

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY E. MARCHBANKS,

Defendant-Appellant.

UNPUBLISHED

February 22, 2005

No. 252186

Cass Circuit Court

LC No. 02-010152-FC

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of three counts of criminal sexual conduct in the first-degree, MCL 750.520b(1)(a), and three counts of criminal sexual conduct in the second-degree, MCL 750.520c(1)(a). Defendant's convictions arise from acts he perpetrated on his daughter. We affirm.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first asserts that his trial counsel was ineffective because he failed to object to hearsay accounts by the victim to witnesses concerning the abuse. However, defendant failed to state how each statement was hearsay, failed to analyze any of the quoted statements in any detail, failed to discuss whether trial counsel was pursuing a legitimate trial strategy, and failed to explain how each statement prejudiced him. Defendant also failed to cite authority that directly supported his theory. The few authorities that defendant did cite were general authority for ineffective assistance claims. Defendant's cursory treatment of this issue warrants the conclusion that defendant has abandoned this issue on appeal. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

II. SUFFICIENCY OF THE EVIDENCE

Defendant next contends that the evidence presented at trial was insufficient to convict him of the charged counts. We disagree.

Defendant's argument that the evidence is weak and unconvincing and primarily limited to the victim's statements, which defendant denied, and therefore failed to meet the prosecutorial burden of proof, is completely without foundation in the law. In effect, defendant's argument invites this Court to second guess the jury and weigh the evidence and credibility of the

witnesses, which this Court will not do. See *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

This issue is without merit.

III. EXPERT TESTIMONY

Defendant next contends that he was deprived of a fair trial by the trial court's erroneous admission of the expert testimony of Norman Saur regarding the comparison of his thumb with the thumb in the explicit photographs of the victim. We disagree.

A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 333 (2002). However, whether a rule or statute precludes admission of evidence is a matter of law and reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Where, as here, the alleged error is a preserved nonconstitutional error, it will not warrant reversal unless the defendant demonstrates that the error resulted in a miscarriage of justice. *Id.* at 493-494. To demonstrate that the error resulted in a miscarriage of justice, the defendant must show that it is more probable than not that the error affected the outcome of the trial. *Id.* at 495. While we agree that the trial court should not have admitted the expert testimony, we find that the testimony was of small consequence in light of the overwhelming evidence against defendant, and thus, the error did not affect the outcome and does not warrant a new trial.

IV. DISCOVERY REQUESTS

Defendant next contends that the trial court erred when it refused to grant his request for a copy of the hard drive and the removable media. We disagree.

Defendant makes the unsupported assertion that he requested the production of the hard drive, which request was refused, and that the refusal denied him the opportunity to present a defense. Defendant again cited only to general authorities for the proposition that evidence requested by a defendant must be produced, but failed to address this issue specifically. In addition, defendant failed to address the timeliness of the requests, the fact that the trial court actually granted defendant permission to examine the requested materials on site, and completely failed to state how the limited discovery prevented him from putting on a defense. Therefore, defendant has abandoned this issue. *Watson, supra* at 587.

V. SENTENCING

Defendant next contends that the trial court erred when it deviated upward by six months from the minimum sentence guidelines. We disagree.

This Court reviews the existence of a factor that can be considered in departing from the sentencing guidelines for clear error; reviews whether the factor is objective and verifiable de novo; and reviews whether the reason is substantial and compelling for an abuse of discretion. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). Because defendant's offenses occurred on or after January 1, 1999, the legislative sentencing guidelines applied to his sentencing. MCL 769.34(2). According to these guidelines, the trial court could only depart

from the minimum sentencing range if it had a substantial and compelling reason. MCL 769.34(3). A substantial and compelling reason is a reason that is objective and verifiable and keenly or irresistibly grabs our attention, is of considerable worth in deciding the length of the sentence, and exists only in exceptional cases. *Babcock, supra* at 257-258. Furthermore, the trial court must articulate the reason for that particular departure on the record. *Id.* at 258-259.

The minimum sentence according to the guidelines was 126 to 210 months and the actual minimum sentence ordered by the court was 216 months. The primary reason cited by the trial court, that the guidelines failed to adequately address the number and severity of the criminal sexual conduct offenses, alone supports the trial court's decision to depart from the guidelines. Defendant forced his own daughter when she was merely ten years old to strip and get into graphic poses while he took pictures, which he stated he was going to sell on the internet. Furthermore, in order to make the photographs more explicit, defendant manipulated his daughter's buttocks and genitalia. Each of these instances of sexual abuse involved multiple pictures, in multiple poses, with at least two separate manipulations of the victim's privates. Furthermore, the victim stated that she experienced discomfort during the CSC 1 offenses and was emotionally distraught the entire time. These facts are not fully considered by the guidelines for scoring multiple offenses and may be considered by a trial court in departing from the guidelines. See *Babcock, supra*, at 272. We conclude that the trial court did not abuse its discretion. Therefore, there was no error warranting a reduction in defendant's sentence or a remand for a new sentencing hearing.

VI. OTHER ACTS EVIDENCE

Defendant next contends that the evidence of the other pictures found on his hard drive and the discs should have been excluded under MRE 404(b). We disagree.

Defendant's trial counsel addressed his objections to the trial court and the trial court dealt with these objections at length, but defendant's trial counsel objected only on the ground that the rebuttal was improper and not under MRE 404(b). An objection on one basis does not preserve appellate review based upon another basis. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Therefore the issue was not properly preserved for review. Because defendant failed to preserve this issue, this Court will review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MRE 404(b)(1) prohibits the admission of evidence that a defendant committed other crimes, wrongs, or acts, "to prove the character of a person in order to show action in conformity therewith." However, other acts evidence can be admitted under certain circumstances. Our Supreme Court has held that there must be three factors present for other act evidence to be admissible. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). First, the prosecutor must offer the prior bad acts evidence under something other than a character or propensity theory. Second, the evidence must be relevant under MRE 402 and MRE 104(b). Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *Id.* (citations omitted).

Even if the evidence of the pictures on the computer could be said to be evidence of other bad acts by defendant by inference, the rebuttal exhibit and testimony were not offered for the impermissible purpose of demonstrating that defendant had bad character and that he should be

convicted based upon the belief that he acted in conformity with that behavior. See *People v VanderVliet*, 444 Mich 52, 69-70; 508 NW2d 114 (1993); *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). The statements and exhibit were offered to rebut the statements by defendant that he did not know there was any child pornography on the computer, that he was unfamiliar with the labels of the pictures of his daughter, and that he did not download, view, or get aroused by pictures of child pornography. The testimony and exhibit also clarified the nature of the evidence on defendant's computer and tended to rebut defendant's theory of the case that he was framed. See *Starr, supra* at 501-502. Furthermore, when defendant testified, he placed his credibility at issue, and such rebuttal testimony and evidence became fair game. *Lukity, supra* at 498-499. Thus, the evidence was clearly offered for a purpose other than to prove that defendant acted in conformity with his bad character.

Likewise, the evidence was relevant. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. The evidence of more than 170 child pornographic photographs on his computer was probative that defendant knew or should have known that there were such pictures on his computer, and thus lied when he stated otherwise. In addition, the evidence of the labels undermines defendant's statements that he did not understand the labels used with the obscene pictures of his daughter and thus undermines the credibility of his denial that he took the pictures or even was aware of them. The evidence also tended to corroborate the victim's statement that defendant intended to sell the photographs on the internet, because it tended to show that defendant knew how to download and upload child pornography and was aware of its commercial value. Therefore, the evidence was clearly both relevant in its own right and proper rebuttal evidence.

Defendant also asserts that the evidence was highly prejudicial and should have been barred under MRE 403. MRE 403 bars the admission of evidence where the probative value is substantially outweighed by the danger of unfair prejudice. *Starr, supra* at 499. In this case, the trial court determined that the evidence was relevant and had significant value, but that the value was outweighed by the prejudicial nature of the photographs themselves. As a result, the trial court barred the admission of the photographs, but permitted the admission of the fact that there were such photographs and the admission of the labels and other technical information. The admission of the very limited testimony by Daly and an exhibit listing the titles and technical information about a series of photographic files stored on electronic media, including their labels, is far less prejudicial than the actual photographs, and considering the important evidentiary value already noted, cannot be said to be so prejudicial that the prejudicial value outweighed its probative value and thus warranted its exclusion. Therefore, the trial court did not err in permitting this evidence to be admitted.

Affirmed.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra