

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLEVELAND ROGERS,

Defendant-Appellant.

UNPUBLISHED
February 17, 2004

No. 243046
Wayne Circuit Court
LC No. 01-011094-01

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

JANSEN, J. (dissenting)

I respectfully dissent. Because it is not clear from the record whether the trial court would have departed from the sentencing guidelines to the same extent had it only considered appropriate factors, I would remand for resentencing.

If the reasons articulated by the trial court are partially invalid and this Court cannot determine whether the trial court would have departed from the guidelines range to the same extent regardless of the invalid factors, it must remand for rearticulation or resentencing. *People v Babcock*, 469 Mich 247, 260; 666 NW2d 231 (2003).

As stated in the majority opinion, the trial court cited some objective and verifiable factors that could establish a substantial and compelling reason for departure and other factors that either were not supported by the record or were not objective and verifiable. The trial court stated that the victim was traumatized which is not objective and verifiable; nor does the record support that the victim was traumatized. In addition, the trial court stated, as a basis for departure, that defendant was lying in wait, which was not supported by the record. Further, the trial court improperly relied on its subjective observation that defendant lacked remorse, which was improper as the sincerity of the defendant's statement "cannot effectively or objectively," be reviewed. See *People v Daniel*, 462 Mich 1, 11; 609 NW2d 557 (2000).

With regard to the trial court's statement, which is relied on in the majority opinion, "I'd still consider that a break, quite frankly," it could be inferred that the trial court may have departed from the sentencing guidelines had it not considered inappropriate factors, but it is unclear if it would have or if it would have departed to the same extent. Therefore, I would remand for resentencing or rearticulation.

/s/ Kathleen Jansen