

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY JUNIOR NELSON,

Defendant-Appellant.

UNPUBLISHED

January 15, 2002

No. 224297

Crawford Circuit Court

LC No. 99-001747-FC

Before: O’Connell, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (oral-penile penetration of a girl under thirteen years of age). The trial court sentenced defendant to nine to seventeen years’ imprisonment. Defendant appeals as of right. We affirm defendant’s conviction, but remand for resentencing.

Defendant first argues that there was insufficient evidence to support his conviction. We disagree. We review this issue de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We “view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

In this case, the six-year-old complainant testified that defendant placed his penis in her mouth and told her to “be quiet and don’t tell anyone.” That testimony was uncontradicted and unequivocal. Defendant presented testimony from his fiancée that he was not in the victim’s bedroom long enough to do what was alleged, but the victim testified that when she came out of her bedroom following the assault, defendant’s fiancée was asleep on the couch in the living room. We are satisfied the jury could have rationally decided to credit the victim’s testimony and discredit the fiancée’s. Therefore, defendant’s conviction is affirmed.

Next, defendant argues that the trial court abused its discretion in sentencing him because his sentence is disproportionate and there was no valid basis for departing from the sentencing guidelines. We remand for resentencing. The legislative sentencing guidelines apply because defendant’s crime was committed after January 1, 1999. MCL 769.34(2).

The legislative sentencing guidelines, MCL 769.34 *et seq.*, do not authorize us to review the proportionality of defendant's sentence. *People v Babcock*, 244 Mich App 64, 78; 624 NW2d 479 (2000). If a defendant's sentence falls within the appropriate guidelines range, we may not examine it at all "absent scoring errors or reliance on inaccurate information." *Babcock, supra* at 73. If, as in this case, defendant's sentence is a departure from the sentence in the guidelines, we follow a two-step process:

First, we determine whether, as a matter of law, the trial court's stated factors for departure were objective and verifiable. *Babcock, supra* at 78; see also *People v Daniel*, 462 Mich 1, 6, 11; 609 NW2d 557 (2000). "Objective and verifiable" is defined as "'actions or occurrences which are external to the minds of the judge, defendant and others involved in making the decision . . . [that are] capable of being confirmed.'" *People v Fields*, 448 Mich 58, 66; 528 NW2d 176 (1995),¹ quoting *People v Krause*, 185 Mich App 353, 358; 460 NW2d 900 (1990). The determination that a particular factor exists is "a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error." *Fields, supra* at 77. The determination that a factor found to exist is objective and verifiable "should be reviewed by the appellate courts as a matter of law." *Id.* at 78.

Second, we must determine whether the trial court abused its discretion in concluding the objective and verifiable factor constituted a substantial and compelling reason to depart. *Babcock, supra* at 78. Substantial and compelling reasons "should 'keenly' or 'irresistibly' grab our attention," *Fields, supra* at 67, and "it is reasonable to conclude that the Legislature intended 'substantial and compelling reasons' to exist only in exceptional cases." *Id.* at 68. See also *Babcock, supra* at 75; *Daniel, supra* at 10. In general, a court abuses its discretion

when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. Stated somewhat differently, an abuse of discretion also exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. [*People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996) (citations omitted).]

In this case, the trial court stated four reasons for departing from the forty-two-to-seventy-month sentence determined by the guidelines: (1) "This man used a position of authority to rape his adolescent niece [sic]"; (2) "[The victim] reports sexual contact from him which was not reported and which he did not deny at sentencing"; (3) "The guidelines range is too low for a 1st degree CSC"; and (4) "The victim is entitled to the peace of mind of knowing 'Uncle Ricky' will be away for the balance of her adolescence."

The first of these four factors cannot be a factor in departing from the guidelines in part because it is included in the guidelines. MCL 777.40, titled "Exploitation of vulnerable victim," provides for the addition of ten points to offense variable (OV) 10 if "the offender exploited a

¹ Although the *Fields* Court was interpreting the requirements for departures from the judicial guidelines, the *Babcock* Court applied its "objective and verifiable" requirement, and by implication, its definition of that requirement, to interpretation of the legislative guidelines.

victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). " 'Abuse of authority status' means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher." MCL 777.40(3)(d). The presentence investigation report (PSIR) added ten points to OV 10 in calculating defendant's sentence. A factor included in the guidelines cannot be used as a factor to depart from them "unless the court finds, from the facts contained in the court record, including the [PSIR], that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). Judge Davis did not note that he considered this factor to have been given inadequate or disproportionate weight. Therefore, it cannot be a substantial and compelling reason for departure.

Factor two—that the victim reported prior sexual contact with defendant and that he did not deny this contact at sentencing—is both objective and verifiable, and therefore the court could have considered it a substantial and compelling reason for departure. This prior contact is reported in two places in the PSIR, and the transcript of the sentencing hearing confirms that defendant did not deny it when he addressed the court.

Factor three—that the guidelines' range for CSC I is too low—is subjective and therefore cannot satisfy the *Daniel-Fields* requirement that departure factors be objective. *Fields, supra* at 66 ("objective and verifiable factors [are] ' . . . external to the mind[] of the judge' "); *Babcock, supra* at 92 (Hood, J., concurring) ("the trial court's personal disagreement with the guidelines is not a substantial and compelling reason for deviation from the guidelines.").

Factor four—that the victim is entitled to peace of mind during her adolescence—is also subjective and therefore inappropriate as a departure factor. At the sentencing hearing, the judge noted that

[t]he long-term ramifications of this type of activity for the victim are extreme. It is not specific to a particular case, but a pretty general and well-understood phenomenon that victims of these types of offenses have a great deal of difficulty going forward. There is some evidence in this record that that is the case with this young lady.

The only "evidence in this record" supporting the judge's conclusion is a note in the PSIR by the victim's grandmother that "[the victim] might need counseling [sic]." Such a tentative statement, especially when viewed beside other, stronger statements by the same person (*e.g.*, "prison is a real good place for [defendant]"), does not rise to the level of an objective and verifiable factor.

Even if there were sufficient evidence in the record, however, the judge might still be unable to use the victim's putative future peace of mind as a departure factor because protection of the public is a factor incorporated in the legislative guidelines. The first of the Legislature's mandates to the sentencing commission regarding its duty to modify the existing sentencing guidelines was to "[p]rovide for protection of the public." MCL 769.33(1)(e)(i). Therefore, if protection of the victim were to be used as a factor in departing from the guidelines *and* there was sufficient evidence in the record to make such a factor objective and verifiable, the court would have to "find[], from the facts contained in the court record, including the [PSIR], that the characteristic has been given inadequate or disproportionate weight" in the guidelines. MCL 769.34(3)(b).

Because three of the four factors the trial court considered in deciding to deviate from the sentencing guidelines were subjective, it is impossible to determine to what extent that deviation was based on substantial and compelling reasons, and therefore also impossible to determine whether the trial court's departure constitutes an abuse of discretion. When our Supreme Court confronted similar situations in *Daniels* and *Fields*, it vacated the defendants' sentences and remanded to the trial court for resentencing. *Daniels, supra* at 8; *Fields, supra* at 62. Accordingly, we vacate defendant's sentence and remand for resentencing, with the instruction that any departure from the sentencing guidelines be based only on objective and verifiable factors that the trial court determines are substantial and compelling reasons for departure. We do not retain jurisdiction.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Michael R. Smolenski