

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRAVIS DENALE NORRIS,

Defendant-Appellant.

UNPUBLISHED

July 16, 2002

No. 230086

Genesee Circuit Court

LC No. 99-005150-FH

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendant was charged with two counts of uttering and publishing, MCL 750.249, and one count each of unlawfully driving away a motor vehicle, MCL 750.413, receiving and concealing stolen property worth at least \$1,000 but less than \$20,000, MCL 750.535(3)(a), and larceny in a dwelling house, MCL 750.360. Following a jury trial, defendant was convicted of two counts of uttering and publishing, one count of unlawfully driving away a motor vehicle, and one count of larceny in a dwelling house. The trial court sentenced defendant in excess of the applicable sentencing guidelines ranges to concurrent terms of (1) one hundred twelve months' to fourteen years' imprisonment for the uttering and publishing convictions, (2) forty to sixty months' imprisonment for the conviction of unlawfully driving away a motor vehicle, and (3) thirty-two to forty-eight months' imprisonment for the larceny conviction. Defendant appeals as of right. We affirm.

Evidence introduced at defendant's trial indicated that he killed two elderly victims for whom he previously had performed odd jobs, and took a vehicle, cash, and some blank checks from the victims' house. With the help of a codefendant, defendant cashed two checks from the victims' bank account. In addition to standing trial on the five counts enumerated above, defendant simultaneously faced trial with respect to a separate information charging two counts each of first-degree and felony murder. The jury failed to reach a unanimous verdict regarding any of the charged counts of murder, and the trial court declared a mistrial regarding these charges.¹

¹ According to the prosecutor's brief on appeal, a different jury subsequently found defendant guilty of two counts of first-degree murder, for which defendant received concurrent terms of life without parole.

Defendant contends that the trial court lacked substantial and compelling reasons for sentencing him in excess of the sentencing guidelines ranges. Because the legislative sentencing guidelines applied to defendant's convictions, the trial court had to impose minimum sentences within the guidelines ranges unless it found "a substantial and compelling reason for [a] departure and state[d] on the record the reasons for departure." MCL 769.34(3). The reasons for departure must be objective and verifiable. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). A court may not premise a departure from the guidelines range on the basis of a defendant's "gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment," representation at trial or religion, MCL 769.34(3)(a), or "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record . . . that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

This Court reviews for clear error the trial court's factual determination that a particular reason exists to warrant departure from the guidelines. This Court reviews de novo as a matter of law the trial court's determination that a particular factor is objective and verifiable. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for an abuse of discretion. *Babcock*, *supra* at 75-76.

The guidelines ranges calculated with respect to defendant's convictions required that, absent valid reasons for departure, the trial court impose minimum terms between seven to twenty-three months for the convictions of uttering and publishing and unlawfully driving away a motor vehicle, and a minimum term between zero to seventeen months for the larceny conviction. The trial court departed significantly from the guidelines ranges by imposing minimum terms of one hundred twelve months for defendant's uttering and publishing convictions, forty months for the unlawful driving away conviction, and thirty-two months for the larceny conviction. The trial court explained as follows at the sentencing hearing its reasons for departing from the guidelines ranges:

I do intend to deviate from the Guidelines. I'm doing that because I had the opportunity to preside at the trial; I heard all the evidence. These crimes all involve taking undue advantage of two vulnerable senior citizens in their homes, one of whom had serious health problems, the other being his wife. [Defendant] stole from 'em for the purpose of satisfying your cocaine and sexual desires. You are awaiting trial only because of a hung jury on the murders of both these people.

I conclude that for the protection of the community it's necessary that the Court exceed the Guidelines.²

² The trial court stated similarly its reasons for departure in a written sentencing information report departure evaluation:

Travis Norris is an extremely manipulative individual who is dangerous & poses a serious threat to the community.

(continued...)

Defendant insists that the guidelines ranges already had incorporated the trial court's reasons for departure, that the court's reasons were not objective or verifiable, and that the court impermissibly relied on pending murder charges, which consisted of "merely unproven accusations."

Although a trial court may not make an independent finding of guilt with respect to a crime for which a defendant has been acquitted, and then sentence the defendant on the basis of that finding, the court in fashioning an appropriate sentence may consider the evidence offered at trial, including other criminal activities established even though the defendant was acquitted of the charges. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). The record in this case reflects that defendant exploited his relationship of trust with two elderly victims and callously ended their lives in the course of stealing their cash, checks and vehicle, which thefts led to his instant convictions. Defendant had for some time performed various manual labors for the victims, a husband and wife, both of whom had reached their mid sixties. The husband was a wheelchair bound diabetic who had his left leg amputated above the knee. On the apparently false premise of returning to the victims' house to claim a wallet he had left behind while assisting in cleaning the basement, defendant lured the wife into the basement where he suffocated her into unconsciousness. Defendant went back upstairs, fought with and physically overcame the husband, whom defendant attempted to smother and knocked onto the floor. Defendant returned to the basement to find the wife regaining consciousness and smothered her again before leaving the house to purchase drugs. Early the next morning, defendant returned to the victims' house to retrieve a hat he had left there and to take the victims' vehicle. Defendant observed the husband lying on the ground, calling out to his wife that he needed his medication. Defendant ignored the husband and left with the victims' vehicle to cash the victims' checks and purchase more drugs and the services of a prostitute. Both victims died from asphyxia secondary to smothering.

We find that in fashioning defendant's sentences, the trial court properly considered defendant's killing of the victims during the course of his crimes. The trial court need not have considered the instant property crimes in a factual vacuum. *Compagnari, supra*. The guidelines calculations of the minimum sentence ranges with respect to defendant's instant property crimes plainly did not take into account defendant's exploitation of his prior relationship with the elderly victims, or the extent of defendant's victimization and ultimate murders of the two victims. In light of these objective and verifiable facts of record, we cannot conclude that the trial court clearly erred in finding that defendant's "[o]ffenses . . . involved the murders of both victims." *Babcock, supra*. Furthermore, we cannot conclude that the trial court abused its discretion in finding that the objective and verifiable factors present in this case constituted substantial and compelling reasons to depart from the statutory minimum sentences. *Id.* at 76. To the extent that a proportionality analysis applies to the degree of the trial court's departure

(...continued)

He selected two vulnerable senior citizens to steal from for the purpose of satisfying his cocaine & sexual desires.

Offenses also involved the murders of both victims for which Def[endant] is awaiting trial after a hung jury.

from the guidelines ranges, *People v Babcock (After Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 235518, issued 3/19/02), slip op. at 3-4, we find the sentences imposed by the trial court proportionate to the seriousness of the circumstances surrounding the offenses and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *Compagnari, supra* at 234-237.³

In light of our conclusion that the trial court did not abuse its discretion in sentencing defendant, we need not consider defendant's additional argument that he should be resentenced before a different judge.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder

³ We note that, contrary to defendant's suggestions in his brief on appeal, the principle of proportionality does not dictate that a departure from guidelines is to be arithmetically measured to determine the propriety of a given sentence. *People v Merriweather*, 447 Mich 799, 808; 527 NW2d 460 (1994).