STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v EDWARD JOHNIGAN, Defendant-Appellant.	FOR PUBLICATION March 22, 2005 9:00 a.m. Nos. 250909; 251408 Wayne Circuit Court LC Nos. 03-004489-01; 03-004486 Official Reported Version

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

SAWYER, J.

In Docket No. 251408, defendant was convicted, following a jury trial, of first-degree, premeditated murder, MCL 750.316(1)(a); felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b, arising out of the murder of Larry Rogers. Defendant was sentenced to life imprisonment for the first-degree murder conviction, thirty-eight to sixty months' imprisonment for the felon in possession of a firearm conviction, and five years' imprisonment for the felony-firearm conviction. In Docket No. 250909, defendant was convicted, following another jury trial, of felon in possession of a firearm. In that case, defendant was charged with killing Michael Moore, but the jury found defendant not guilty of murder and felony-firearm. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to life imprisonment. We affirm defendant's convictions, but remand for resentencing in Docket No. 250909.

Defendant first argues that the trial court abused its discretion in admitting evidence regarding the murder of Ian French and evidence of unrelated weapons found in defendant's house. We disagree. We review for a clear abuse of discretion a trial court's decision to admit evidence pursuant to MRE 404(b).[1]

Use of other acts as evidence of character is generally excluded to avoid the danger of conviction based on a defendant's history of misconduct.[2] A proper purpose for admission is one

[1] *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

[2] *Id.* at 495.

that seeks to accomplish something other than the establishment of a defendant's character and his propensity to commit the offense.[3] In this case, the prosecutor could have relied on several legitimate purposes, "motive" chief among them, for introducing evidence that defendant acted in his role as a hired killer.[4] In this case, however, the trial court found a compelling justification in the prosecutor's inability to counter defendant's representation of the informant as a false witness, and we agree. In *Starr*,[5] our Supreme Court recognized that a prosecutor may introduce evidence of other acts for the proper purpose of demonstrating a lack of mistake (or fabrication) in a witness's accusations. In that case, a defendant's adopted daughter alleged sexual abuse against her father only after his stepdaughter accused him of similar conduct.[6]

In this case, the informant testified that defendant told him that he was stockpiling weapons to use in his new vocation as a "hit man." Defendant also hinted or outright revealed to the informant beforehand his intention to commit the three murders and verified them after they were accomplished. As in *Starr*, the evidence introduced in this case confirmed that the prosecution's key witness did not merely invent the circumstances of the criminal activity.[7] The evidence demonstrated that defendant often accurately bragged of his criminal exploits to the informant, perhaps to recruit him for other murders or merely for personal aggrandizement. As in *Starr*, the exclusion of this evidence would have left an inexplicable gap in the sequence of events that reasonably led the police and prosecutor to give credence to the witness's incrimination of defendant.[8] This gap would have left the witness vulnerable to disprovable allegations of fabrication.[9] Because this case so closely mirrors *Starr*, we find no abuse of discretion in the trial court's decision to admit the "other acts" evidence.

Defendant next argues that the prosecutor improperly vouched for the credibility of the informant and improperly emphasized defendant's character. We disagree. Defendant failed to preserve this claim of error in Docket No. 251408, and, because a curative instruction could have displaced any prejudicial effect, we do not find any error requiring reversal.[10] In Docket No. 250909, defendant's brief on appeal does not include any specific citation to prosecutorial misconduct in the record. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority."[11] Moreover, defendant's argument amounts to a claim that the prosecutor reiterated improper "other acts" evidence in closing

---

[3] *Id*. at 496.

[4] MRE 404(b).

[5] *Starr, supra* at 500-501.

[6] *Id*. at 501-502.

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

[11] *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

arguments. Because the admission of this evidence was not error, the prosecutor's arguments on the evidence do not require reversal.

Defendant also argues that the trial court erred in sentencing defendant to life imprisonment for the felon in possession of a firearm conviction in Docket No. 250909. We agree and remand for resentencing.

The sentencing guidelines in this case recommended a minimum sentence in the range of twenty-four to seventy-six months. Nonetheless, the sentencing judge sentenced defendant to life in prison. At no time did the sentencing judge indicate that he understood that his sentences departed from the sentencing guidelines, nor did he specifically indicate what facts justified a departure. Specifically, the judge explained the sentence imposed as follows:

> Okay. What I'm looking at here is the, let's see, all right, on this particular case, No. 03-4489, I think that we're all, we're kind of maybe surprised in some ways at the verdict in this particular case, at least in terms of the fact that they found not guilty on the other one but also found guilty on the possession of a firearm by a felon, and maybe that information as indicated is that they were focused on the circumstances of the arrest and weapons that were found at that time. The whole history of Mr. Johnigan, you know, looking at his entire record going back to the 1986 robbery armed there in 1990 had robbery armed and the felony firearms that occurred, you know, there and then he was put in prison and even while in prison he had a conviction of possession of some kind of improper illegal weapon, and having served a term from 1990 to 2002 and then being parolled (sic, paroled) and then being almost immediately involved with the cases that are here, I think what we have here obviously is a person who has decided to be involved with crime whenever there is the opportunity to do so, and to me almost beyond, you know, rehabilitation. The charge does allow, even though it was a firearm in possession by a felon for normally would carry five years, but as an habitual he can get up to life on that and I'm going to impose that particular sentence on that particular case, 03-4489, as a habitual 4th and put him on life sentence for that.

A trial court is required to choose a minimum sentence within the guidelines unless there is a substantial and compelling reason to depart from the guidelines range.[12] The sentencing court must articulate on the record a substantial and compelling reason for its particular departure and explain why that reason justifies that particular departure.[13] In reviewing the sentencing court's decision, this Court may not affirm a sentence on the basis that a substantial and compelling reason exists that was not articulated by the trial court.[14] We may uphold a sentence that departs from the guidelines where some of the reasons given are substantial and compelling

[12] *People v Babcock (Appendix)*, 469 Mich 247, 272; 666 NW2d 231 (2003).

[13] *Id.*

[14] *Id.* at 273.

while others are not, provided that we are able to determine that the trial court would have departed to the same extent on the basis of the permissible factors alone.[15] Ultimately, we review for an abuse of discretion the trial court's determination that the objective and verifiable factors constitute a substantial and compelling reason for departure.[16]

We do not necessarily disagree that the circumstances of this case present objective and verifiable factors that establish substantial and compelling reasons to depart from the sentencing guidelines and impose a life sentence. But, as *Babcock* makes clear, we cannot affirm a sentence merely because we find there to be a substantial and compelling reason to depart from the guidelines. Rather, it is necessary that the trial court does so. Not only must the trial court articulate the reason for the departure, but it must also "explain why this reason justifies *that* departure."[17] In the case at bar, the sentencing judge does not acknowledge that he is departing from the sentencing guidelines, much less explain why the reasons he cites justify the particular departure made. That is, while the court explains the reasons for the sentence imposed, it does not explain why it believes that the guidelines range is inadequate under the circumstances of this case.

Furthermore, it is difficult to conclude that the trial court did not abuse its discretion when there is no indication that the trial court understood the nature and extent of its discretion. Or, to put it another way, without knowing that the trial court understood that it was departing from the guidelines, we cannot say with any degree of certainty that, if the trial court did understand that it was departing from the guidelines by imposing a life sentence, that it "would have departed, and would have departed to the same degree . . . ."[18]

Turning to the opinion of our dissenting colleague, there are a number of points with which I take issue. First, our colleague suggests that the sentencing is rendered moot by this Court's recent decision in *People v Mack*.[19] I begin my analysis of *Mack* by noting that its interpretation of MCL 777.21(2) is erroneous. The critical error in *Mack* is that it overlooks the language of MCL 777.21(2), which provides as follows: "If the defendant was convicted of multiple offenses, subject to section 14 of chapter IX, score each offense as provided in this part." Section 14 of chapter IX is MCL 769.14, which is inapplicable here (or in *Mack*). *Mack* does correctly note that MCL 771.14 only requires the presentence investigation report to include guidelines scoring for the highest crime class. But that does not change the fact that MCL 777.21(2) directs that all crimes be scored, except as provided by MCL 769.14.

Admittedly there is a certain lack of logic to the Legislature only requiring the presentence investigation report to include the scoring for the highest offense but requiring the

---

[15] *Id.*

[16] *Id.* at 274.

[17] *Id.* at 272.

[18] *Id.* at 273.

[19] 265 Mich App 122; ____ NW2d ____ (2005).

trial court to score all offenses. Perhaps the Legislature intended to reference § 14 of chapter XI (MCL 771.14) in MCL 777.21(2), which would produce the result reached in Mack. But the Supreme Court has made it clear that it is our responsibility in interpreting statutes to determine what the Legislature said, not what it intended to say. Where the language of a statute is unambiguous, we presume that the Legislature intended the meaning clearly expressed and we are not permitted to engage in further construction of the statute.[20] Departure from a literal construction of the statute is only permitted if such a construction would produce an absurd and unjust result, which would "be clearly inconsistent with the purposes and policies of the act in question."[21] Furthermore, the "absurd result" rule cannot be used to defeat a statute's clear meaning.[22]

In the case at bar, while the language used by the Legislature in MCL 777.21(2) may produce an illogical and even unintended result, the language is not ambiguous and therefore this Court is not permitted to construe it in any manner other than as written. Accordingly, the result that the *Mack* Court should have reached is that, under the clear language of MCL 777.21(2) as written, a sentencing court must score the sentencing guidelines for all offenses that fall within the scope of the guidelines. We note that this does not produce an irresolvable conflict with MCL 771.14(2)(e)(ii), which requires the probation department only to prepare a presentence investigation report with a sentencing guidelines range recommendation for only the highest crime class among multiple crimes carrying concurrent sentences. The effect of the two statutes as written is that, while the probation department need only score the guidelines for the highest crime, the sentencing court must score the guidelines for the remaining crimes as well. It is not for this Court to speculate whether that is the result intended by the Legislature or to attempt to rewrite the statues involved if it is not.

Ultimately, however, we need not create a conflict with the *Mack* decision because we do not believe that it controls here. Under MCL 771.14(2)(e)(ii), the guidelines are scored for "each crime having the highest crime class." The only one of defendant's convictions that is assigned to a crime class is the felon in possession conviction, which is a Class E felony.[23] Neither first-degree murder nor felony-firearm is covered by the sentencing guidelines, presumably because both carry mandatory and determinate sentences. Therefore, the "highest class" felony in the case at bar was the felon in possession and, therefore, even under *Mack*, the sentencing court was obligated to score the guidelines for that conviction.

---

[20] *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

[21] *Id.* at 403-404, citing *Salas v Clements*, 399 Mich 103, 109; 247 NW2d 889 (1976).

[22] *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 143; 662 NW2d 758 (2003); see also *People v McIntire*, 461 Mich 147, 157; 599 NW2d 102 (1999), wherein the Supreme Court chastised the Court of Appeals for invoking the "absurd result" rule merely to avoid an "illogical result."

[23] MCL 777.16m.

Turning to the other points raised by the dissent, the dissent first indicates that we have conceded that the sentence was proportionate to the crime.[24] We have made no such concession; rather, we merely make the point that, while a departure may well be justified, we cannot make any determination on the appropriateness of the sentence until the sentencing judge in the first instance properly imposes sentence. If the sentencing judge imposes a sentence that exceeds the guidelines and articulates the reason for the departure, then, and only then, can we make the determination that the sentencing judge imposed a proper sentence (i.e., that the departure was justified). In short, an observation that a departure is not obviously inappropriate is not, as the dissent suggests, equivalent to a determination that the sentence imposed, which departs from guidelines and for which the trial court did not articulate a basis for departure or even acknowledge that it was a departure, is proportionate to the crime.

Next, the dissent observes that a defendant convicted of being a felon in possession as a fourth-offense habitual offender may be sentenced to life in prison. MCL 769.12 in fact authorizes a life sentence for any fourth-offense habitual offender if the underlying offense is a five-year felony or greater. But that says nothing about whether imposing a life sentence in a particular case represents a departure from the sentencing guidelines and, therefore, the trial court is subject to the requirements and limitations imposed by statute regarding such departures. Indeed, the felon-in-possession statute would legally authorize the imposition of a sentence of three to five years for a defendant who was convicted without a habitual offender enhancement. But that is not to say that the sentencing guidelines in a particular case might only recommend a minimum sentence of less than three years. In which case, although the sentencing judge could legally impose a sentence of three to five years, it would represent a departure from the sentencing guidelines and, therefore, the sentencing judge would have to comply with the requirements for a departure. The same principle applies here: a life sentence may be lawfully imposed, but to do so the trial court was obligated to follow the departure rules because the sentencing guidelines did not recommend a sentence of life in prison.

The dissent next turns to *People v Houston*,[25] which held that a life sentence is a departure if not recommended under the guidelines. Our dissenting colleague indicates that he disagrees with *Houston* and would not follow it if it were not binding precedent.[26] I also disagree with *Houston*, but not for the basic proposition that a sentence of life in prison represents a departure from the sentencing guidelines if not authorized by the guidelines. Rather, I disagree with *Houston*'s conclusion that the guidelines authorize a sentence of life in prison for a habitual offender whenever the upper end of the minimum sentence guideline is more than three hundred months as calculated under MCL 777.21(3).[27]

---

[24] *Post* at ___.

[25] 261 Mich App 463; 683 NW2d 192 (2004).

[26] Which raises the question why our colleague is dissenting rather than concurring if he acknowledges that there is a binding case that compels the result reached in the case at bar.

[27] *Houston, supra* at 474-475.

As *Houston* correctly noted, the Legislature did not produce separate grids for the habitual offender enhancements.[28] Rather, MCL 777.21(3) directs that, when determining the sentencing recommendation for a defendant being sentenced as a habitual offender, the minimum sentence range for an unenhanced sentence is determined and then the upper limit of that range is increased by twenty-five percent, fifty percent or one hundred percent, depending on whether the defendant is a second-, third-, or fourth-offense habitual offender. As a result, the guidelines for a habitual offender will never provide a recommendation of a life sentence for a habitual offender unless the recommendation for a nonhabitual offender also provides a recommendation of a life sentence.

The Court in *Houston* then determined that under the basic sentencing grid for second-degree murder, in the twelve cells (out of a total of eighteen) in which the upper range of the recommendation is three hundred months or more there is also provided the alternative of life.[29] *Houston* also observed that in only one instance where the upper end of the range is less than three hundred months do the guidelines recommend life. *Houston* then concluded that, in light of this "clear guidance" by the Legislature, a life sentence for a defendant sentenced as a habitual offender is within the guidelines whenever the upper limit of the range, as calculated under MCL 777.21(3), is three hundred months or greater.[30]

There is no justification for the *Houston* Court's interpretation of the statute. The legislative scheme for establishing sentencing guidelines recommendations for habitual offenders in MCL 777.21(3) is clear and unambiguous. Accordingly, further construction is neither required nor permitted.[31] I do not disagree with the proposition that the Legislature has not adequately dealt with the issue of life sentences for habitual offenders under the sentencing guidelines. A strong argument can certainly be made that the sentencing guidelines ought to provide for the alternative of a life sentence for a habitual offender in circumstances where the recommendation for a nonhabitual offender with the same scoring under the guidelines does not provide for the alternative of life in prison. The scheme offered by *Houston* certainly would be a reasonable and workable way to address this issue. It would make sense to me for the Legislature to provide in MCL 777.21(3) that whenever the recalculated upper limit for a habitual offender meets or exceeds three hundred months, life would become an available alternative under the guidelines. But the Legislature has not so provided in the statute and it is improper for this Court to rewrite the statute to add such a provision.

For the above reason, I, like our dissenting colleague, disagree with *Houston*. But, because we reach the same result in the case at bar as would be reached under the holding in *Houston*, there is no basis for us to request the convening of a conflict panel.[32]

---

[28] *Id.* at 474.

[29] *Id.* at 475.

[30] *Id.* at 475.

[31] *DiBenedetto, supra* at 402.

[32] MCR 7.215(J).

The dissent next argues that the guidelines do not apply to life sentences at all because a life sentence is a determinate sentence without a minimum to be imposed. This overlooks the fact that the Legislature has specifically provided for the alternative of a life sentence in sixteen cells of the various guidelines grids.[33] If the Legislature shared the dissent's view that life sentences, because they are determinate in nature, are simply outside the scope of the guidelines, there would have been no reason to include the words "or life" in those sixteen cells. Statutes are to be interpreted in a manner that gives meaning to each word, phrase, and clause used.[34] The dissent's argument simply renders meaningless the phrase "or life" as used by the Legislature sixteen times.

The dissent attempts to dismiss this inconvenient fact by stating that the fact the guidelines do specifically provide for life sentences in a number of instances "falls far short of a legislative directive that rescinds the particularized statutory grant of discretion to impose a life sentence against our most dangerous repeat offenders."[35] The dissent's argument overlooks the most basic truth of the sentencing guidelines scheme: the authority and discretion of a sentencing judge to impose a maximum sentence—or any other sentence—authorized by statute is not rescinded by the sentencing guidelines. Rather, the sentencing guidelines merely provide guidance to the sentencing judge and impose an obligation on the sentencing judge to justify a sentence that departs from that guidance.[36]

We agree with the dissent that defendant is a hardened contract killer who has planned and engaged in a series of deadly criminal enterprises. He is deserving of enhanced criminal penalties and, in fact, will spend the rest of his life in prison on the basis of his murder convictions. But when the dissent states that "the trial court placed on the record substantial and compelling reasons justifying the departure"[37] and, therefore, our colleague would affirm the sentence, he overlooks the fact noted above: we cannot affirm a sentence merely because we can identify substantial and compelling reasons that justify a departure. Rather, as a court of review, we review the reasons the trial court identifies as substantial and compelling reasons for a departure. Here, while the reasons the trial court stated for the sentence imposed may well constitute substantial and compelling reasons for a departure, the trial court did not identify them as such because the trial court did not recognize that it was imposing a sentence that represented a departure from the sentencing guidelines.

Accordingly, we must remand the matter to the trial court for resentencing on this charge. On remand, the trial court may either impose a sentence within the guidelines recommendation or impose a sentence that departs, including reimposing the original life sentence. But if the trial

---

[33] MCL 777.61 and MCL 777.62.

[34] *People v Stone*, 463 Mich 558, 565; 621 NW2d 702 (2001).

[35] *Post* at ___.

[36] MCL 769.34(3).

[37] *Post* at ___.

court imposes a sentence that departs from the guidelines, it shall comply with the requirement of articulating the reasons that justify the departure.

Affirmed in part and remanded for resentencing in part. We do not retain jurisdiction.

/s/ David H. Sawyer