

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Appellee,

No.

v.

GARY THOMAS SMITH,
Appellant.

Wayne County Circuit Court No. 03-12800
Court of Appeals No. 267099

**ANSWER IN OPPOSITION TO DEFENDANT'S APPLICATION
FOR LEAVE TO APPEAL**

134682-

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COUNTER-STATEMENT OF JURISDICTION

The People accept Defendant's Statement of Jurisdiction.

QUESTIONS PRESENTED

I.

To establish that counsel was ineffective, defendant must show that but for counsel's error, he had a reasonable probability of acquittal. Here, Defendant's attacks on trial counsel preparation before trial failed to produce any evidence that Defendant suffered prejudice. Did the trial court abuse its discretion by denying Defendant's motion for a new trial?

The People answer: NO

Defendant answers: YES

II.

The trial court may depart from the guidelines based on factors already considered in determining the sentence range if it finds they have been given inadequate weight. Here, the trial court found that the guidelines gave inadequate weight to the nature of Defendant's exploitation of his 10 year old victim whom he forced to endure repeated molestation by threatening to make her family homeless. Did the trial court abuse its discretion by exceeding the sentencing guidelines?

The People answer: NO

Defendant answers: YES

COUNTER-STATEMENT OF FACTS

Defendant, Gary Thomas Smith, was charged with three counts of first degree criminal sexual conduct for molesting 10 year old Erica Stark.¹

The trial record shows that Cynthia Stark entrusted Gary Smith and his wife Carol Smith, who ran a day care out of their home, to take care of Stark's daughter, Erica, from the time that Erica was a year old. Over the years, Stark and her daughter Erica became came to think of the Smiths as family, both describing Erica's relationship with Defendant as a father-daughter relationship.² When Stark moved to Atlanta at one point, the Smiths kept in touch with Erica and Stark's younger daughter, Alexis, and the two girls traveled back to Michigan to visit the Smiths during the summers.³

In May 2002, Stark started renting a room from the Smiths and sent Erica, who as 10 years old at the time, and Alexis, age 7, to live with the Smiths. Stark moved there in August, with her two year old son, Gary.⁴ Over the next year, Defendant molested Erica repeatedly.⁵ Erica testified

¹MCL § 750.520b.

Defendant's first trial, held in March 2004, ended in a mistrial. 3/22/04, 149-157. At Defendant's first trial, the prosecutor presented the testimony of Dr. Sandra Bronni, Cynthia Stark, Erica Stark, Police Officer Timothy Demers, Clayton Helton Talley, Laura Helton, and Danielle Helton. The defense presented Carol Smith, Gabriele Brown, Linda Woodward, and Defendant.

The trial court granted Attorney Steven Smith's motion to withdraw from the case 3/22/04, 157. On April 19, 2004, attorney Samuel Simon was assigned to take over the case.

²9/27/04, 4-14.

³*Id.*; 9/27/04, 54-59.

⁴9/27/04, 18, 58-59.

⁵ 9/27/04, 64.

that each time, Carol Smith was in the basement on the computer and she (Erica) and Defendant were in the living room watching TV. Erica recounted that the first time, she was lying on her stomach on the couch and Defendant was sitting on the couch. He put his hand down her pants, placed his hand on top of her underwear, and rubbed her buttock. Erica testified that she was scared and did not move at first. Defendant stopped when Erica got up from the couch and left the room.⁶

Defendant molested Erica again about two weeks later. Erica remembered that she was on the couch watching television with Defendant. This time, Defendant placed his hand inside her underwear. Erica testified that Defendant put his finger inside the place where she would go “pee” and he rubbed the area. Erica said that this felt uncomfortable and Defendant stopped when Erica got up and left the room.⁷ The next time, Defendant put his finger inside the “part where women have their periods.” Erica testified that this hurt her and she tried to move and push his hand away, but Defendant stiffened his arm.⁸ Erica testified that, at the end of the summer, Defendant put his finger inside the place where she would go “poop.” Erica described that this hurt like he was stretching her skin. She pushed his hand away and he removed his finger.⁹ On another occasion, Defendant rubbed Erica with two fingers in the place where she went “poop.” On one of these occasions, Erica saw Defendant rubbing himself on his private parts with his other, until he had a

⁶9/27/04, 60-64, 76-77.

⁷9/27/04, 65-70, 76.

⁸9/27/04, 71-75.

⁹9/27/04, 77- 78.

wet spot on his shorts.¹⁰ Defendant told her that if she told anyone, he would kick her family out of the house, so Erica was afraid to say anything for some time.¹¹

On August 20, 2003, Erica spent the night at the home of Danielle Helton, a young girl about Erica's age whom she met through the Smiths – Danielle's parents, Laura and George Helton, were friends with Defendant and Carol Smith.¹² That night, while Erica, Danielle, and Danielle's sixteen year old brother, Clayton, were playing video games, Danielle fell asleep.¹³ Erica asked Clayton if he would ever hurt a little girl while she was sleeping and he replied "no." Erica started sucking her thumb – something she did when she was scared of nervous – and told Clayton that Defendant had been touching her in her private parts. Erica made Clayton promise not tell anybody.¹⁴

Clayton Helton recounted that night and testified that when Erica asked whether he would ever touch her while she was sleeping, he "threw a fit" and told Erica that that was "sick," "disgusting," and wrong. Erica told him that sometimes when she was on the couch or the chair, Defendant would stick his finger up her. She told him that when she tried to move away, Defendant would tense his arm, hurting her more. Clayton testified that Erica looked scared and told him that if she said anything, Defendant would kick her family out of the house.¹⁵ When Clayton asked her where everyone was when this happened, Erica told him that Carol Smith was downstairs on the

¹⁰9/27/04, 79-83.

¹¹9/27/04, 83.

¹²9/27/04, 86.

¹³9 /27/04, 85-86

¹⁴9/27/04, 87-91.

¹⁵9/27/04, 135.

computer and her mother, Cindy Stark, was either at work or in her room.¹⁶ Clayton testified that he knew that Carol Smith spent a great amount of time in the basement, often spending the entire night on the basement computer.¹⁷

After that conversation, Clayton went straight to his mother's room and tried to wake her up to tell her what Erica said. Laura Helton recalled that she had been sick that night and that Clayton came to her room, upset and asking to talk but Helton told him to wait until the morning. First thing the following morning, Clayton told her what Erica had said about Defendant. Helton spoke to Erica, who cried and sucked her thumb, and told about what Defendant had done to her.¹⁸

Laura Helton testified that she had plans to go shopping with Carol Smith later that day, so she took Erica back to Defendant's house. When they arrived, Helton told Carol Smith that she had something to tell her privately, but Cindy Stark arrived home, so Helton did not say anything more to Carol Smith. Instead, they went left the house to go shopping. Cindy Stark rode with Carol Smith, and Helton rode with Defendant, in a separate car.¹⁹ When they arrived at the shopping center, Cindy Stark went to the Salvation Army while Helton went to Big Lots with Carol Smith. Helton took Carol Smith aside and told her what Erica had stated about Defendant.²⁰ Helton testified that Carol Smith was upset and started shaking.²¹ Cindy Stark testified that Carol Smith suddenly

¹⁶ 9/27/04, 120-127.

¹⁷9/27/04, 131-138.

¹⁸9/27/04, 91, 127-130, 144-149; 9/28/04, 15-21.

¹⁹9/27/04, 149-152.

²⁰9/27/04, 152.

²¹9/27/04, 152-153.

entered the Salvation Army and announced to her, “there’s a problem.”²² Carol Smith told Stark that Erica had confided to Helton’s son that Defendant had been touching her. Cindy Stark started crying and asked Helton to repeat to her what Erica had stated.²³ The three women decided to drive together back to the house and Defendant followed in the other car. When they reached the house, Stark took Erica into the back room and Erica told her mother that Defendant had touched her in a sexual way.²⁴

Cindy Stark testified that she started packing her family’s belongings and Carol Smith yelled at Stark was believing her daughter over Defendant. Stark told Carol that she loved her but that she believed her daughter and could not stay there any more.²⁵ Laura Helton recalled that Carol Smith responded by spitting in Cindy’s face. Helton called her husband to bring their pick-up truck to help Cindy Stark and her children move their belongings out of Defendant’s house. The next day, Helton accompanied Cindy and Erica Stark to the hospital.²⁶

Carol Smith, Defendant’s wife, testified that she had been taking care of Erica since 1994, when she was a baby and that they became very close.²⁷ In August 2003, Laura Helton told Smith that Erica accused Defendant of touching her.²⁸ Carol Smith testified that Erica’s story could not be true because she (Smith) suffered from agoraphobia and had panic attacks, so Defendant was in her

²²9/27/04, 26.

²³9/27/04, 152-153.

²⁴ 9/27/04, 26-33.

²⁵9/27/04, 34-42.

²⁶9/27/04, 92-99, 150-156.

²⁷9/28/04, 37-47.

²⁸ 9/28/04, 53-54.

presence "24-7," never leaving her side.²⁹ In fact, Smith testified that Cindy Stark called her immediately after Defendant preliminary examination and offered to make the case go away if Smith paid her \$20,000.³⁰

Defendant denied Erica's accusations. He testified that he never left his wife alone because of her panic attacks, so when Carol Smith in the basement, he was always with her.³¹ Defendant also testified that Erica's accusations could not be true because he had a bad back and usually sat in the chair while he watched television in the living room, not on the couch.³² Defendant testified that he was close to Erica, her sister, and baby brother and that Erica made him a Father's Day card in 2003.³³ On the other hand, Defendant testified that his relationship with Erica's mother, Cindy Stark was "tolerant" and he only put up with her because of the children. He said that Cindy Stark always "trashed" things in their house and disappeared for days at a time.³⁴ Defendant testified that the room that Cindy Stark rented was kept in an unsanitary condition, with dirty diapers and dirty items thrown about. She damaged the dressers, ruined the mattresses, and stained the carpet. Defendant testified that approximately a week before Erica's allegations, he had asked Cindy Stark to clean up her room or "she wouldn't have a room." Defendant testified that Cindy Stark was angry with him

²⁹9/28/04, 57, 61.

³⁰9/28/04, 67-68.

³¹9/28/04, 113, 146-147.

³²9/28/04, 114.

³³9/28/04, 116.

³⁴9/28/04, 117-118.

as a result.³⁵ Ralph Belanger testified that he was Defendant's neighbor and friend. He stated that Defendant's character was for truthfulness and honesty. Belanger never saw Defendant do anything wrong and had never known him to lie.³⁶

Linda Woodward testified that she was a neighbor and friend of Defendant's. She testified that during the time of May 2002 through August 2003, she often visited Defendant's house to see Carol Smith. She explained that she and Carol collected "Beanie Babies" and, since Woodward did not have a computer at home, she often went to Defendant's house to see what was available on "Ebay." Woodward described Defendant and Erica's relationship as "father-daughter."³⁷ On September 2003, Woodward was at the house when Carol Smith received a telephone call from Cindy Stark. Woodward picked up the extension and heard Stark ask for \$20,000 to make the case go away.³⁸

On September 29, 2004, Defendant's jury convicted him of three counts of first degree criminal sexual conduct.³⁹ The trial court sentenced Defendant 30 to 50 years incarceration.⁴⁰

³⁵9/28/04, 125-129.

³⁶9/28/04, 153-154.

³⁷9/28/04, 157-159.

³⁸9/28/04, 157-162.

³⁹9/29/04, 63-66.

⁴⁰10/15/04, 6-8.

ARGUMENT

I.

To establish that counsel was ineffective, defendant must show that but for counsel's error, he had a reasonable probability of acquittal. Here, Defendant's attacks on trial counsel preparation before trial failed to produce any evidence that Defendant suffered prejudice. The trial court did not abuse its discretion by denying Defendant's motion for a new trial.

Appellate Standard of Review

The People reject Defendant's statement of the standard of review. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. Where the reasons given by the trial court are inadequate or not legally recognized, the trial court will be said to have abused its discretion.⁴¹

The trial court's factual determinations in the context of this ineffective assistance of counsel claim are reviewed under the clearly erroneous standard.⁴² In general, where there are two permissible views of the evidence, the court's choice between them cannot be deemed clearly erroneous.⁴³ Therefore, the trial court's decision will not be reversed unless the reviewing court is

⁴¹*People v Leonard*, 224 Mich App 569, 580 (1997).

⁴² *Strickland, supra*, 466 US at 698.

⁴³*People v Bushard*, 444 Mich 384, 396 (1993).

left with a definite and firm conviction that a mistake has been made.⁴⁴ Finally, the appellate courts must defer to the trial court's superior ability to assess witness credibility.⁴⁵

Discussion

Defendant argued that he was entitled to a new trial due to ineffective assistance of counsel because his trial attorney failed to adequately prepare for trial and did not call crucial witnesses for his defense. On October 28, 2005, after an extensive *Ginther* hearing, Judge Timothy Kenny, who presided over both of Defendant's trials, denied Defendant's motion.⁴⁶

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*.⁴⁷ First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment.⁴⁸ To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial.⁴⁹ The defendant must overcome a strong presumption

⁴⁴ *People v Kurylczyk*, 443 Mich 289, 303 (1993); *People v McElhaney*, 215 Mich App 269, 286 (1996).

⁴⁵ MCR § 2.613(C); *People v Ahumada*, 222 Mich App 612, 617 (1997).

⁴⁶ 10/28/05, 3-14.

⁴⁷ *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298 (1994).

⁴⁸ *Strickland*, *supra* at 687.

⁴⁹ *People v Watkins*, 247 Mich App 14, 30 (2001).

that counsel's performance constituted sound trial strategy.⁵⁰ In order to make a fair assessment of an attorney's performance, judicial scrutiny must be "highly deferential," making every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."⁵¹

Second, the defendant must show that the deficient performance prejudiced the defense.⁵² That is, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.⁵³ "A reasonable probability is a probability sufficient to undermine confidence in the outcome."⁵⁴ Since the defendant bears the burden of demonstrating both deficient performance and prejudice, he must also bear the burden of establishing the factual predicate for his claim.⁵⁵

In this case, the trial court correctly denied the motion for a new trial as the defense failed to establish that erred in any way that prejudiced Defendant.

The record shows that Defendant was initially represented by attorney Steven Smith. After his first trial ended in a mistrial, Smith withdrew from the case.⁵⁶ Attorney Samuel Simon was

⁵⁰*Id.*, at 690; *People v Tommolino*, 187 Mich App 14, 17 (1991).

⁵¹ *Strickland*, 466 US at 689.

⁵² *Strickland*, 466 US at 687.

⁵³*Id.*, 466 US at 694; *People v Johnson*, 451 Mich 115, 124 (1996).

⁵⁴ *Id.*

⁵⁵*People v Hoag*, 460 Mich 1, 6 (1999).

⁵⁶3/22/04, 157.

assigned to take over the case on April 19, 2004.⁵⁷ Simon testified that he ordered the transcripts from Defendant's first trial and provided a copy to Defendant well in advance of the date scheduled for his re-trial. In preparation for the re-trial, Simon reviewed the transcripts numerous times and spent a significant period consulting with Steven Smith regarding the first trial. Simon indicated that his conversations with Steven Smith were crucial as they gave him a good perspective on the strength of the prosecutor's case as well as the value of any potential defense witnesses.⁵⁸

Simon testified that he met with Defendant and his wife at each court hearing. The Smiths told him they could not meet him at his office, so they had lengthy conversations on the telephone. Simon did not go to Defendant's house, but had photographs of the relevant rooms that he used at trial.⁵⁹ Simon testified that he consulted with Defendant and his wife about their theories of defense.⁶⁰ Simon also met with the prosecutor and viewed the victim's Kid Speak video tape, where the victim gave her account of the crime to police.⁶¹ Defendant wanted him to use the Kid Speak video in his defense to show some inconsistencies in the victim's remarks, but Simon told Defendant he strongly disagreed. Simon explained that the benefits of any minor inconsistencies were greatly outweighed by the danger of using a video of the noticeably younger victim whose statements were

⁵⁷8/26/05, 28.

⁵⁸8/26/05, 4-14; 10/6/05, 19-20.

⁵⁹8/26/05, 17-27, 41-45, 84.

⁶⁰8/26/05, 32-34, 68-79, 89-90.

⁶¹8/26/05, 10.

substantially consistent with her testimony. Based on his professional experience, Simon chose not to introduce the video.⁶²

Simon testified that he and Defendant talked about the fact that Gabriele Brown was out of the country and unavailable for the re-trial. Simon told Defendant that he did not want to use her prior testimony because the jury may speculate on her absence. According to Simon, Defendant agreed that they should present Ralph Belanger instead, deciding that he would make a better character witness. In Simon's opinion, Brown's testimony did not contain any evidence that could not be obtained through other witnesses.⁶³

Defendant testified that Simon never spoke to him on the telephone and only spent five to ten minutes talking to him after the court hearings. Defendant claimed that Simon never advised him of any plea offers. He testified that Simon said that he planned on having Gabreille Brown's read into the trial, but failed to do so because he (Simon) did not think that the defense needed the testimony. Defendant admitted that Simon provided the transcripts from the first trial, but claimed that he never reviewed his own prior testimony. Defendant denied ever talking to Simon about the "Kid Speak" video, but admitted that he wanted to use the tape in his defense.⁶⁴

Similarly, Carol Smith testified that Simon only spoke to her and Defendant briefly after the court hearings and never spoke to him on the telephone.⁶⁵ She testified that she told Simon that she

⁶²8/26/05, 45-50, 80-82.

⁶³8/26/05, 36-40, 82-88.

⁶⁴9/27/05, 19-25, 32-33, 42-47.

⁶⁵9/30/05, 3-5.

wanted him to introduce the Kid Speak video tape and he responded “what tape?”⁶⁶ Carol Smith alleged that she never inquired about the tape again.⁶⁷

The law states that decisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy and will not support the claim that counsel was ineffective even where differences of opinion arise between counsel and the defendant.⁶⁸ In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel’s failure to prepare for trial resulted in counsel's ignorance of, and hence, failure to call witnesses or present other evidence, which consequently deprived him of a substantial defense.⁶⁹ A substantial defense is one that might have made a difference in the outcome of the trial.⁷⁰

Here, Attorney Simon reviewed the transcripts from the first trial extensively and consulted with the first attorney. Because the transcripts committed all the witnesses, including those on the defense side, to their prior testimony, counsel’s preparation was sufficient to ready him for trial. None of the additional witnesses presented by Defendant at his *Ginther* hearing provided any testimony that would made a different outcome probable.⁷¹

⁶⁶9/30/05, 10-11.

⁶⁷9/30/05, 11-26.

⁶⁸*People v Campbell*, 165 Mich App 1, 7-8 (1987); *People v Cicotte*, 133 Mich App 630 (1984).

⁶⁹*Id*; *People v Hoyt*, 185 Mich App 531, 537-538 (1990); *People v Julian*, 171 Mich App 153 (1988).

⁷⁰*People v Foster*, 77 Mich App 604, 609 (1977).

⁷¹*Strickland, supra*, 466 US at 694.

The decision to forgo Gabrielle Brown's prior testimony was made not out of ignorance but rather as a result of reflection and professional judgment and, thus, cannot be the basis for a claim of ineffective assistance of counsel. In Defendant's first trial, Brown testified that she met Carol Smith over the internet four years earlier, but only met her and Defendant personally a few months before moving into their house in July 2003. Like every other witness, including the prosecution witnesses, Brown testified that Defendant and the victim had a very loving relationship and that Defendant and Cindy Stark did not have good relationship.⁷²

The trial court did not abuse its discretion by finding that, having presided over Brown's testimony in the first trial, her testimony would not have made a difference to the outcome of the case, and therefore, the choice not to use the prior testimony cannot be the basis of a claim of ineffective assistance of counsel.⁷³

Defendant's argument invited the Court to quantify how much time is enough time for an attorney to spend with each individual witness. This argument conflicts with *Strickland* which warns that the courts "should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result."⁷⁴ Judge Kenny found that trial counsel obtained and utilized the transcripts from the first trial throughout the second trial.⁷⁵

⁷² 3/22/04, 69-73.

⁷³ 10/28/05, 7-8. Aside from the cumulative nature of Brown's testimony, Judge Kenny also remarked that Brown's relationship with the Smiths "very, very strange," a factor he considered in ruling that the choice not to have Brown's testimony read into the second trial as a sound tactical decision. 10/28/05, 13.

⁷⁴ *Strickland, supra*, 466 US at 697.

⁷⁵ 10/28/05, 9.

Further, Judge Kenny found that it was especially important to note that trial counsel “talked extensively” with the attorney who represented Defendant in the first trial. The judge stated that the first attorney “did an outstanding job” in the first trial and found that Mr. Simon’s “trial strategy and tactics in this particular case tracked with the exception of calling Gabriele Brown, it tracked almost verbatim the strategy of Mr. Smith [the first attorney].” So, although the court found that conducting all the meeting with the witnesses in the hall of the courthouse was “deficient,” since “the witnesses testified to exactly what they intended to testify to,” there was no harm to Defendant’s case since there was no “reasonable probability of an acquittal if the deficiencies had been corrected.”⁷⁶

Because Defendant’s argument is conspicuously devoid of any showing of prejudice, the trial court correctly denied his claim for relief and his claim on appeal must fail.

⁷⁶10/28/05, 9, 11-14.

II.

The trial court may depart from the guidelines based on factors already considered in determining the sentence range if it finds they have been given inadequate weight. Here, the trial court found that the guidelines gave inadequate weight to the nature of Defendant's exploitation of his 10 year old victim whom he forced to endure repeated molestation by threatening to make her family homeless. The trial court did not abuse its discretion by exceeding the sentencing guidelines.

Appellate Standard of Review

The People accept Defendant's statement of the standard of review. Existence or nonexistence of a particular factor, in the context of imposing sentence that departs from sentencing guidelines, is a factual determination for the sentencing court and should therefore be reviewed by an appellate court for clear error.⁷⁷ The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.⁷⁸

Discussion

The trial court may depart from the appropriate sentence range established under the sentencing guidelines if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.⁷⁹ In order to constitute substantial and compelling

⁷⁷*People v Babcock*, 244 Mich App 64, 75-76 (2000).

⁷⁸*Id.*, 244 Mich App at 77-78.

⁷⁹MCL § 769.34.

reasons for departure under applicable statute, the factors relied on by the trial court in imposing sentence that departs from sentencing guidelines must be objective and verifiable.⁸⁰

Once the appellate court determines that substantial and compelling reasons exists, the statute gives no authorization for further review of the overall sentence under the *Milbourn* principle of proportionality. Therefore, if the reviewing court concludes that a substantial and compelling reason exists, “the defendant's sentence must be affirmed as long as the sentence otherwise comports with the statute and other requirements of law.”⁸¹

The trial court may base its departure on offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range if 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.⁸²

In this case, Defendant’s guidelines were 108 months to 180 years. Judge Timothy Kenny found that the circumstances in this case justified an upward departure from the sentencing guidelines, describing it as the “absolute worst type of exploitation.” The Judge explained that the victim, who came from a “dysfunctional family” and was “starved for a positive adult male role model” was placed “in a position of trust and care with the defendant and his wife.” Yet, Defendant abused this opportunity and for a “period of about 15 months [the victim became] a sex toy for the

⁸⁰*Id.*, 244 Mich App at 75-76.

⁸¹*Id.*, 244 Mich App at 77-78.

⁸²MCL § 769.34.

defendant. To what extent she will be damaged in the future, who knows? One certainly hopes that she will be able to do well.”⁸³

Further, the court found, Defendant added to the trauma of the case by forcing the complainant “to go through a rather, for her, for a 10 year old, the kind of frightening gynecological type of examination.”⁸⁴ Judge Kenny concluded that “[t]hese are characteristics that I think don’t adequately get covered in the guidelines. ...I mean its’s unimaginable to me t o think that a 10 year old who may be fearful of the fact that she may lose the roof over her head for herself, her mother and her two siblings, is forced to silently endure this kind of sexual exploitation.” The court held that these were objective and verifiable factors that the “guidelines didn’t calculate that, but I am.” Accordingly, the trial court sentenced Defendant to a term of 30 to 50 years.⁸⁵

Since the evidence presented at trial supported Judge Kenny’s conclusion that this level of exploitation was given inadequately weight by the sentencing guidelines, he did not abuse his discretion by ordering Defendant to serve thirty to fifty years in prison.

⁸³10/15/04, 6-7.

⁸⁴10/15/04, 7.

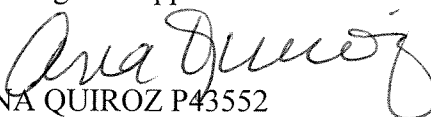
⁸⁵10/15/04, 7-8.

RELIEF

WHEREFORE, the People request that this Court deny Defendant application for leave to appeal.

Respectfully submitted,
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