

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID EVAN MCQUEEN,

Defendant-Appellant.

UNPUBLISHED

November 21, 2023

No. 364372

St. Joseph Circuit Court

LC No. 21-023820-FC

Before: LETICA, P.J., and BORRELLO and RICK, JJ.

PER CURIAM.

Defendant, David Evan McQueen, appeals by leave granted¹ the sentence imposed after he pleaded guilty to second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (victim under 13 years of age). The trial court sentenced defendant, as a third-habitual offender, MCL 769.11, to serve 12 to 30 years in prison. Defendant appeals, contending that the trial court abused its discretion in sentencing him to a minimum term that exceeded the sentencing guidelines recommendation of 36 to 106 months. We affirm.

I. BACKGROUND

This case arose from an incident when the victim’s mother, who was in a sexual relationship with defendant, discovered him sexually assaulting her five-year-old daughter, the victim. The victim’s mother left the victim and defendant alone while she prepared to shower. Before she entered the shower, however, she returned to the area where the victim and defendant were. She saw that the victim’s and defendant’s pants and underwear were off and that defendant’s penis was exposed. The victim’s mother initially reported that the victim’s vagina was visible and that defendant’s “penis was touching [the victim’s] vagina.” The victim’s mother “could not tell if [defendant’s] penis was inside of [the victim].” The victim’s mother also told police that the victim’s “vagina was red and appeared to be rubbed red.”

¹ See *People v McQueen*, unpublished order of the Court of Appeals, entered February 2, 2023 (Docket No. 364372).

But, during defendant's plea, defendant denied that he touched the victim with his penis. Instead, defendant initially admitted to "rubbing" the victim before denying that he had rubbed the victim's vagina. He further denied that the victim's vagina was red. Defendant only admitted that he "touched" the victim's vagina with his hand.

A subsequent laboratory report confirmed the presence of male DNA in the victim's vulvar area.² Moreover, at sentencing, the victim's mother testified that she observed defendant holding his erect penis and placing its head between the victim's vaginal lips³ while poised to thrust. The victim was either playing a game or watching a movie on defendant's phone during the assault.

The victim's mother immediately directed defendant to "get out" of her home. The victim's mother further testified that defendant attempted to blame the victim for his assault, even as he apologized for his conduct and recognized that he was going to jail. The victim's mother further explained that an "anxiety attack" ensued, leading her to strike her chest and state that she could not breathe. Defendant later messaged the victim's mother a suicidal statement, but he deleted it before she could show it to the police.

Defendant committed his first sexual offenses in 2000, when he was twelve- and one-half years old. The victims were described as "low[-]functioning" male children younger than defendant. Defendant admitted he had "two other male victims" as well as a female victim related to him. Nevertheless, defendant told the PSIR interviewer that the victim in his juvenile matters was a female who resided in a co-ed facility with him. After those offenses, defendant spent much of his life in juvenile detention and the adult justice system. His extensive criminal history includes charges of theft, illegal possession of firearms, and multiple failures to register as a sex offender. In fact, defendant, who was 33 years old when he committed the instant offense, has convictions in three other states.

As already discussed, defendant pleaded guilty to CSC-II as a third habitual offender. In exchange for defendant's plea, the prosecution dismissed a charge of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a), as a fourth habitual offender, MCL 769.12(1)(b). Consequently, defendant faced a 30-year maximum prison sentence rather than a sentence of "imprisonment for life or any term of years, but not less than 25 years," if convicted of assaulting a child under 13 years old when he was older than 17, MCL 750.520b(2)(b).

After assigning points under the prior record variables (PRVs) and the offense variables (OVs), the trial court calculated defendant's minimum sentencing guidelines range as 36 to 106

² According to the presentence investigation report (PSIR), the laboratory report concluded that "it is approximately 940 quadrillion times [more] likely [that] it originated from [the victim] and [defendant] than if it originated from [the victim] and one unrelated unknown contributor."

³ The sentencing court declined to access points for an additional penetration under Offense Variable (OV) 11, MCL 777.41(1)(b), because it determined that the mother's testimony was that defendant's penis did not go past the victim's vaginal lips, but "it only touched" them. Instead, the court assessed five points for OV 12, MCL 777.42(1)(d) ("[o]ne contemporaneous felonious criminal act involving a crime against a person was committed.").

months (or 8 years and 10 months) in prison. At sentencing, defendant apologized to the victim and her mother. The victim's mother made a statement, explaining how the victim's life was negatively affected by defendant's assault. The victim's mother described how she had to reassure the victim for months that the victim was not at fault for her mother losing her job and their home. The victim engaged in therapy, but stopped. The victim only recently indicated that she was ready to resume therapy. Similarly, the victim's mother engaged in therapy, but stopped because her provider was located next to the jail where defendant was housed. The victim's mother also attended support groups and was searching for another therapist.

The victim's mother requested a 15-year minimum sentence in part to protect defendant's young son from defendant. The prosecutor requested a sentence at the high-end of the guidelines while defense counsel requested a sentence at the low end of the guidelines, noting that defendant's plea had spared the victim from having to testify at trial.

Defendant apologized to his "old friend"⁴ for what happened" and asked for forgiveness. Defendant knew what he had done was wrong and that he could not undo it. Defendant asked to participate in programming and wanted to "get into some treatment" for his "anger" and "other issues" when he was released.

The trial court determined that a sentence within the guidelines recommendation was disproportionate to the harm suffered by the victim and her mother. Instead, it sentenced defendant to 12 to 30 years' imprisonment, highlighting that: (1) defendant engaged in a pattern of criminal behavior; (2) the trial court's belief that defendant would have penetrated the victim but for her mother's interruption; (3) defendant's assault had a life-long impact on the victim and her mother, including the loss of the victim's mother's employment and the victim's mother now questioning whether she had afforded defendant prior opportunities to offend against her child; (4) defendant took advantage of a young girl who was tongue-tied and had difficulty in not only expressing herself but also in explaining the assault to a jury; (5) defendant engaged in brazen behavior with the victim's mother just a few feet away, demonstrating that he "cannot control his urges and cannot control his ability to do this[;]" and (6) the public needed protection given that defendant took advantage of his relationship with the victim shortly after gaining custody of his own child. The sentencing court again noted that without the benefit that defendant received from the reduction in his habitual-offender status, his minimum sentencing guidelines range would have been 36 months to 142 months. The court reasoned:

I – I honestly think he should do the maximum, but I'm not going to automatically get myself an appeal where I got to justify the length of the – in trying to do

⁴ The victim's mother stated that she called defendant her "best friend for 14 years" and that they were sexually involved, including the night before the offense. The victim's mother questioned whether defendant had previously assaulted the victim and whether she had missed the signs.

something, you know, calculation that is going to satisfy the Court of Appeals.^[5] I can just say that, you know, he got a big benefit by dropping it down to a habitual, to limit his (inaudible) so I'm going to sentence to 12 years to 30 years in the Michigan Department of Corrections which I believe is close to what the maximum would have been as a habitual 4th and it is the reason that I'm doing it. In addition, for the protection of society, [and] in addition for – hopefully, um, I'm not giving up. I think the Department of Corrections can try and do whatever they can do for [defendant], (inaudible) but, um, at this point it's to try and get as close to that 13 years^[6] that the victim[']s mother] asked for, not get overturned, and not get appealed, uh, you know, not supposed to take those considerations [sic], but I have – if I do get overturned it's just another trauma for the victim and the mother and them [sic] family. And so, I understand the reason the Prosecutor and you did this to reach this resolution, but uh, there are limits to what I can do, so, I appreciate you weighing the balances of that and your need in that regard to accept this, um, and hopefully, the Department of Corrections will, if they don't see that [defendant] has progressed, with hold him to the full 30 years. So 12 – 30 years[.]

Defendant appeals, challenging the out-of-guidelines sentence imposed.

II. STANDARD OF REVIEW

“[A]ppellate courts must review all sentences for reasonableness, which requires the reviewing court to consider whether the sentence is proportionate to the seriousness of the matter.” *People v Posey*, ___ Mich ___, ___; ___ NW2d ___ (2023) (Docket No. 162373); slip op. at 29. The Supreme Court first outlined the proportionality test in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). In *Milbourn*, the Court affirmed that the judicial guidelines, the predecessor to the legislative guidelines, “represent the actual sentencing practices of the judiciary, and . . . [are] the best ‘barometer’ of where on the continuum from the least to the most threatening circumstances a given case falls.” *Id.* at 656. Overall, “the guidelines reflect the relative seriousness of the different combinations of offense and offender characteristics.” *Id.* at 658. Consequently, when a trial court departs from the guidelines and its reasons for doing so are “unsupported by reasons not adequately reflected in the guidelines variables,” this may indicate that the trial court has “violated the principle of proportionality and thus abused its sentencing discretion.” *Id.* at 659, 660.

Because the legislative guidelines “embody the principle of proportionality and trial courts must consult them when sentencing, it follows that they continue to serve as a ‘useful tool’ or ‘guideposts’ for effectively combating disparity in sentencing.” *People v Dixon-Bey*, 321 Mich App 490, 524-525; 909 NW2d 458 (2017). This Court has provided three primary factors to

⁵ It appears that the court was referring to a 20-year minimum sentence that it could impose under MCL 769.34(2)(b) (“The court shall not impose a minimum sentence, including a departure, that exceeds $\frac{2}{3}$ of the statutory maximum sentence.”).

⁶ The victim’s mother asked for a 15-year minimum sentence so that defendant’s three-year-old son would be an adult when defendant was released.

determine “whether a departure sentence is more proportionate than a sentence within the guidelines range” *Id.* at 525. These factors include “(1) whether the guidelines accurately reflect the seriousness of the crime, (2) factors not considered by the guidelines, and (3) factors considered by the guidelines but given inadequate weight.” *Id.* (quotation marks and citations omitted). Factors “not considered by the guidelines” may include things like, “the defendant’s expressions of remorse” and “the defendant’s potential for rehabilitation.” *People v Lawhorn*, 320 Mich App 194, 207; 907 NW2d 832 (2017) (quotation marks and citation omitted).

“[A] trial court must justify the sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been.” *Dixon-Bey*, 321 Mich App at 525 (quotation marks and citations omitted). “[B]y failing to provide adequate reasons for the extent of the departure sentence imposed,” a court abuses its discretion in applying the principle of proportionality. *People v Steanhouse*, 500 Mich 453, 476; 902 NW2d 327 (2017). See also *People v Smith*, 482 Mich 292, 305-306; 754 NW2d 284 (2008) (“the trial judge gave no explanation for the *extent* of the departure independent of the reasons given to impose a departure sentence.”). If the sentencing court articulates reasons for the sentence imposed and some are proper and others are not, the reviewing court “must determine whether the trial court would have departed and would have departed to the same degree on the basis of the [proper reason or] reasons alone.” See and compare *People v Babcock*, 469 Mich 247, 260; 666 NW2d 231 (2003). While an explicit statement by the sentencing court that it would impose the same sentence regardless of what turns out to be an invalid ground for departure is “the best practice[.]” “something short of such an explicit statement may well suffice as long as it is clear from the record that the trial court would not have sentenced defendant differently if it had not relied on [the] improper reason.” *Id.*, n 15.

III. ANALYSIS

Defendant contends that the trial court’s sentence was unreasonable and an abuse of discretion. Defendant reasons that the underlying offense was his first sexually-related offense in over 20 years, not the “continued pattern” referenced by the trial court. Moreover, defendant asserts that it remained unclear whether he failed to seek treatment or help regarding his sexual proclivities because his first offenses occurred out of state and the sentencing court lacked certain background information about them. In making this argument, defendant merges the prosecutor’s remarks and the trial court’s reasoning. The record, however, is not entirely clear whether the court was referencing defendant’s continuing criminal behavior or his sexual assaults as a juvenile and an adult. Regardless, we discern no error in its’ description.

In calculating the sentencing guidelines range, the trial court considered defendant’s prior convictions when scoring the PRVs. See MCL 777.21(1). Although the trial court’s decision to exceed the guidelines primarily rested on the harm suffered by the victim, the court also considered the danger that defendant posed to society. Defendant’s lengthy criminal background indicated to the court that defendant was a risk to the public. After defendant’s initial juvenile adjudications in 2000, defendant failed on multiple occasions to register as a sex offender and committed numerous nonsexual offenses as an adult. Defendant’s extensive criminal history demonstrated a clear inability to conform his behavior to the requirements of law and suggested an unnatural sexual appetite that continued despite the lengthy gap between defendant’s first and most recent sexual offense involving a child.

Defendant further contends that points assessed in scoring the OV's accounted for the seriousness of defendant's offenses by addressing the victim's bodily injury (OV 3, MCL 777.33(1)(e)), the victim's psychological injury (OV 4, MCL 777.34(1)(a)), the exploitation of a vulnerable victim (OV 10, MCL 777.40(1)(b)), and his additional sexual touching (OV 12, MCL 777.42(1)(d)). Contrary to defendant's argument, the OV's failed to fully account for the victim's and her mother's psychological harm. OV 4 concerns "psychological harm to a victim" and requires a 10-point assessment when "[s]erious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(a). Nevertheless, this Court has recognized that "[a]lthough OV 4 accounts for psychological injuries suffered by victims, it does not adequately consider the ways in which an offense affects familial relationship, nor does it always account for the unique psychological injuries suffered by the victims." *People v Anderson*, 298 Mich App 178, 189; 825 NW2d 678 (2012) (citations omitted). See also *Lawhorn*, 320 Mich App at 210-211 ("it was reasonable for the trial court to conclude that the factors it considered, especially the effects of [the] defendant's behavior on the victim that culminated in his stabbing another child and saying that he hated his life and that nobody loved him, were not adequately considered in the guidelines calculation.").

In this case, the trial court assessed 10 points under OV 4 and adequately explained why OV 4 failed to fully account for the lifetime harm defendant's actions inflicted upon the victim. The victim's mother explained that defendant stole the victim's innocence and his assault still affected her behavior. The victim required therapy, and, even though she was an innocent victim, she thought that she was at fault for the loss of her mother's job and their home. Both the victim and her mother lost their relationship with defendant's son. The victim's mother was in a romantic relationship with defendant and considered him a long-time friend. She replayed prior situations where she left the victim alone with defendant and questioned whether she had missed signs of a prior assault. The victim's mother described the "mental and emotional pain of losing everything around you" and said the "pain . . . is too severe to . . . adequate[ly]" describe. Like the victim, the victim's mother sought professional counseling. The victim's mother also attended support groups and described her pain in not being able to talk to the victim about defendant's assault until she was forensically interviewed. For these reasons, OV 4 did not fully account for the victim's psychological suffering or her mother's emotional harm. *Lawhorn*, 320 Mich App at 210-211; *Anderson*, 298 Mich App at 189.

Defendant further contends that the sentencing court ignored his clear statements of remorse, and thus, his potential for rehabilitation. Although defendant expressed remorse at sentencing, the victim's mother also told the court that, when she caught defendant in the act, he tried to blame the victim for what happened, even as he apologized. It is true that the court offered no direct opinion about defendant's expressed remorse at sentencing; however, it stated that its concern was not defendant's rehabilitative potential, but the protection of society in light of defendant's history and the circumstances surrounding this offense. In our view, the sentencing court was in the best position to determine the sincerity of defendant's remorse and rehabilitative potential. See e.g., *Lawhorn*, 320 Mich App at 207 (recognizing that sentencing courts have departed from the guidelines for reasons including "the defendant's expressions of remorse[] and the defendant's potential for rehabilitation" when warranted) (quotation marks and citation omitted); *People v Carlson*, 332 Mich App 663, 675; 958 NW2d 278 (2020) (where the sentencing court explicitly rejected defense counsel's expressions of remorse on defendant's behalf).

Defendant next contends that the court exceeded the guidelines because defendant was a fourth habitual offender and it was trying to “get as close to that 13 years^[7] that the victim[’s mother] asked for, not get overturned, and not get appealed” The record reflects that the court recognized its error in relying on the victim’s mother’s requested sentence and its desire not to be overturned or to be appealed when selecting a proportionate sentence. We caution the trial court to avoid reliance on these improper factors in the future. Nevertheless, review of the transcript convinces us that the court opined that the extent of its departure was warranted in light of defendant’s status as a fourth-felony habitual offender and the benefit he received from his plea agreement, more specifically, the reduction in his sentencing guidelines recommendation from 36 to 142 months to 36 to 106 months. “[T]his Court has recognized that a sentencing court may consider the nature of a plea bargain and the charges that were dismissed in exchange for the plea for which the court is sentencing.” *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Along with the other valid reasons outlined by the sentencing court, we conclude that it would have imposed the identical out-of-guidelines sentence without consideration of any improper factors. *Babcock*, 469 Mich at 260 n 15. This was a small departure considering the gravity of defendant’s crime and his criminal history. *Lawhorn*, 320 Mich App at 211. Accordingly, the trial court did not abuse its discretion by imposing a sentence outside of the sentencing guidelines recommendation that was proportionate to the seriousness of the crime and the circumstances surrounding it.⁸

Affirmed.

/s/ Anica Letica
/s/ Stephen L. Borrello
/s/ Michelle M. Rick

⁷ See footnote 6.

⁸ Contrary to defendant’s argument, the trial court did not fail “to separate the conduct forming the basis of the sentencing offense from the conduct forming the basis of an offense that was . . . later dismissed or dropped” Cf. *People v Gray*, 297 Mich App 22, 33-34; 824 NW2d 213 (2012). Nor did the court show bias by stating that the victim and her mother had a lifetime sentence or by explaining that if the Department of Corrections failed to see defendant progress, it would “hopefully . . . hold him to the full 30 years” once it had already imposed a 30-year maximum sentence.