

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

GAIL ANN GUZIKOWSKI,

Defendant-Appellant.

UNPUBLISHED

September 13, 2002

No. 232043

Manistee Circuit Court

LC No. 97-002707-FC

Before: Murphy, P.J. and Hood and Murray, JJ.

PER CURIAM.

Following this Court's reversal of defendant's first-degree felony-murder conviction, *People v Guzikowski*, unpublished opinion per curiam of the Court of Appeals, issued 9/17/99 (Docket No. 206947), the trial court entered a reduced conviction of second-degree murder and sentenced defendant to life imprisonment with possibility of parole and ordered defendant to pay restitution. Defendant appeals her new sentence as of right. We affirm.

Because defendant committed the offense of which she was convicted on January 7, 1997, the judicial sentencing guidelines apply. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). We review a defendant's sentence to determine whether the trial court abused its discretion in imposing it. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

Defendant first asserts the trial court erred in scoring offense variable three (OV 3) (intent to kill or injure) at fifty points because the score was inconsistent with a second-degree murder verdict, because the trial court could not rely on the expert witnesses' testimony to support the scoring, and because the prosecutor failed to meet its burden of showing by a preponderance of the evidence that the variable should be scored at fifty points. However, our Supreme Court has held that a challenge to offense variable scoring under the judicial sentencing guidelines does not in itself constitute a cognizable claim on appeal. *People v Raby*, 456 Mich 487, 496-499; 572 NW2d 644 (1998), superseded by statute as stated in *People v Hegwood*, 465 Mich 432 (2001). Indeed, the Court recognizes a cognizable claim based on the guidelines' application "only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *Id.* at 497-498.

In this case, defendant does not assert that the trial court had no factual basis for scoring OV 3 at fifty points or that the facts relied on were false. *Id.* at 497-498. Therefore, defendant has not presented a cognizable claim. *Id.*

Second, defendant asserts that her sentence was disproportionately severe. We disagree. A sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentence must be proportionate to both the seriousness of the crime and the defendant's prior record. *Id.*; *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000).

Because defendant's sentence fell within the guidelines' range, it is presumed proportionate. *Bennett, supra* at 515-516. We find no unusual circumstances in this case that make the sentence disproportionate, and therefore conclude that there was no abuse of discretion by the sentencing judge.

Since we have concluded that resentencing is not required, defendant's request that she be sentenced by another judge is moot.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Christopher M. Murray