STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 6, 2004
v	No. 246041 Lenawee Circuit Court
RANDALL LEE FIELDS, Defendant-Appellant.	LC No. 02-009738-FC

Before: Wilder, P.J. and Hoekstra and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct (multiple variables), MCL 750.520d.[1] The trial court sentenced him to concurrent terms of ten to fifteen years in prison. Defendant appeals as of right his convictions and sentences. We affirm.

I. Basic Facts

The victim testified that he met defendant when he was approximately twelve years old through defendant's nephew whom the victim met on a school bus. Defendant lived across the street from the victim. The victim also met James Philo, another adult, at defendant's house. After the victim started "hanging out" with defendant, Philo moved into defendant's house and the three of them spent time together watching television and sometimes pornographic films. The victim described one instance when, after consuming alcohol and smoking marijuana, the defendant and Philo went into the bedroom where defendant performed oral sex on the victim. Philo also placed his mouth on the victim's penis. The victim testified that defendant performed oral sex on him on two separate occasions. Deputy Batterson testified that while defendant was in custody on an unrelated domestic abuse matter, he was questioned about his relations with the victim. Defendant provided a statement that corroborated the victim's testimony but added that on one occasion he engaged in oral sex with Philo and the victim in a motel in Toledo, Ohio and that he masturbated the victim on two other occasions.

[1] Defendant was charged with three counts.

II. Defendant's Statement

Defendant first argues that the trial court erred in admitting a statement that defendant made while jailed on an unrelated matter. We disagree.

We review a trial court's findings of fact in a suppression hearing for plain error; but we review de novo the trial court's ultimate ruling on the motion. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). The trial court did not make any findings of fact because the parties agreed that the facts were undisputed.

At trial, Deputy Batterson testified that he removed defendant from his cell, where he was jailed on domestic assault, and led him to a conference room. He told defendant that he wanted to speak with him in regard to the victim whom defendant indicated he knew. The interview began around 7:00 or 9:00 p.m. and ended around midnight. Defendant was not read his *Miranda* rights, but Deputy Batterson told him he was free to leave the conference room and return to his jail cell. Deputy Batterson told defendant that there had been allegations of a sexual nature involving the victim. Defendant stated that he was a fatherly figure to the victim. Although defendant did not initially acknowledge any sexual relations, he ultimately stated that he had oral sex with the victim and masturbated him. He also stated that he witnessed oral sex between the victim and Philo. He stated that this occurred in the bedroom of his home in September. He also spoke of another incident involving himself, the victim and Philo at a Toledo, Ohio motel.

With regard to *Miranda*[2] warnings generally, this Court has long held:

> *Miranda* warnings are necessary only when the accused is interrogated while in custody, not simply when he is the focus of an investigation. Custodial interrogation is "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" [*People v Herndon,* 246 Mich App 371, 395; 633 NW2d 376 (2001) (footnotes omitted).]

But with regard to interrogation of a defendant who is in custody on an unrelated matter, this Court has more recently held:

> "[I]n addition to the elements of 'custody' and 'interrogation,' there must be some nexus between these elements in order for *Miranda* to apply." That a defendant is in prison for an unrelated offense when being questioned does not, without more, mean that he was in custody for the purpose of determining whether *Miranda* warnings were required. [*Id.* at 396, quoting *People v Honeyman,* 215 Mich App 687, 694; 546 NW2d 719 (1996)].[3]

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[2] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] On appeal, defendant suggests that these cases hold no precedential value because this Court reached its decision in *Honeyman* "without citation to authority" and "created the 'nexus' theory (continued…)

Here, defendant was unquestionably in custody, but on a matter unrelated to the interrogation. Although defendant was not read his *Miranda* rights, he was told that he was free to leave the conference room and return to his cell. Defendant never asked to leave. Because *Miranda* warnings were not required, the trial court did not err in denying defendant's motion to suppress his statement.

III. Other Acts

Defendant also argues that the trial court erred in admitting other acts evidence. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Aguwa*, 245 Mich App 1, 6; 626 NW2d 176 (2001). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A criminal defendant may obtain relief from an unpreserved error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

Because this evidence was either objected to on a basis other than that argued on appeal or was not objected to at all, it is reviewed for plain error. Defendant objected to evidence that the victim also engaged in oral sex with Philo in defendant's presence based on relevance, not MRE 404(b). Defendant objected to evidence that he had oral sex with the victim in a hotel in Toledo, Ohio stating that the act was "outside the jurisdiction of the Court. It's more prejudicial than probative." Defendant did not object when Deputy Batterson testified that defendant masturbated the victim and engaged in oral sex with Philo. Defendant also did not object when the victim testified that defendant used alcohol and marijuana with him.

There was no plain error in the admission of this evidence. The prosecution did not offer this evidence as 404(b) evidence, but rather, as part of the whole story surrounding the criminal acts for which defendant was charged. The evidence was admissible as part of the res gestae of the offenses, independent of MRE 404(b). *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996); *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995). "'Evidence of other criminal acts is admissible when so blended or connected with the crime of which [the]

(…continued)

out of whole cloth." According to MCR 7.215(C)(2), "A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." Moreover, one of the reasons this Court publishes opinions is if it "establishes a new rule of law." MCR 7.215(B)(1). Thus, the fact that this Court created the "nexus theory" in *Honeyman* does not cause the opinion to lack precedential effect.

defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.'" *Sholl*, *supra*, quoting *State v Villavicencio,* 95 Ariz 199, 201; 388 P 2d 245 (1964). Here, defendant fostered a relationship between himself and the victim as well as between Philo and the victim. The three spent time together on several occasions watching television and pornographic films. On occasion, defendant offered the victim alcohol and marijuana. It was under these circumstances and on more than one occasion that defendant had sexual relations with the victim and/or Philo had sexual relations with the victim in defendant's presence. These acts were so blended with the crimes defendant was charged with that they incidentally explained the circumstances of those crimes. Therefore, the trial court did not err in admitting this evidence.[4]

IV. Sentencing

Defendant also argues that the trial court erred in finding "there were substantial and compelling reasons to depart from the statutory sentencing guidelines and abused its discretion when imposing a sentence of 120 months to 180 months in prison where the guidelines range called for a sentence of 45 to 75 months."

At the sentencing hearing, the trial court stated:

> In this case since I reviewed the pre-sentence report, I reviewed your description of the offense, as I reviewed the testimony that was given, this happened so repeatedly, you took advantage of this young man with another, I think the sentencing guidelines are totally inadequate. I think that you are a danger to our youth. If you are released, I think that you will repeat. I'm convince[d] that is – that you will.

On the sentencing information report departure evaluation, the trial court wrote:

> The following aspects of this case led me to impose a sentence outside the recommended range:
>
> Repeatedly this defendant sexually abused this minor child victim and encouraged and aided another to abuse this child, all over an extended period of time.
>
> In order to enable him to do this, defendant deceived the victim's family and enticed and took him to locations where he was separate from those who could counsel and assist him.
>
> Defendant is a person who, when free, will repeat this criminal conduct.

[4] Defendant also briefly mentions Deputy Batterson's testimony that "[Defendant] was incarcerated on an unrelated matter--." Defendant objected to this testimony and the trial court sustained the objection. The trial court instructed the jury to disregard evidence that was stricken during trial. Therefore, there was no plain error.

Generally, upon conviction of a felony committed after January 1, 1999, a trial court must impose a sentence within the recommended range of accurately scored sentencing guidelines. MCL 769.34(1), (2); *People v Hegwood,* 465 Mich 432, 438-439; 636 NW2d 127 (2001). A trial court may depart from the guidelines recommended range only "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3); *Hegwood, supra* at 439-440. "A substantial and compelling reason must be "objective and verifiable"; must "'keenly' or 'irresistibly' grab our attention"; and must be "of 'considerable worth' in deciding the length of a sentence." *People v Babcock,* 469 Mich 247, 272; 666 NW2d 231 (2003), quoting *People v Fields,* 448 Mich 58, 62, 67; 528 NW2d 176 (1995).

MCL 769.34(3)(b) provides: "The 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."

Defendant argues that the fact that defendant "repeatedly . . . abused this minor child victim and encouraged and aided another to abuse this child, all over an extended period of time" is not a valid reason for departure because it was already taken into account by the sentencing guidelines. Although defendant's prior and concurrent offenses and his continuing pattern of criminal behavior were taken into account in offense variable (OV) 13 concerning defendant's continuing patter of criminal behavior, the facts that defendant's relationship with the victim extended over a period of time and that defendant encouraged and/or aided Philo's abusive relationship with the victim were not taken into account. This is a substantial and compelling reason for departure because it aggravated the circumstances surrounding defendant's criminal conduct.

Defendant also argues that the fact that defendant deceived the victim's family and enticed and took him to discreet locations is also not a valid reason. Although we agree that the nature of the crime necessitates deception, the fact that defendant "enticed" the victim with alcohol and marijuana is a substantial and compelling factor that was not otherwise accounted for.

We agree with defendant that the fact that defendant is a danger to youths is not a valid factor for the purpose of departure. The youthfulness of the victim was taken into account by OV 10 concerning the vulnerability of the victim. Speculation that defendant will be a danger to other youths, although very likely the case, is not objective and verifiable. We also agree that the trial court's speculation that defendant "will repeat" is not objective and verifiable.

Keeping in mind that the trial court is entitled to some deference because of its "familiarity with the facts and its experience in sentencing, [and because] the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case," *Babcock, supra* at 268-269, we conclude that while some of the trial court's factors were not valid reasons for departure, others were. When a trial court provides multiple substantial and compelling reasons for departure from the guidelines range, some of which are not substantial and compelling, our Supreme Court has instructed us to "determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and

compelling reasons alone." *Babcock, supra* at 260. Here, the trial court stated: "I will point out that if the appellate court decides that I was incorrect in my decision regarding the guidelines, the sentence would still be 10 to 15 years." Thus, the trial court made clear that it would depart to the same degree even if we remanded for corrections. Accordingly, we affirm defendant's sentence.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly