

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KENNETH EDWARD JONES,

Defendant-Appellant.

UNPUBLISHED

June 10, 2004

No. 238557

Washtenaw Circuit Court

LC No. 00-000962-FH

ON REMAND

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of second-degree murder, MCL 750.317. The trial court sentenced defendant to forty-five to eighty years' imprisonment. This sentence exceeded the statutory guidelines recommended minimum range of 180 to 300 months or life, MCL 777.61, III-B. We affirmed the trial court's upward departure from the guidelines in *People v Jones*, unpublished opinion of the Court of Appeals, issued July 22, 2003 (Docket No. 238557). But our Supreme Court vacated our judgment by order dated December 30, 2003 (Docket No. 124474), and directed this Court to reconsider its opinion in light of *People v Babcock*, 469 Mich 247, 666 NW2d 231 (2003). We again affirm.

In our first opinion, we held that the trial court had properly scored the sentence guidelines, and that defendant had not established that the trial court otherwise relied upon inaccurate information at sentencing. Because our Supreme Court vacated our prior judgment but remanded for reconsideration in light of *Babcock, supra*, which only addressed departures from the guidelines, we conclude that our Supreme Court similarly intended only that we reconsider that part of our prior opinion that addressed the sentence guidelines departure. Accordingly, we adopt and reaffirm our prior opinion regarding all non-departure issues. We also note that even if the trial court erred in scoring one or more of the questioned offense variables, the error would be harmless if the trial court properly found a substantial and compelling reason on the record that justified the departure from the guidelines. *People v Mutchie*, 468 Mich 50, 52; 658 NW2d 154 (2003).

We also held that the trial court properly found that the brutal nature of the crime was a substantial, compelling, objective and verifiable, reason for departing from the guidelines. We did not address the trial court's other stated reason for departing from the guidelines: that defendant's own admissions established he lacked remorse. Rather, we held that the legislative

sentencing guidelines require “only a singular substantial and compelling reason to depart.” *Jones, supra*, slip op p 7. Further, we held that “the trial court did not clearly err or abuse its discretion by finding both that the brutality of the crime was ‘a substantial and compelling reason for that departure’ . . . and . . . that the offense characteristic had been given inadequate weight” Finally, we held that the trial court did not abuse its discretion by imposing a sentence of forty-five to eighty years’ imprisonment because the sentence was proportionate to the seriousness of the circumstances underlying the offense and the offender. *Jones, supra*, slip op p 7.

Unless it articulates a substantial and compelling reason, a trial court must impose a minimum sentence upon conviction for an “enumerated felony” within the properly calculated recommended minimum guidelines’ range. MCL 769.34(1), (2), (3); *Babcock, supra* at 255-256, 272 ¶ 1; *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001). “A substantial and compelling reason must be ‘objective and verifiable’; must “‘keenly” or “‘irresistibly” grab our attention’; and must be ‘of “considerable worth” in deciding the length of a sentence.’” *Babcock, supra* at 272 ¶ 3, quoting *People v Fields*, 448 Mich 58, 62, 67; 528 NW2d 176 (1995). We review the trial court’s factual finding that a particular sentencing factor exists for clear error, but whether the factor is objective and verifiable is a question of law subject to de novo review on appeal. *Babcock, supra* at 273 ¶¶ 10, 11. The trial court’s determination that a substantial and compelling factor is a reason to depart from the guidelines recommended minimum sentence range is reviewed for an abuse of discretion. *Id.* at 274 ¶ 12.

Our Supreme Court explained that the Legislative guidelines embody the principle of proportionality. *Id.* at 263-264. Accordingly, “while ‘substantial and compelling’ identifies the quality of the reasons that must be cited in support of a departure from the guidelines, the principle of ‘proportionality’ defines the standard against which the decision to depart, and the particular departure imposed, must be assessed.” *Id.* at 262 n 20. But because of the “trial court’s familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case,” and thus, “the appellate court must accord this determination some degree of deference.” *Id.* at 268-269. The standard appellate courts are to employ “acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.” *Id.* at 269. The trial court abuses its discretion when it chooses an outcome falling outside the permissible principled range of outcomes. *Id.*, at 269, 274 ¶ 12.

Here, the sentencing guidelines were properly scored at 5 prior record variable points and 106 offense variable points resulting in a recommend minimum sentence range for an indeterminate sentence of 180 to 300 months. MCL 777.61 (III-B).¹ The trial court initially considered sentencing defendant to life in prison but instead sentenced defendant to a term of

¹ The III-B cell for class “M2” also permitted a sentence of “or life.” Thus, if the trial court had sentenced defendant to life in prison, the sentence would have been within the guidelines recommended range, *People v Greaux*, 461 Mich 339, 345; 604 NW2d 327 (2000), and this Court would have been required to affirm, MCL 769.34(10); *Babcock, supra* at 261, 272 ¶ 2.

years, which was above the guidelines recommended range. The trial court wrote the following in the SIR departure evaluation form:

Defendant savagely & brutally attacked the victim causing the victim's death; the brutality was excessive & beyond what was considered in the guidelines; Defendant's attack, pursuit & capture of the victim & the victim's ability to twice get away from Defendant only to be hunted down & killed is reminiscent [sic] of an animal hunting & attacking its prey; & Defendant showed no remorse when he confessed nor at sentencing; Defendant has no explanation of why he committed the crime; & Defendant was concerned & considered that he might again attack another person at the time he gave his confession.

At the sentencing proceeding, the trial court stated the following to explain its reasons for the sentence imposed:

The Court's had an opportunity to review the presentence report [and] the guidelines themselves. . . . I do find there are substantial and compelling reasons to depart from the guidelines. It's entirely consistent with the testimony that I heard and the nature of your crime.

We've already spent a great deal of time listening to argument, and my response with regard to the nature of the brutality, the savagery - - there's only one way to describe what you did. When [the prosecutor] made the analogy of you being a wolf hunting a sheep, that was incorrect. That sheep was wounded. You were like an animal hunting another wounded animal as prey. You had multiple times that you could have broken that off. You didn't. You pursued and you pursued and you pursued.

* * *

You pursued, you captured, you beat. The victim somehow was able to get away. You pursued, you captured, you beat. The victim was able to get away. You pursued, captured, and beat him to death. The photographs, the testimony of Dr. Cassin, the suffering that [the victim] had to go through prior to his last breath, all just speaks volumes to me with regard to the nature of your attack.

You don't show any remorse. Your statement today, you're apologizing but, again, you are not really showing me remorse. Everybody - - well, maybe not everybody, but a significant number of people today and in their letters, make reference to your statement about, "I did not lose any sleep over it." Seems as though everybody has missed what I wrote down as I was listening to the videotape the second time, your statement that you said, "I don't feel bad about what happened. I know that is crappy, but that's how I feel." That tells me someone - - and this is a year after you did this - - shows no - - no remorse whatsoever.

* * *

I believe that the nature of the lack of your remorse, the way it's been shown in many different ways beyond what I am even stating now, the viciousness, the animal-like quality of hunting down your prey, all are substantial and compelling reasons for me to depart upward, which I'm going to do.

Now the curious thing. I intended to sentence you to life in prison, because that's where I want you. But the curious thing about that is, for second-degree murder, if you're sentenced to life in prison, you're eligible for parole, and it's the parole board that makes that determination, and I don't think the parole board should be making that determination any time soon. So I'm going to be sentencing you to a term of years which I feel is entirely appropriate, given the nature of the crime that you committed, the nature of the brutality of the crime, and the like.

On reconsideration of the reasons the trial court gave for departure, we again hold as a matter of law that the physical evidence of the crime scene and the autopsy results objectively verify the brutality of the offense. *Babcock, supra* at 258 n 12, 273 ¶ 11. We also conclude that the trial court did not clearly err in its factual finding that the offense in this case was especially vicious and brutal. *Id.* at 273 ¶ 10. Moreover, it is clear from the record that the trial court concluded that by imposing a sentence above the recommended guidelines range because of the viciousness of the attack in this case, the sentence would be “a more proportionate criminal sentence than is available within the guidelines range.” *Id.* at 272 ¶ 6. We recognize “that the trial court was in the better position to make such a determination and [give] this determination appropriate deference.” *Id.*, at 270. And, we conclude that the trial court did not abuse its discretion by finding that the brutality of the offense had been given inadequate weight in the guidelines and was a substantial and compelling reason justifying a departure from the guidelines' recommended range. MCL 769.34(3)(b); *Babcock, supra* at 258 n 12, 274 ¶ 12. See also *People v Lowery*, 258 Mich App 167, 171; 673 NW2d 107 (2003), holding that the degree of injury and the manner in which injuries are inflicted may constitute a substantial and compelling reason to depart from the guidelines where not adequately accounted for in the guidelines.

The trial court also discussed defendant's lack of remorse as a reason for departing from the recommended sentence range. But, as recited previously, the trial court expounded at length as to why it was sentencing defendant above the guidelines range. Clearly, remorse was only one of many factors the Court cited.

Our Supreme Court has provided instructions on how we must proceed when a trial court provides multiple substantial and compelling reasons for departure from the guidelines range:

Because the trial court must articulate on the record a substantial and compelling reason to justify the particular departure, if the trial court articulates multiple reasons, and the Court of Appeals determines that some of these reasons are substantial and compelling and some are not, the panel must determine the trial court's intentions. That is, it must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone. If the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the

basis of the substantial and compelling reasons, or determines that the trial court would not have departed to the same degree on the basis of the substantial and compelling reasons, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure. [*Babcock, supra* at 260-261 (footnotes omitted).]

Based on our review of the record, we believe it is obvious that “the trial court would have departed and would have departed to the same degree irrespective of its concluding defendant lacked remorse because the court focused so strongly on the brutality, viciousness, and savageness of the killing, i.e., on the basis of the [single] substantial and compelling reason[] alone.” *Id.* at 260. See *People v Babcock (On Remand)*, 258 Mich App 679, 682; 672 NW2d 533 (2003). Thus, because we can so determine we need not discuss or decide the remorse issue under this fact scenario.

Accordingly, we affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder