STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARRY EUGENE SEARLES,

Defendant-Appellant.

UNPUBLISHED
August 2, 1996

No. 176611
LC No. 93-006409

Before: Hood, P.J., Markman and A.T. Davis*, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b); MSA 28.788(2)(1)(b). Following a jury trial, defendant was acquitted on the first count involving activities alleged to have occurred on December 25, 1992. He was convicted on the second count, involving an incident alleged to have occurred on June 23, 1993. He was sentenced to 26 to 50 years' imprisonment, and appeals as of right. We affirm.

The charges against defendant stem from allegations by his stepson that he had been repeatedly forced to have sexual intercourse with his mother from the time he was eight or nine years old to the time he ran away from home at age 15. The child's mother, Cherie Searles, was also charged with CSC I in connection with these incidents. She pled guilty to second-degree criminal sexual conduct in exchange for a 15-year cap on her sentence. She testified at trial and confirmed that she had repeatedly had sexual intercourse with her son over a period of seven or eight years.

Defendant first argues that the trial court erred in denying his motion to suppress inculpatory statements made to Trooper Rick Harrington because he was in custody when he made the statements, but was not given his *Miranda* warnings, and the statements were involuntary. A trial court's ruling on legal grounds on a motion to suppress is reviewed under the clearly erroneous standard. *People v Smielewski*, 214 Mich App 55, 62; 542 NW2d 293 (1995).

* Circuit judge, sitting on the Court of Appeals by assignment.

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966). Miranda warnings are required when a person is in custody or otherwise deprived of freedom of action in any significant manner. *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995). The totality of the circumstances must be examined to determine if the defendant was in custody at the time of the interrogation. *Id.* The critical question is whether the accused reasonably could have believed that he was not free to leave. *Id.*

It is undisputed that defendant was not given *Miranda* rights before making the statements. However, on cross-examination, defendant admitted that the interview took place in a parking lot in the afternoon, outside the Caro Regional Center. Harrington approached him, identified himself and said he would like to speak with him. He did not direct him to the car but said "[C]ome over to the police car, I'd like to talk to you." He was not handcuffed. He was not searched. The car door was left "wide open," and no one attempted to close the door or lock it. Likewise, Harrington testified that he did not "order" defendant to do anything, or tell him that he could or could not go. He did not draw his weapon, use handcuffs or otherwise make threatening gestures to him. Under the totality of the circumstances, we find that a person in defendant's position could not have reasonably believed that he was in custody at the time he made the inculpatory statements to Harrington. Therefore, *Miranda* warnings were not required.

We also find no merit in defendant's argument that his statements should have been suppressed because they were involuntary. In reviewing a finding of voluntariness, this Court must examine the entire record and make an independent determination on the issue of voluntariness. *People v Haywood*, 209 Mich App 217, 225-226; 530 NW2d 497 (1995). This Court reviews the totality of the circumstances surrounding the making of the statements in light of the factors stated in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Those factors include age, intelligence level, previous experience with the police, nature of the questioning, length of detention, lack of advice of rights, delay in arraignment, whether the accused was injured, intoxicated or drugged, or in ill health, deprivation of food, sleep, or medical attention, physical abuse and whether any threats were made against the suspect. *Id.*

Again, no *Miranda* warnings were required because defendant was not in custody at the time of the interview. Although defendant claimed that he suffered from a nervous condition, he stated that at the time of the interview he was being treated only for an ulcer. Harrington testified that defendant never indicated that he did not want to participate in the conversation. Defendant did not dispute this contention. Under the totality of the circumstances, we find that defendant's statements were voluntary. We therefore conclude that the trial court properly denied defendant's motion to suppress.

Defendant next argues that the trial court erred in allowing evidence of prior uncharged acts of sexual misconduct involving him, his stepson and wife because it showed that he had a propensity to

commit the charged acts in conformity therewith. The decision to admit evidence is within the trial court's discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

MRE 404(b) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of another crime may be admitted if (1) it is relevant to an issue other than character or propensity, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by the danger of unfair prejudice. *Catanzarite, supra*, pp 578-579.

We find that the trial court did not abuse its discretion in admitting testimony of the prior uncharged instances of sexual misconduct under MRE 404(b). The evidence was offered for the purpose of establishing a scheme, plan or system of sexual misconduct by defendant in an effort to establish the victim's credibility concerning the charged acts. Furthermore, the evidence was relevant to the issue of whether defendant committed the charged acts. Because defendant pleaded not guilty, every material allegation was in issue. MCR 6.301(A). Additionally, the evidence was not more prejudicial than probative. "[T]he probative value of similar acts evidence [may outweigh] the disadvantage where the crime charged is a sexual offense and the other acts tend to show a familiarity between the defendant and the person with whom he allegedly committed the charged offense." *People v Dermartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973). Surely, allegations of forced sexual intercourse between a son and his mother would, standing alone, be unnatural or improbable without reference to the facts preceding or inducing the action. Finally, the court instructed the jury to consider the prior acts evidence only for the limited purpose for which it was offered under MRE 404(b).

Defendant also contends that the trial court erred in denying his motion for a directed verdict of acquittal and a new trial because the jury's verdict of guilty on one count of CSC I was against the great weight of the evidence and constituted a compromise verdict because the exact dates of the crimes charged were not sufficiently established by the evidence. We disagree. This Court reviews a denial of a motion for a new trial based on a great weight of the evidence argument under an abuse of discretion standard. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). The question is whether the verdict was manifestly against the clear weight of the evidence. *Id.*

The evidence presented at trial did not clearly weigh in defendant's favor. As defendant concedes, the specific time or date of an offense are not required to be proven beyond a reasonable doubt in child-victim cases. *People v Miller*, 165 Mich App 32, 47; 418 NW2d 668 (1987); *People v Naugle*, 152 Mich App 227, 235; 393 NW2d 592 (1986). Further, time is not an element of a

sexual assault offense. *Id*. The offense dates are only required to be as specific as the circumstances permit. MCL 767.51; MSA 28.991. Moreover, defendant has provided no support for his argument that there is a different rule when the "victims are a 15 year old and his adult mother and the charge is specific to a date that they supposedly are able to remember." We therefore conclude that the trial court did not abuse its discretion in determining that the verdict as to the June 23, 1993 incident was not against the great weight of the evidence.

We also find no merit in defendant's argument that the jury's verdict of guilty on one count of CSC I and acquittal on the other constituted a compromise verdict. Criminal verdicts need not be consistent. *People v Vaughn*, 409 Mich 463, 465-466; 295 NW2d 354 (1980). "Because the jury is the sole judge of all the facts, it can choose, without any apparent logical basis, what to believe and what to disbelieve." *Id.* In ruling that the verdict was not the result of a compromise, the trial court found, and we agree, that:

> [T]he proofs and evidence narrow down to two dates in the information. . . . [T]he transcript would show a void. That is, a void in the testimony concerning the incident occurring on the date of December 25th . . . It was the Christmas date, that's the one that the jury found him not guilty on. And I think it was an oversight of the prosecution that they did not elicit testimony through direct examination of the mother, or the victim as to the specific conduct on that date. So the jury in its infinite wisdom said that the prosecution had not established beyond a reasonable doubt that it occurred on that date. Simply looking at the evidence, I don't think it's a compromise verdict at all.

We therefore conclude that the trial court properly determined that the acquittal as to the December 25, 1992 incident was not he result of a compromise. Therefore, the trial court properly denied defendant's motion for acquittal and a new trial.

Defendant next argues that he was denied a fair trial by the introduction of the improper rebuttal testimony of Trooper Harrington for impeachment purposes. Because defendant failed to object to the admission of this evidence, this Court will review that issue only for manifest injustice. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995).

Rebuttal testimony is limited to refuting, contradicting, or explaining evidence presented by the other party. *Id.* It must relate to a material, noncollateral matter. *People v Holland*, 179 Mich App 184; 445 NW2d 206 (1989). When the rebuttal evidence involves a simple contradiction of the defendant's testimony and directly tends to disprove exact statements given by the witness, it is proper rebuttal testimony. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). In this case, Harrington's rebuttal testimony was material, limited to directly contradicting the testimony of defendant, and did not involve issues that had not been previously addressed in the prosecutor's case-in-chief. Since there was no error, there could be no manifest injustice as a result of the admission of the testimony.

Defendant next argues that the cumulative effects of the errors resulted in a denial of a fair trial. Because none of the instances complained of constituted error, defendant was not denied a fair trial.

Defendant finally challenges his sentence of 26 to 50 years' imprisonment on several grounds. First, he argues that the trial court was required to, but failed to consider the severity and nature of the crime; the circumstances surrounding the criminal behavior; defendant's attitude toward his criminal behavior; defendant's criminal history, his social and personal history; and, the statutory sentencing limits. Defendant also claims that the trial court failed to consider his potential for rehabilitation, but had as its singular goal the "warehousing" of defendant.

Contrary to defendant's argument, we find that, although the factors are not *required* considerations, the court considered them in imposing sentence. The court made the following statements at sentencing:

> I'm simply addressing a 46 year old man that in this record, which I believe, *repeatedly, continually sexually abused his child, or his stepchild from the age of eight until the day that he escaped this monstrous prison that you as the inkeeper [sic] created, and continued to do so*. And I want you to know that I tried to figure out why you did it. I think the reason why you did it is because you're a very sick person.
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> *Milbourn* gives me some direction when it says Judge, look first to the nature of the offense. *This offense started occurring eight years prior to the time of this child leaving that home. That in and of itself is simply appalling. Each day when someone decides to commit a crime, they make a choice that day.* They go to steal a candy bar, they have time to think about stealing the candy bar, and they go on and steal it. Quite frankly, many of the criminals that I see are one time offenders. They come in here, they made a mistake, they pay their dues and they're on their way. *Mr. Searles, you have no concept of morality. You have no character. You are simply the worst despicable excuse for a human being that I've had in my presence in the last 53 years. On this record, it would have been better for you to have murder both of these people, cut them up with an axe and get rid of their life [sic].*
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> You might as well have done that, because now, as the prosecutor mentioned, *this child has to live his life knowing that he was forced to repeatedly and continually have sexual intercourse with his own mother. . . .*
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> And then in addition to that, the icing on the cake, Mr. Searles is for you then to do the same, and *insist upon him watching. . . .* When I run into a mind that is beyond comprehension, there is only one safe thing to do. The safe thing to do is forget about the individual at the time of sentencing. That is, put society's interest before those

> of the individual. And when I do that , there's a term in the criminal justice system that I learned at a seminar many years ago, and that is warehouse the individual.
>
> You could have stopped doing it at the age of nine, the age of 10, or the age of 12, age of 13. *You just kept right on doing it*. [Emphasis added.]

It is clear from our review of the record that the court articulated several cogent and applicable reasons for the sentence imposed.

Defendant next argues that resentencing is required because the trial court improperly scored several offense variables. Appellate review of sentencing guidelines calculations is very limited. *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994). A sentencing court has discretion in determining the number of points to be scored, provided there is evidence on the record to adequately support a particular score. *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993).

Defendant was assessed ten points for OV 6, which requires a score of ten points if there were two or more victims. Defendant claims that because Cherie pled guilty to CSC II as a result of her own actions in the case, she should not be considered a victim. The trial court opined, and we agree, that defendant "would not have convicted of this crime if the jury believed that Cherie Searles was in fact not being forced to do these things as much as [the child]." Accordingly, the two victims were the child and his mother, Cherie. We therefore conclude that the trial court properly assessed defendant ten point for OV 6.

Defendant was assessed twenty five points for OV 12, which requires a score of twenty five points for "one criminal sexual penetration." Defendant claims that the penetration forming the basis of the conviction should not be considered. However, the child and Cherie testified that on June 23, 1993, the child digitally penetrated his mother's vagina before entering it with his penis. Therefore, as the trial court opined, the digital penetration is the "one criminal sexual penetration." Accordingly, we conclude that the trial court properly assessed defendant twenty five points for OV 12.

Defendant was assessed fifteen points for OV 25, which requires a score of fifteen for "three or more contemporaneous acts." Defendant's sole objection to OV 25 rests on the fact that he was acquitted of the other CSC I charge. An acquittal on a charge does not necessarily mean that the defendant did not engage in criminal conduct. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). Rather, it demonstrates a lack of proof beyond a reasonable doubt. *Id.* A fact can be establish for purposes of guidelines calculations even though it was not found for the purpose of conviction. *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993). We find that the evidence in the record supported the trial court's finding that the events occurred three or more times within six months. We therefore conclude that the evidence supported defendant being scored fifteen points for OV 25.

Defendant finally argues that his sentence was disproportionate because the trial court's upward departure from the guidelines range was based on factors already considered by the guidelines. A

sentence must be proportional to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). As recently reiterated in *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995), "[u]nder *Milbourn*, the 'key test' of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether [a sentence] reflects the seriousness of the matter." Departures from the guidelines ranges are appropriate where the guidelines do not adequately account for factors legitimately considered at sentencing. *People v Watkins*, 209 Mich App 1, 6; 530 NW2d 111 (1995).

We find that the trial court's upward departure is justified by the facts. The relationship between defendant and the victim is an important factor not included in the guidelines calculations. *Houston, supra*, p 323. That relationship can be an aggravating or mitigating. *Milbourn*, *supra*, pp 660-661. Obviously, the relationship between defendant and the child, defendant and Cherie, and the child and his mother, was an aggravating factor. Defendant was the victim's stepfather. Yet, defendant forced the boy to have sex repeatedly with his mother, defendant's wife. As the trial court stated, "this child has to live his life knowing that he was forced to repeatedly and continually have sexual intercourse with his own mother." In light of the seriousness of the crime and the victims' relationship, we conclude that the sentence was proportionate to the offender and the offense.[1]

Affirmed.

/s/ Harold Hood
/s/ Stephen J. Markman

[1] The trial court did not state its reasons for its upward departure from the guidelines on the SIR. However, because the court's reasons for the departure are clear from the record, a remand would be unnecessary.