

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN W. TOLBERT,

Defendant-Appellant.

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UNPUBLISHED  
February 12, 2004

No. 243039  
Wayne Circuit Court  
LC No. 01-009242-01

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

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant to three to ten years' imprisonment. Defendant now appeals as of right. We affirm.

This case arises out of defendant's savage beating of his mother. On August 1, 2001, the sixty-two-year-old victim went to her ex-husband's house to deliver groceries and money to her son Michael. Defendant was also at the house and began an assault on the victim. After yelling at the victim, defendant pushed the victim into a chair and hit her in the face with his fist. He then kicked the victim and stomped on her legs, feet, and ankles. The assault resulted in the victim's left ankle, right foot, and nose being broken, and the victim being hospitalized for two weeks.

Defendant's sole issue on appeal concerns the trial court's upward departure from the sentencing guidelines in sentencing defendant.<sup>1</sup> Defendant argues that the trial court's reasons for departing from the statutory minimum sentencing guidelines range were already taken into account in the guidelines and did not justify a departure.

This Court reviews the trial court's determination of the existence of a sentencing factor for clear error. *People v Babcock (Babcock III)*, 469 Mich 247, 264; 666 NW2d 231 (2003), quoting *People v Babcock (Babcock I)*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). The determination that a sentencing factor is objective and verifiable is reviewed de novo. *Babcock*

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<sup>1</sup> Because defendant's offense occurred after January 1, 1999, his sentence is governed by the legislative sentencing guidelines, MCL 777.1 *et seq.*

*III, supra* at 264. The determination that an objective and verifiable factor constitutes a substantial and compelling reason to depart from a mandated minimum sentence is reviewed for an abuse of discretion. *Id.* at 264-265. “An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *Id.* at 274.

Defendant received a total offense variable score of 120: twenty-five points for OV 3, ten points for OV 4, twenty-five points for OV 6, fifty points for OV 7, and ten points for OV 10. The court acknowledged that, based on defendant’s revised scoring, the minimum guidelines range was ten to twenty-three months. However, the court sentenced defendant to three to ten years’ imprisonment. The court gave the following explanation for its departure:

Well, this is one of the most heinous crimes that I’ve seen in my tenure as a Judge. There is no reason in the world, whatsoever, that could justify you beating your own mother like this. You didn’t just slap her once, you continued to repeatedly hit her and kick her. As she pleaded with you to stop, you only threatened her more. . . . This court believes that you were merciless, and that the guidelines don’t justify your punishment in this particular case. And even though we’ve adjusted the guidelines to be 10 to 23 months, I’m going to sentence you to 3 to 10 years in prison, with mental health treatment. And that’s the sentence of the Court.

“[A] judge’s discretion to depart from the range stated in the legislative guidelines is limited to those circumstances in which such a departure is allowed by the Legislature. Under the statutory sentencing guidelines, a departure is only allowed by the Legislature if there is a ‘substantial and compelling reason’ for doing so.” *Babcock III, supra* at 255; MCL 769.34(3). “[T]he trial court must articulate on the record a substantial and compelling reason to justify the particular departure imposed.” *Babcock III, supra* at 260. However, the trial court is not required to use any formulaic or “magic” words in doing so. *Id.* at 259. A “substantial and compelling reason” must be construed to mean an objective and verifiable reason that keenly or irresistibly grabs the court’s attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases. *Id.* at 258. “Although the trial court may depart from the guidelines range on the basis that a substantial and compelling reason to do so exists, the trial court ‘shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight.’” *Id.* “[T]he principle of ‘proportionality’ defines the standard against which the decision to depart, and the particular departure imposed, must be assessed.” *Id.* at 263 n 20. “Therefore, the appropriate sentence range is . . . a function of the seriousness of the crime and of the defendant’s criminal history.” *Id.* at 264.

At the outset, we note that defendant does not contend that the trial court’s reasons for departing from the sentencing guidelines are not objective and verifiable. Nor does he argue that they do not keenly or irresistibly grab our attention, or that they are not of considerable worth in deciding the length of a sentence. Defendant’s sole contention on appeal is that the trial court violated the proscription of MCL 769.34(3)(b), which states that the trial court, “shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight.”

Defendant contends that “[t]he only factor identified by the court to justify a departure from the statutory guidelines was that Defendant-Appellant had severely beat the complainant.” However, contrary to defendant’s assertion, the trial court articulated at least three reasons for sentencing defendant as it did. The first reason was the severity of the crime, which the court called “one of the most heinous crimes that I’ve seen in my tenure as a Judge.” The second was the familial relationship between defendant and the victim – the court stated that, “[t]here is no reason in the world, whatsoever, that could justify you beating your own mother like this.” The third reason given by the court was the fact that defendant hit the victim repeatedly, and was “merciless” in ignoring the victim’s pleas to stop hitting and kicking her, and in continuing to threaten her. Under the circumstances, we are satisfied the trial court properly considered these factors in departing from the statutory sentencing guidelines range.

The seriousness of defendant’s crime may arguably already be taken into account by the sentencing guidelines.<sup>2</sup> However, even if this factor is already taken into account in the offense variables, the court could still base a departure from the sentencing guidelines on it if the court found it to have been given “inadequate or disproportionate weight.” MCL 769.34(3)(b). Such a finding need not be express, but can be implied. *People v Lowery*, 258 Mich App 167, 170; \_\_\_ NW2d \_\_\_ (2003). After describing the salient features of the assault, the court stated that “the guidelines don’t justify your punishment in this particular case.” We find this statement sufficient to indicate that the court found that the statutory factors were given inadequate weight. Given the brutality of defendant’s offense and the fact that he continued to make threats against the victim after the assault, it was proper for the trial court to justify its departure on the severity of the crime.

With regard to the familial relationship between a defendant and victim, this Court has stated:

[I]n certain cases important considerations may arise at sentencing that are not contemplated by the sentencing guidelines. . . . One such example is the prior relationship between the offender and the victim. . . .

A prior relationship between a victim and an offender can be a very mitigating circumstance or a *very aggravating circumstance*, depending upon the history of interaction between the parties. [*People v Moorer*, 246 Mich App 680, 685; 635 NW2d 47 (2001), citing *People v Milbourn*, 435 Mich 630, 659-661; 461 NW2d 1 (1990) (emphasis in *Milbourn*).]

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<sup>2</sup> Defendant received 25 points for OV 3, causing a “life threatening or permanent incapacitating injury”; 10 points for OV 4, causing a “serious psychological injury requiring treatment”; 25 points for OV 6, having an “unpremeditated intent to kill, the intent to do great bodily harm,” or “creating a very high risk of death or great bodily harm. . .”; and 50 points for OV 7, treating a victim “with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.”

Accordingly, in this case, the trial court properly took into account the fact that the victim was defendant's mother<sup>3</sup> in departing from the guidelines.

The third reason given by the trial court for departing from the sentencing guidelines was that defendant hit the victim repeatedly, and was "merciless" in ignoring the victim's pleas to stop hitting and kicking her. Defendant appears to argue that this reason would fall under OV 7 – treating the victim "with sadism, torture, or excessive brutality." MCL 777.37, which explains OV 7, does not, however, expressly mention hitting a victim repeatedly, or being merciless. Nor does it appear to us to be taken into account by the definitions of "sadism," "torture," or "excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." Thus, the trial court could have reasonably found that defendant's mercilessness was an offense characteristic not taken into account by the sentencing guidelines. Even if it is taken into account, the trial court's remarks at sentencing imply that the court found the guidelines gave this characteristic inadequate weight. Again, defendant savagely beat his mother and expressed a willingness to do it again. The trial court was justified in departing from the recommended guidelines range.

In sum, the trial court properly found that the severity of this crime, defendant's relationship to the victim, and defendant's mercilessness in beating the victim, were all factors that were not given adequate weight in the guidelines. The trial court properly found that these factors justified an upward departure from the statutory guidelines range in this case.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Brian K. Zahra

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<sup>3</sup> It is unclear if victim is defendant's biological mother, or his stepmother. Throughout the trial transcript victim refers to defendant as her "son." However, during the sentencing hearing, defendant states: "And that [victim] is not my real mother, that's my stepmother."