suggestive comments, telling her that he would like to perform oral sex on her and that "she would like it."

Loretta testified that defendant kept pornographic material at their residence, including movies, sex toy catalogs, and photographs downloaded onto the family computer. The victim testified that while living on North Monroe Avenue defendant showed her a pornographic photograph on the computer. The victim described the image as a naked woman inserting a black dildo into her vagina. In April 1999, when the victim was 13, the family moved to a one-room apartment located on Vineyard Street. On one occasion, defendant told the victim to go make a sandwich but to "run the bread between her legs first." Defendant also continued showing the victim pornographic material. The family moved to a larger, two-story house located on Arbor Avenue in August 1999. Defendant continued to touch the victim's buttocks, vagina and breasts through her clothing approximately every other day. Typically, every Saturday was "cleaning day" for the family. While the other girls would be upstairs cleaning their bedrooms, defendant and the victim would be in her basement bedroom. During this time, defendant continued to show the victim pornographic images on the computer and also rent movies that depicted "nude people having sex, masturbating [and] oral sex." At nights and on Saturdays defendant would either masturbate in front of the victim until he ejaculated or would force the victim to masturbate him. The victim testified that defendant would place a five-inch long candle into his anus while he masturbated.¹ Defendant also forced the victim to insert her finger into her vagina while he watched and masturbated. When the victim was 16 years old, defendant placed his hand on her vagina and moved his fingers "back and forth." On other occasions, defendant would digitally penetrate the victim's anus while telling her to "bear down" and that "it should feel good." Defendant often threatened the victim, including telling her that he would "beat her ass" and that he would go to jail if she revealed the sexual abuse. Defendant would also withhold privileges if she would not engage in sexual activities with him.

As the victim got older, defendant became increasingly jealous and possessive. He would consistently listen in on her phone calls, tell her with whom she could and could not be friends, and limit her social activities. When the victim was accepted to college, defendant told her that she was "deserting him" and that college was a "bad place." Defendant's controlling behavior increased when the victim went to college in the summer of 2004. Defendant would call to check up on her approximately twenty times per day and often visited her at college unannounced. The sexual abuse continued when the victim came home on weekends during her first semester at college. At one point, defendant told the victim that he had fallen in love with

¹ Loretta also testified that defendant would insert a candle into his anus during sexual intercourse and that she would insert a candle into his anus while defendant masturbated.

her “as a woman and not as a daughter.” He continued to threaten the victim, telling her that he would “beat” the rest of the family and that he would “shoot himself” if she revealed the sexual abuse. During the victim’s first semester at college, she counseled with Sandra McCormick to deal with issues the victim had with defendant’s verbal and emotional abuse. The victim did not initially disclose defendant’s sexual abuse.

On October 29, 2004, the victim came home for the weekend. On October 31, 2004, the victim, defendant, and Loretta got into an argument over whether the victim should return to college. Later, while the victim and her mother were in the car set to return back to school, defendant approached the car and began yelling. He removed a part from under the hood and disabled the car. At some point, the neighbors called the police, who arrived and ordered defendant to fix the car. The victim and Loretta initially left the house but returned to collect all four of Loretta’s daughters and drove the victim back to school. Loretta decided to separate from defendant and she and her daughters did not return to the house at Arbor Avenue. On November 2, 2004, Loretta and the victim obtained separate personal protection orders against defendant. When the victim returned to school, she disclosed the sexual abuse to her boyfriend and McCormick. On January 7, 2005, she disclosed the sexual abuse to Loretta. On January 21, 2005, the victim gave a detailed statement to Monroe police detective John Wall regarding defendant’s continued sexual abuse.

Wall requested that defendant come in for an interview. On January 27, 2005, defendant voluntarily submitted to a videotaped interview. During the interview, defendant stated that he had been having marital problems since 1997, including a “lack of a sex drive.” Defendant attributed many of his marital problems to his 2002 diagnosis of prostate cancer and a later diagnosis of manganese toxicity. Defendant also admitted that he had a drinking problem during the marriage and that he was intoxicated approximately five days a week. Regarding the victim, defendant stated in that he had a good relationship with her but that he was “really possessive” and that he was irritated with her when she went to college. However, defendant specifically denied masturbating in front of the victim, touching her breasts, buttocks or vagina, or showing her pornographic material.

II

Defendant argues that the prosecutor committed misconduct and denied defendant a fair trial when she examined the victim’s sister, who was defendant’s sole witness at trial, regarding the truthfulness of the prosecution witnesses’ testimony. We disagree.

“Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003), citing *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to object below to the alleged instances of prosecutorial misconduct, this Court’s review is limited to whether plain error affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must show that: (1) there was an error; (2) the error was plain, i.e., clear or obvious; and (3) the error impacted substantial rights by affecting the outcome of the proceedings. *Id.* Reversal is then warranted only if the error resulted in the conviction of

an innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.*; *Callon, supra* at 329.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor's remarks are reviewed in context to determine whether the defendant was denied a fair trial, including consideration of the remarks in light of defense arguments. *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003). Generally, a prosecutor may not ask a defense witness to comment on the credibility of prosecution witnesses. See *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, "[i]t is not improper for the prosecutor to attempt to ascertain which facts are in dispute." *Ackerman, supra* at 449.

Here, the prosecutor improperly questioned the victim's sister regarding whether the prosecution's witnesses were testifying truthfully during the prosecution's case-in-chief. *Buckey, supra* at 17.² But defendant has not established that he was denied a fair and impartial trial by the prosecutor's examination. *Carines, supra* at 763-764; *Buckey, supra* at 17. The prosecutor's questions were brief, and in light of the other testimonial evidence submitted at trial implicating defendant in the charged offenses, defendant has failed to show how the examination was outcome determinative. *Id.* Furthermore, the jury was instructed that it was to determine the credibility of the witnesses. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Finally, a request for "a curative instruction could have cured any possible prejudice." *Ackerman, supra* at 449, citing *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Accordingly, we conclude that defendant was not denied a fair trial as a result of the prosecutor's questioning of the victim's sister.

III

Defendant argues that the prosecutor failed to present sufficient evidence to support the convictions of two counts of disseminating sexually explicit matter to a minor, MCL 722.675. He contends that, pursuant to the version of MCL 722.676 that was in effect at the time of the offenses, a parent who disseminated sexually explicit matter to his child could not be prosecuted under MCL 722.675. The prosecutor concedes that defendant's convictions and sentences for disseminating sexually explicit matters to a minor should be vacated. We therefore vacate defendant's convictions and sentences for disseminating sexually explicit matters to a minor.³

² For example, the prosecution questioned the victim's sister regarding whether other minor sisters were lying when they indicated during their testimony that defendant was often alone with the victim in the basement, or if Loretta was lying during her testimony when she indicated that defendant called the victim more than one time per day.

³ Under these circumstances, we need not address defendant's remaining arguments with regard to the two counts of distributing sexually explicit matter to a minor.

IV

Defendant argues that MCL 750.145a is unconstitutionally overbroad and vague in both its application to the facts of defendant's case and on its face. We disagree.

To preserve this issue for appellate review, a defendant must challenge the constitutionality of the statute below. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). Because defendant failed to raise his constitutional challenge in the trial court, we review for plain error affecting substantial rights. *Carines, supra* at 763-764.

The former version of MCL 750.145a provided as follows:⁴

Any person who shall accost, entice, or solicit a child under the age of 16 years with intent to induce or force said child to commit an immoral act, or to submit to an act of sexual intercourse, or an act of gross indecency, or any other act of depravity or delinquency, or shall suggest to such child any of the aforementioned acts, shall on conviction thereof be deemed guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than 1 year.

“A statute may be challenged for vagueness on three grounds: (1) It does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; (3) its coverage is overbroad and impinges on First Amendment freedoms.” *People v Tombs*, 260 Mich App 201, 218; 679 NW2d 77 (2003), citing *People v Howell*, 396 Mich 16, 20; 238 NW2d 148 (1976), citing *Grayned v Rockford*, 408 US 104, 108-109; 92 S Ct 2294; 33 L Ed 2d 222 (1972). Defendant contends that MCL 750.145a is unconstitutional on its face because the terms “immoral act” and “suggest” fail to give fair notice of what is proscribed conduct, allows the jury unfettered discretion in deciding which acts are prohibited under the statute, and is overbroad under the First Amendment. Defendant also contends that the statute was unconstitutionally applied to the particular circumstances of his case. Defendant's arguments are without merit.

“To give fair notice, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or required.” *People v Noble*, 238 Mich App 647, 652; 608 NW2d 123 (1999) (internal citation omitted). “The statute cannot use terms that require persons of ordinary intelligence to guess its meaning and differ about its application.” *Id.*, citing *People v Capriccioso*, 207 Mich App 100, 102; 523 NW2d 846 (1994). “A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.” *Noble, supra* at 652, citing *People v Vronko*, 228 Mich App 649, 653; 579 NW2d 138 (1998). “When determining whether a statute inappropriately delegates unstructured and unlimited discretion to a decision maker, the court examines whether the statute provide[s] standards for enforcing and administering the laws in order to ensure that enforcement is not arbitrary or discriminatory.”

⁴ Defendant was convicted under the prior version of MCL 750.145a. See 2002 PA 45.

English v Blue Cross Blue Shield of Michigan, 263 Mich App 449, 469; 688 NW2d 523 (2004) (internal citations and quotations omitted).

A defendant may also facially challenge the constitutionality of a statute on overbreadth grounds “on the basis of the hypothetical application of the statute to third parties not before the court” if the statute impinges First Amendment rights. *People v Rogers*, 249 Mich App 77, 95; 641 NW2d 595 (2001). “The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the plainly legitimate sweep of the statute where, as here, conduct and not merely speech is involved.” *People v Morey*, 230 Mich App 152, 164; 583 NW2d 907 (1998), citing *People v Cavaiani*, 172 Mich App 706, 711; 432 NW2d 409 (1988). The “mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.” *Rogers, supra* at 96, citing *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 800; 104 S Ct 2118; 80 L Ed 2d 772 (1984). Rather, “there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.” *Id.* Further, “[a] statute may be saved from being found to be facially invalid on overbreadth grounds where it has been or could be afforded a narrow and limiting construction by state courts or if the unconstitutionally overbroad part of the statute can be severed.” *Id.*

In the present case, we conclude that MCL 750.145 is a not unconstitutionally vague on its face because the statute gives fair notice of what is proscribed conduct. Defendant claims that the phrase “immoral act” may be interpreted to mean different things based on the subjective values of a person, including acts that are “clearly legal.” Furthermore, defendant contends that the term “suggest” is unconstitutionally vague because a person may be prosecuted under the statute for discussing a prohibited act with a minor in a purely hypothetical, yet legal, context. MCL 750.145a prohibits a person from accosting or soliciting a minor “with intent to induce or force” the child to commit or submit to prohibited activities, including an immoral act or to submit to an act of gross indecency or sexual intercourse. This Court has held that the statute specifically applies to offenses against children under the age of 16 and prohibits acts against children that are both sexual and nonsexual in nature. See *People v Meyers*, 250 Mich App 637, 650-653; 649 NW2d 123 (2002). The term “immoral” is defined as “lascivious,” which means, “arousing sexual desire” or “indicating sexual interest.” *Random House Webster’s College Dictionary* (1997). The term “suggest” means “to mention, introduce or propose (an idea, plan, person, etc.) for consideration, possible action, or some purpose or use.” *Id.* Examining the entire text of MCL 750.145a, *People v Hill*, 269 Mich App 505, 524; 715 NW2d 301 (2006), we conclude that the Legislature intended for the statute to prohibit a person from soliciting children from participating in or being victimized by certain criminal acts, especially those of a sexual nature. Thus, a person of ordinary intelligence would have a reasonable opportunity to know that an act that is sexual in nature is prohibited with a child less than 16 years of age. *Noble, supra* at 652. Additionally, a person of reasonable intelligence would know that the statute prohibits a person from mentioning to a child that they take possible action and engage in a prohibited sexual act. Furthermore, we note that defendant has failed to show that no circumstances exist under which MCL 750.145a would be valid. *People v Abraham*, 256 Mich App 265, 280; 662 NW2d 836 (2003). Accordingly, we conclude that MCL 750.145a is not constitutionally invalid on its face.

To the extent that defendant argues that the jury would have unlimited discretion in the application of the term “suggest” or the phrase “immoral acts,” we note that the statute provides specific standards for enforcing and administering the law. *English, supra* at 469. Indeed, as discussed above, the statute clearly specifies the prohibited behavior. Additionally, this Court has previously concluded that the mens rea contained in a similar statute properly limits the trier of fact’s discretion in determining whether the statute has been violated. See *Tombs, supra* at 220 (examining the mental state necessary to violate MCL 750.145d).

Moreover, we reject defendant’s argument that the statute was unconstitutionally applied to the particular circumstances of his case. MCL 750.145a clearly prohibits soliciting “a child under the age of 16 with intent to induce or force said child to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency.” The record shows that on more than one occasion defendant made sexually suggestive comments to the victim, who was 13 years of age at the time. Specifically, defendant told her that he wanted to perform oral sex on her and also told her, while watching a pornographic movie, that “we should have oral sex.” Based on this evidence alone, the jury could have concluded that defendant intended to engage in an immoral act or an act of gross indecency with the victim. Furthermore, suggesting that a 13-year-old girl engage in oral sex constitutes an immoral act or an act of gross indecency. Thus, defendant’s suggestions were a violation of the MCL 750.145a and, as applied, the statute cannot be regarded as unconstitutionally vague.

Finally, we conclude that MCL 750.145a is not overbroad and that the statute does not impinge on First Amendment freedoms. “Facial overbreadth challenges to statutes have been entertained where a statute (1) attempts to regulate by its terms only spoken words, (2) attempts to regulate the time, place, and manner of expressive conduct, or (3) requires official approval by local functionaries with standardless, discretionary power.” *Rogers, supra* at 95-96, citing *Broadrick v Oklahoma*, 413 US 601, 612-613; 93 S Ct 2908; 37 L Ed 2d 830 (1973). When reviewing an overbreadth challenge to a statute that regulates in the area of the First Amendment, this Court must look to the statute to determine whether it regulates only spoken words, rights of association or communicative conduct. *People v Taravella*, 133 Mich App 515, 519-520; 350 NW2d 780 (1984), citing *Broadrick, supra* at 615. Although MCL 750.145a involves a speech component, it is clearly targeted at conduct as opposed to pure speech. Application of the statute is limited to individuals who act with the purpose of committing or attempting to commit a criminal act. Specifically, a defendant must solicit a child less than the age of 16 to engage in one of the prohibited acts. MCL 750.145a. The statute is narrowly drawn to only include communications made in furtherance of a criminal purpose or act and does not punish the actual speaking of the words by a defendant. Accordingly, we conclude that MCL 750.145a is not constitutionally overbroad, nor does it impinge on First Amendment freedoms.

V

Defendant argues that resentencing is required for his convictions for two counts of accosting a child for an immoral purpose, MCL 750.145a. Defendant contends that, at the time the offenses occurred, the statute was classified as a misdemeanor and the maximum term of imprisonment was one year. Further, defendant claims that his prison sentence of 32 to 48 months on each count violates the Ex Post Facto Clause of the state and federal constitutions. The prosecutor concedes that defendant is entitled to resentencing for each conviction of

accosting a child for an immoral purpose convictions. We therefore vacate the sentences imposed for the convictions of accosting a child for an immoral purpose and remand for resentencing on these convictions only.

Defendant finally raises several additional sentencing issues and argues that he is entitled to be resentenced on each of his CSC convictions. First, defendant contends that the trial court failed to properly complete a Sentencing Information Report (SIR) for each of the CSC II convictions and that his sentences for his CSC III convictions are outside the properly calculated range. Additionally, defendant argues that the trial court did not articulate substantial and compelling reasons to depart from the sentencing guidelines for his CSC III sentences and that the departure was disproportionate. We disagree with both of defendant's arguments.

Generally, this Court reviews a challenge to the guidelines scoring, and the proper application and interpretation of the statutory sentencing guidelines, de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). There is no preservation requirement when a trial court departs from the guidelines at sentencing. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). In reviewing a departure from the sentencing guidelines range, this Court reviews the existence of a particular factor supporting a departure for clear error, the determination whether the factor is objective and verifiable de novo and whether a reason is substantial and compelling for an abuse of discretion. *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).

When a defendant has multiple concurrent convictions and is subject to concurrent sentences, the defendant's sentence is based on the recommended minimum sentence range for his highest-class offense, and scoring of the defendant's lesser offenses is unnecessary. *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005). When a defendant is subject to concurrent sentences, only the guidelines for defendant's most severe offense must be scored. *Id.*

In the present case, defendant committed the CSC III offenses after January 1, 1999, requiring the trial court to apply the statutory sentencing guidelines set forth in MCL 769.31 *et seq.* and MCL 777.1 *et seq.* *People v McLaughlin*, 258 Mich App 635, 671 n 13; 672 NW2d 860 (2003).⁵ To determine a minimum sentence under the sentencing guidelines, a trial court should identify the offense category, score the appropriate offense variables and prior record variables and use the resulting points to identify the proper sentence range in the statutory sentencing grids. MCL 777.21(1)(a)-(c); *Morson, supra* at 255. MCL 777.16d defines CSC III as a class B felony. MCL 777.63 sets forth the minimum sentence range for a class B felony. Defendant's SIR indicates that his prior record variable level (PRV) was calculated at 20 points, level C, and that his offense variable level (OV) level was calculated at 100 points, level VI, giving defendant a minimum guidelines sentence range of 57 to 95 months for his CSC III conviction. See MCL

⁵ The CSC III offenses occurred from October 2001 to October 2004.

777.63.⁶ The lower court record reveals that the trial court properly calculated defendant's minimum sentence guidelines range for his CSC III convictions at 57 to 95 months (SIR).

Accordingly, we conclude that the trial court properly considered defendant's CSC III convictions for sentencing purposes because the convictions were defendant's highest-class offenses. *Mack, supra* at 127-128. Furthermore, because defendant's CSC III convictions were the highest-class offenses, the trial court was not required to score the other offenses. *Id.* Contrary to defendant's argument on appeal, application of the judicial sentencing guidelines to defendant's CSC II convictions was not required. See *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997).

"Under these guidelines, a trial court may only depart from the guidelines if it has substantial and compelling reasons to do so, and states those reasons on the record." MCL 769.10(3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The trial court's reasons for departing from the guidelines must be "objective and verifiable" meaning that "the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *Id.* A substantial and compelling reason must keenly or irresistibly grab a court's attention, must be of considerable worth in deciding the length of a sentence and exists only in exceptional cases. *Babcock, supra* at 257-258, quoting *People v Fields*, 448 Mich 58, 62; 67-68; 528 NW2d 176 (1995) (quotations omitted). A "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 in the court record that the characteristic has been given inadequate or disproportionate weight." MCL 769.10(3)(b); *Abramski, supra* at 74.

In departing from the 57 to 95 month guidelines range for the CSC III conviction and sentencing defendant to a term of 119 to 180 months, the trial court stated:

I am going to take into consideration that he [defendant] does not show any remorse, and that's the Catch-22 that he's in. In order to maintain his innocence, there is no way you could show any remorse, but that's - that's where he is, and the court has to take that into consideration, because each sentence is to be individualized proportionate to the person's wrongdoing, and I think remorse is an issue that should be strongly considered.

Even though I know, on occasion, people will express remorse, and they may not even sound sincere, perhaps they're not, but there's not even an expression of remorse here.

Furthermore, it's true that the sentencing guidelines only takes in a very short period of time considering the length of time that these incidents occurred. Again, it was a very complicated case. I commend counsel for – on both sides for

⁶ On appeal, defendant does not challenge the trial court's determination of his OV and PRV scores.

how they handled it. But, again, the jury saw fit to convict him [on] all of the counts, and the sentencing guidelines do not take into consideration the fact that this happened over a longer period of time than what the guidelines will take into consideration.

Further, the trial court indicated its reasons for departing from the statutory guidelines in the Departure Evaluation Form:

The court inquired of counsel if they agreed that the sentencing guidelines do not take into consideration lack of remorse and counsel concurred. Furthermore, the court inquired if counsel agreed that the sentencing guidelines do not take into consideration the fact that the evidence demonstrated that the six offenses in question lasted for several years, in excess of the five-year span addressed by the guidelines. It is clear that the offenses contained in counts 1-6 [sic] are the most serious offenses that he was convicted.

The court understands the defendant's position to maintain his innocence and to seek an appeal by right of his convictions and sentences. Nonetheless, this court finds that the jury considered the evidence and appropriately convicted him of the several offenses. Therefore, the issues discussed above are properly considered in fashioning an appropriate sentence for each offense.

The court recognizes that each sentence should be individualized and proportionate to the offense and the defendant's background. The court recognizes that the recidivism rate for sexual offenders is high, however, this notion is not taken into consideration in the court's sentences. Therefore, the court finds substantial and compelling reasons to exceed the sentencing guidelines on counts 1-6 [sic] by two additional years (to wit: 119 months to the maximum term). The remaining sentences are appropriate and neither counsel object[ed] to the recommendations as made by the probation department.

Defendant contends that the trial court's reasons for the upward departure were not substantial and compelling. We disagree.

First, defendant claims that the trial court erred in considering defendant's lack of remorse, reasoning that defendant's failure to admit guilt is not a proper sentencing consideration when departing from the guidelines. A review of the record at sentencing shows that the trial court did not consider defendant's failure to admit guilt when it considered whether to depart from the guidelines. Instead, the trial court repeatedly pointed to defendant's lack of remorse in committing the continued sexual abuse against his daughter. A trial court may properly consider defendant's attitude toward his criminal behavior, specifically his failure to express remorse for any of the charged crimes in the face of identification testimony. *People v Spanke*, 254 Mich App 642, 649-650; 658 NW2d 504 (2003); *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). Furthermore, a trial court may not premise a sentence on a defendant's refusal to accept guilt; however, resentencing on this basis "is required only if it is apparent that the court erroneously considered the defendant's failure to admit guilt, as indicated by action such as asking the defendant to admit his guilt or offering him a lesser sentence if he did." *Spanke*,

supra at 650. A review of the lower court record shows that the trial court did not request that defendant admit his guilt or that the trial court offered him a lesser sentence in exchange.

Additionally, defendant argues that OV 13 already accounted for the time period when the sexual abuse occurred. The trial court scored 25 points for OV 13. MCL 777.43(b) provides that 25 points should be scored for OV 13 if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” OV 13 further provides that “[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2). Only those crimes committed during a five-year period that encompasses the sentencing offense may be considered. *People v Francisco*, 474 Mich 82, 86; 711 NW2d 44 (2006). But prior offenses that did not occur within five years of the sentencing offense can give rise to a substantial and compelling reason to justify a departure from the guidelines range. *People v Price*, 477 Mich 1, 5 n 3; 723 NW2d 201 (2006).

The trial court properly considered the fact that the sexual abuse occurred over a period of more than ten years. The trial court’s reasons for departure constitute circumstances not adequately embodied within the variables used to score the guidelines. Accordingly, we conclude that the trial court correctly set forth substantial and compelling reasons to depart from the sentencing guidelines. *Abramski, supra* at 74.

Defendant finally argues that his sentences for the CSC III convictions were disproportionate. We disagree.

Even where a departure from the sentencing guidelines is justified, the substantial and compelling circumstances articulated by the trial court must justify the particular departure imposed in the case. *Babcock, supra* at 259-260. “In determining whether a sufficient basis exists to justify a departure, the principle of proportionality - that is, whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record - defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.” *Id.* at 262. The principle of proportionality requires that a sentence “be proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *People v Milbourn*, 435 Mich 630, 636, 651; 461 NW2d 1 (1990).

Here, the trial court addressed the offender, and the sentencing transcript demonstrates that the sentence was individualized. Contrary to defendant’s argument on appeal, lack of an extensive prior record is not sufficient to overcome the presumption of proportionality. *People v Piotrowski*, 211 Mich App 527, 533; 536 NW2d 293 (1995). Moreover, the circumstances surrounding the instant offenses established the serious and reprehensible nature of defendant’s crimes. Appellate courts should consider whether the circumstances surrounding a defendant’s conviction place that defendant in the least or most threatening class with respect to that particular crime. *Milbourn, supra* at 654. The record reveals that defendant engaged in the sexual assault of his minor daughter on numerous occasions over a ten-year period. Many of these instances occurred while the victim’s sisters and mother were in the home. After a review of the entire record, we conclude that the sentences imposed by the trial court are proportionate to the seriousness of the crimes and defendant’s criminal history, and thus, does not violate the principles of proportionality. *Babcock, supra* at 264, 273.

In sum, we conclude that the trial court based its departure on objective and verifiable factors and that those factors were not adequately addressed by the sentencing guidelines. *Babcock, supra* at 266; *Abramski, supra* at 74. Further, the trial court did not abuse its discretion in departing upward from the sentencing guidelines. The 119 to 180 month sentences imposed by the trial court are proportionate to the seriousness of the egregious and exceptional circumstances surrounding the offenses and the offender. *Milbourn, supra* at 636.

We vacate defendant's convictions and sentences of two counts of disseminating sexually explicit matter to a minor and vacate defendant's sentences of two counts of accosting a child for an immoral purpose. We remand for resentencing on the convictions of accosting a child for an immoral purpose conviction, and affirm defendant's convictions and sentences for CSC II and CSC III. Jurisdiction is not retained.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey