

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LOUIS WAYNE SCOTT,

Defendant-Appellant.

UNPUBLISHED

March 16, 2004

No. 231516

Macomb Circuit Court

LC No. 00-001128-FC

ON REMAND

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

On October 3, 2003, the Michigan Supreme Court issued an order vacating our judgment in this case and remanding for reconsideration in light of *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003) (*Babcock III*), in lieu of granting leave to appeal. Because *Babcock III* pertains to only the portion of our opinion discussing the trial court's decision to depart from the recommended sentencing guidelines range, we adopt our prior opinion affirming defendant's conviction of second-degree murder, MCL 750.317. *People v Scott*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2002 (Docket No. 231516). Additionally, on reconsideration in light of *Babcock III*, we again affirm defendant's sentence of 60 to 101 years' imprisonment.

Defendant's conviction in this case arose out of the death of his five-month-old daughter on December 12, 1999. As we stated in our prior opinion, defendant admitted that on December 10, 1999, he

became angry with the victim when she would not stop fussing[] and squeezed her in a "bear hug" until she stopped crying and heard her gasp for air. Defendant also admitted to forcibly throwing the victim face down on a bed from a distance of one to two feet. Defendant further admitted to putting his hand in the middle of the victim's back, between her shoulder blades, and holding her face down on the mattress until she stopped crying and then stopped moving altogether. Defendant admitted that he then left the room to watch the *Roseanne* show. [Slip op at 2.]

The autopsy performed on defendant's daughter showed that she died from asphyxia due to oxygen deprivation as a result of smothering. Defendant was convicted of second-degree murder following a jury trial.

At sentencing, the trial court departed from the recommended minimum sentence range of 225 to 375 months' imprisonment and imposed a sentence of 60 to 101 years' imprisonment. In doing so, the trial court stated:

There's no question in my mind that the sentencing guidelines could never compensate the life of a child, and the sentencing guidelines in my opinion are very unfair, based upon the facts and circumstances as they were displayed to the Court.

I am going to exceed the sentencing guidelines because I feel that this gentleman should not have a life in terms of at one point getting free, because we have a child who never even had the chance to toddler around, to play with toys, to understand what it is to give a kiss to a grandparent or to [a] parent, to give and get hugs and understand the meaning of that.

You're the most disgusting thing I ever seen [sic] in my life, to take and do what you did. You know what, it's unfortunate that you couldn't endure the pain that she endured, and I can't even—that's called corporal punishment. We don't believe in that here in the United States. But what you did to that baby was so disgusting, and for you to stand up here like you didn't do a thing is even more disgusting to me.

In the Sentence Departure Form, the trial court stated that its decision to exceed the guidelines was “[b]ased upon [defendant’s] total lack of remorse and the helplessness, innocence[,] and inability of the child to protect [her]self and the testimony in this matter.”

On appeal, this Court affirmed defendant’s sentence. We held that the trial court did not abuse its discretion by deciding that substantial and compelling reasons to depart existed. Our Supreme Court remanded for reconsideration in light of *Babcock III*.

II. Standard of Review

We review the existence of a particular sentencing factor for clear error, as a question of fact. *Babcock III*, *supra* at 264 (citations omitted). Whether a factor is objective and verifiable constitutes a question of law, which we review de novo. *Id.* We review for abuse of discretion the trial court’s decision whether the “objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence.” *Id.* (internal quotations omitted). In the context of departures from the sentencing guidelines range, “[a]n abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes.” *Id.* at 269.

III. Analysis

Defendant asserts that the trial court did not articulate substantial and compelling reasons for departing from the recommended sentencing guidelines range. We disagree.

First, we reject defendant’s claim that one of the trial court’s reasons for departure was its disagreement with the jury’s verdict of second-degree murder. As we stated in our prior opinion,

the record shows that the trial court accepted the jury's verdict despite the fact that it disagreed with it. The trial court's comments that the sentencing guidelines could not "compensate the life of a child" and were "very unfair" were general comments about the tragic circumstances of the case and not statements of the trial court's reasons for departure from the sentencing guidelines range. Moreover, the trial court articulated specific reasons for departure, both at the sentencing hearing and on the departure form, and these reasons did not include the trial court's disagreement with the verdict.

Second, we do not agree that the trial court violated MCL 769.34(3)(b) by departing from the guidelines based on the "helplessness, innocence[,] and inability of the child to protect [her]self." A sentencing court may 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." MCL 769.34(3)(b). Defendant argues that the factors cited by the trial court as the reasons for departure are accounted for in offense variable (OV) 10,¹ exploitation of a vulnerable victim, and that the trial court did not "articulate why the guidelines gave insufficient weight to the nature and extent of the conduct." MCL 769.34(3)(b), however, merely requires that the trial court *find* that the characteristic has not been sufficiently accounted for in calculating the guidelines score, and does not require the trial court to articulate the basis for its reasoning. Our review of any such finding by the trial court is for clear error. MCR 2.613; see also *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

Here, the trial court's statement that the guidelines could not compensate for the life of a child and were unfair under the facts and circumstances of this case appears to be the

¹ MCL 777.40(1) provides:

Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

- (a) Predatory conduct was involved15 points
- (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status10 points
- (c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious5 points
- (d) The offender did not exploit a victim's vulnerability0 points[.]

underpinnings of the trial court's finding that the "helplessness, innocence[,] and inability of the child to protect [her]self" received inadequate weight in calculating defendant's sentencing guidelines score. See *People v Lowery*, 258 Mich App 167, 170; 673 NW2d 107 (2003) (affirming the trial court's departure where the trial court implied through its statements concerning the inadequacy of the guidelines that certain characteristics received inadequate weight); compare *Babcock III*, *supra* at 259 n 13 (stating that the trial court is not required to "use any formulaic or 'magic' words" in articulating its substantial and compelling reasons for departure but must state its reasons with sufficient quality to permit "effective appellate review"). Under MCL 777.40(1), the trial court may only assess points for the applicable factor that has the highest score. As such, the sentencing guidelines score does not necessarily account for the existence of multiple listed factors. The trial court's articulation of the inadequacy of the sentencing guidelines satisfied MCL 769.34(3)(b), and we conclude that the trial court could permissibly rely on the "helplessness, innocence[,] and inability of the child to protect [her]self" as substantial and compelling reasons for departure.

We agree with defendant that the trial court erroneously decided that defendant's lack of remorse constituted a substantial and compelling reason for departure. Although defendant does not claim that this factor is not objective and verifiable, the prosecution concedes that a lack of remorse is not objective and verifiable. In *People v Daniel*, 462 Mich 1, 8; 609 NW2d 557 (2000), the Court stated that an expression of remorse is not objective and verifiable. *Id.*, citing *People v Fields*, 448 Mich 58, 69, 80; 528 NW2d 176 (1995). The Court explained that although the fact of expressing remorse is objective and verifiable, "a defendant's intent when he expresses remorse is within his own mind, and is, therefore, subjective." *Daniel*, *supra* at 8 n 9, quoting *People v Krause*, 185 Mich App 353, 358; 460 NW2d 900 (1990). Similarly, although the fact that defendant did not express remorse is objective and verifiable, defendant's actual state of mind is subjective. Because a reason for departure must be objective and verifiable in order to be substantial and compelling, *Babcock III*, *supra* at 257-258, defendant's lack of remorse does not constitute a substantial and compelling reason to depart.

We also agree with defendant's contention that the trial court improperly cited its desire for defendant to "not have a life" and improperly relied on "the testimony in this matter" as reasons for departure. The trial court's desire that defendant "not have a life" is neither substantial and compelling nor objective and verifiable, and "the testimony in this matter" is insufficiently specific as a basis for departure to permit appellate review; therefore, we will not consider this statement as a substantial and compelling reason to depart. See *Babcock III*, *supra* at 259 n 13.

Despite these errors, however, we conclude nevertheless that had the trial court relied on the "helplessness, innocence[,] and inability of the child to protect [her]self" as the only substantial and compelling reasons for departure, the trial court would have imposed the same sentence. As such, and despite our findings that the trial court erred in certain respects, remand for resentencing is not necessary. *Babcock III*, *supra* at 260.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder