

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK JERMAINE CALBERT,

Defendant-Appellant.

UNPUBLISHED

March 19, 1999

No. 209416

Saginaw Circuit Court

LC No. 94-008765 FC

Before: Jansen, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his resentencing for a conviction of unarmed robbery, MCL 750.530; MSA 28.798, following the successful appeal of his felony murder conviction.¹ Defendant was resentenced to ten to fifteen years in prison. We affirm.

Defendant first argues that his sentence, which reflected an upward departure from the sentencing guidelines of two to five years, was disproportionate and that the trial court utilized inappropriate factors in deviating upward. A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990). An upward departure from the guidelines is warranted when the recommended guidelines range is disproportionate to the seriousness of the crime. *Id.*, at 657. Therefore, an upward departure may be based on factors that are accounted for in the guidelines but are not weighed sufficiently, *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995), or on factors that are not embodied in the guidelines under the facts of any particular case, *People v Marshall*, 204 Mich App 584, 590; 517 NW2d 554 (1994). When making an upward departure, the sentencing court must articulate the specific reasons for not following the guidelines recommendations. *People v Gilbert*, 183 Mich App 741, 751; 455 NW2d 731 (1990).

Defendant claims that the trial court erred in considering defendant's admission regarding the shooting of his cousin, which was made during the presentence investigation interview, claiming that the report was not accurate. Defendant did not object to the inclusion of this statement in the presentence report at either the time of his original sentencing or at resentencing. MCR 6.429(C) provides that a

defendant may not raise on appeal an issue challenging the accuracy of the presentence report unless the party has raised the issue at sentencing. Therefore, this issue is waived for appellate review.

Defendant also claims that the trial court erred in considering the factor of premeditation of the robbery. This was based on the jury's finding that defendant was guilty of unarmed robbery. Based on this finding, the trial court reasoned that the jury rejected defendant's contention that he had no knowledge of the plan to rob the store. Because the trial court could consider facts underlying an acquittal, *People v Harris*, 190 Mich App 652, 665; 476 NW2d 767 (1991), the trial court could certainly consider the facts underlying a conviction.

Defendant also challenges the trial court's reliance on defendant's incarceration record as a basis for departure. Defendant did not dispute that he had twenty-four major misconduct tickets, including one for an assault and battery on a fellow inmate. The trial court's consideration of these misconducts was proper in determining whether to depart from the guidelines because the guidelines do not account for misconduct in custody. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995).

Finally, defendant argues that the trial court contravened this Court's vacation of his conviction of felony murder when it took the death of the store clerk into account at resentencing. Although a trial court may not make an independent finding of guilt and then sentence a defendant based on that finding, *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663 (1996), a trial court may consider the evidence admitted at trial as an aggravating factor in determining the appropriate sentence, *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995). Here, the trial court considered the death of the victim in sentencing defendant, but, the trial court made no finding that defendant was criminally responsible for the death. Instead, the trial court simply noted that this was a circumstance of the unarmed robbery for which the defendant was properly convicted. *People v Newcomb*, 190 Mich App 424, 428; 476 NW2d 749 (1991). The information was properly used in creating a proportionate sentence. Moreover, the factors considered by the trial court as a basis for departure were proper. Further, the sentence was not disproportionate in light of the serious consequences of defendant's actions, namely, the death of the convenience store clerk during the robbery.

Affirmed.

/s/ Kathleen Jansen

/s/ David H. Sawyer

/s/ Stephen J. Markman

¹ Following his first jury trial, a mistrial was declared because of a hung jury. After his second jury trial, defendant was convicted of felony murder under an aiding and abetting theory. This Court subsequently vacated defendant's conviction of felony murder, finding that there was insufficient evidence of defendant's intent, and remanded for resentencing for unarmed robbery. *People v Calbert*, unpublished opinion per curiam of the Court of Appeals, issued April 18, 1997 (Docket No. 179739).