

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARY RANGE,

Defendant-Appellant.

UNPUBLISHED

March 29, 2002

No. 229330

Wayne Circuit Court

LC No. 00-001153

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right her sentence of 7½ to 20 years' imprisonment for armed robbery, MCL 750.529. We remand for resentencing.

Defendant argues on appeal that the sentencing court failed to articulate a substantial and compelling reason for departing from the sentencing guidelines as required by MCL 769.34(3). We review for an abuse of discretion whether the factors in this case constituted substantial and compelling reasons to depart from the guidelines' range and we review de novo whether the court's stated factors for departure were objective and verifiable. *People v Armstrong*, 247 Mich App 423; 636 NW2d 785 (2001); *People v Babcock*, 244 Mich App 64, 76, 78; 624 NW2d 479 (2000).

Under the applicable legislative guidelines, a judge may depart from the stated range only under circumstances allowed by the Legislature. *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). As an initial matter, it is unclear whether the trial judge recognized that the sentence departed from the guidelines. No mention of a departure was made in the record, the required departure form was not filed and the sentencing information report states that the sentence was not a departure. However, a review of the record shows that in sentencing defendant, the judge made two statements that could have served as a basis for departure. In the absence of guidance from the departure form, we analyze the adequacy of these statements to sustain a departure below.

First, the judge stated that the victim was beaten over the head, sustained serious injuries and, had he died, defendant could have been charged with first-degree murder. However, a sentencing court may not depart from the guidelines based on an offense or offender characteristic already taken into account in determining the appropriate sentencing range unless

the court finds, based on the facts in the record, that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Armstrong, supra*; *Babcock, supra* at 77.

Here, defendant's offense variable score took into account that: (1) the victim was touched by a weapon (OV 1), MCL 777.31(1)(c); (2) defendant possessed a potentially lethal weapon (OV 2), MCL 777.32(2); and (3) the victim incurred bodily injury requiring medical treatment (OV 3), MCL 777.33(1)(d). Because the judge made no finding that these characteristics had been given inadequate or disproportionate weight, they could not properly serve as the basis for a departure. MCL 769.34(3)(b); *Babcock, supra* at 77. Furthermore, the judge's observation that defendant could have been charged with first-degree murder had the victim died cannot justify a departure, because evidence on the record indicates that the victim's injuries were not life threatening.

The second possible rationale for departure was the judge's statement that because defendant was involved with drugs, she would likely "go right back out and do it again, to get money to buy drugs again." Regardless whether a concern that defendant will become a repeat offender is substantial and compelling, reasons for departure from the guidelines must also be objective and verifiable. *Babcock, supra* at 78. Because the judge's speculation that "she's going to go right back out and do it again" is neither objective nor verifiable, this was not a permissible reason to depart from the guidelines.

Finally, defendant requests resentencing before a different judge based on the judge's statement that the legislative sentencing guidelines are merely advisory. However, nothing in the record indicates that the judge will be unable to correct this erroneous view on remand. Where the sentencing court's error seems to be a result of its incorrect understanding of the new sentencing structure rather than any prejudices or improper attitudes regarding the defendant, resentencing before a different judge is unnecessary. *Hegwood, supra* at 440, n 17.

We note that the alleged inaccuracy regarding defendant's probationary status need not be addressed on remand because the ten-point discrepancy in defendant's score would not result in a different sentence range. Any error was therefore harmless. *People v Daniels*, 192 Mich App 658,675; 482 NW2d 176 (1992).

We affirm defendant's conviction and remand for resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin