

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL TOLAND,

Defendant-Appellant.

UNPUBLISHED
February 26, 2002

No. 227354
Wayne Circuit Court
LC No. 99-008697

Before: Smolenski, P.J., and Doctoroff and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of twenty to forty years in prison for his convictions of criminal sexual conduct in the second degree (CSC II), MCL 750.520c, and habitual offender, fourth or subsequent offense, MCL 769.12, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was originally charged with one count of criminal sexual conduct in the first degree (CSC I), MCL 750.520b, and two counts of CSC II. Complainant, defendant's fifteen-year-old mentally impaired niece, testified that defendant penetrated her vagina with his fingers, touched her vagina, and kissed her breasts. The jury acquitted defendant of CSC I, but convicted him of two counts of CSC II.

The applicable statutory sentencing guidelines recommended a minimum term range of nineteen to thirty-eight months for the convictions of CSC II. The range increased to nineteen to seventy-six months under the habitual offender grid. MCL 777.21(3)(c). The trial court sentenced defendant to twenty to forty years in prison, with credit for 229 days. The trial court stated that it exceeded the guidelines because they did not adequately account for the circumstances of the offense.

In most instances a trial court must impose a sentence within the calculated guidelines range. MCL 769.34(2). A trial court may depart from the guidelines if it finds that a substantial and compelling reason exists to do so. To constitute a substantial and compelling reason for departing from the guidelines, the reason must be objective and verifiable, and must irresistibly hold the attention of the court. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). We review the trial court's determination of the existence of a substantial and compelling reason for departure for clear error. The determination that the reason is objective and verifiable is reviewed as a matter of law. The determination that the reason constituted a substantial and

compelling reason to depart from the guidelines is reviewed for an abuse of discretion. *Id.*, 75-76. Once we determine that a trial court's stated reason for departing from the guidelines is objective and verifiable, we must limit our review of a sentence to whether the trial court abused its discretion in concluding that the factor constituted a substantial and compelling reason for the departure. If we conclude that a substantial and compelling reason existed for departing from the guidelines, we must affirm the resulting sentence as long as it otherwise comports with the sentencing guidelines and other requirements of the law. The statutory sentencing guidelines do not authorize a further review of the sentence pursuant to the principle of proportionality set out in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *Babcock, supra*, 77-78. The court may depart from the guidelines for nondiscriminatory reasons where legitimate factors either were not considered by the guidelines, or were considered but were given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

Defendant argues that the trial court abused its discretion by departing from the sentencing guidelines. We disagree and affirm defendant's sentence. The guidelines take into account the mental disability of a victim in Offense Variable 10, MCL 777.40, exploitation of a vulnerable victim. The undisputed, verifiable evidence showed that defendant assaulted complainant, his mentally impaired niece, in her own home. Complainant's mental status was such that she effectively believed that she was at fault for defendant's actions. Defendant's contention that his relationship to complainant did not warrant the trial court exceeding the guidelines because the statute under which he was convicted, MCL 750.520c(1)(b)(ii), accounted for the relationship, is without merit. Defendant's assertion that he could not have been convicted of any crime had the relationship not existed is erroneous. A defendant need not be related to the victim in order to be convicted of CSC II. The trial court did not err in finding that complainant's vulnerability, based on both her mental disability and her relationship to defendant, was given inadequate weight by the guidelines. *Armstrong, supra*. The trial court did not abuse its discretion by finding that substantial and compelling reasons existed for departing upward from the guidelines. The sentence otherwise comports with the guidelines and other requirements of the law; no further review is authorized. *Babcock, supra*, 77-78.

Defendant's assertion that trial counsel rendered ineffective assistance by failing to object to the sentence is without merit. Defendant has not demonstrated a reasonable probability that had counsel raised an objection, a different sentence would have been imposed. No prejudice occurred. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Affirmed.

/s/ Michael R. Smolenski
/s/ Martin M. Doctoroff
/s/ Donald S. Owens