

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NTUKU ALIAKBAR,

Defendant-Appellant.

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UNPUBLISHED

January 29, 2004

No. 228262

Wayne Circuit Court

LC No. 99-004574

ON REMAND

Before: Cavanagh, P.J., and Markey and Cooper, JJ.

MEMORANDUM.

Our Supreme Court has vacated our prior opinion in this matter and remanded this case to us for reconsideration in light of *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). In our prior opinion, we affirmed defendant's conviction for arson of a dwelling house, MCL 750.72, and sentence of 7½ to 20 years' imprisonment, which constituted an upward departure from the guidelines recommendation of fifteen to twenty-five months. See MCL 769.34. We reverse.

The sole issue on appeal was whether defendant's sentence constituted an improper departure requiring resentencing. Whether a particular factor relevant to the imposition of a departure sentence exists is reviewed for clear error. *Babcock, supra* at 265. Whether that factor is objective and verifiable is reviewed as a matter of law. *Id.* Whether those objective and verifiable factors constitute substantial and compelling reasons to depart from the sentencing guidelines is reviewed for an abuse of discretion. *Id.*

Here, the trial court rejected the sentencing guidelines recommendation stating that the guidelines did "not truly reflect the gravity of this offense. And the exposure to danger that these people have been put through, and the fact that they're living in fear of this matter continuing." Apparently, the factors that the trial court relied on in determining the departure sentence were the (1) exposure to danger in this arson of a dwelling case, and (2) the victims' fear of a repeated attack. However, factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Babcock, supra* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). To the extent that the trial court articulated the factors it was relying on, these factors failed to establish substantial and compelling reasons to support the upward departure. Arson of

a dwelling house always poses danger. And, although we recognize that defendant was alleged to have perpetrated other acts of violence against his family, the victims here, including breaking car windows, we cannot conclude that the sentence is proportionate to the seriousness of defendant's conduct and his criminal history. See *Babcock*, *supra* at 262. Accordingly, we remand this matter to the trial court for resentencing.

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Jessica R. Cooper