

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD LEONARD STANDBERRY,

Defendant-Appellant.

UNPUBLISHED

July 29, 2004

No. 246886

Wayne Circuit Court

LC No. 02-005926-01

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of manslaughter, MCL 750.321, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to four to fifteen years' imprisonment for the manslaughter conviction, consecutive to a two year sentence for the felony-firearm conviction. We affirm defendant's convictions and sentencing guidelines range. Because the trial court's reasons for upwardly departing from the sentencing guidelines range are at least partially invalid, we remand for rearticulation or resentencing.

First, defendant claims there was no evidence to support the court's scoring of fifteen points for offense variable (OV) 5. We disagree. This Court reviews the trial court's factual determinations for clear error, and we review whether the facts as found support a guideline score for an abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). We "will uphold the trial court's guidelines scoring if there is any evidence in the record to support it." *People v Houston*, 261 Mich App 463, 471; ___ NW2d ___ (2004).

The sentencing guidelines state that fifteen points should be scored for OV 5 when "serious psychological injury to the victim's family may require professional treatment." MCL 777.35(2). Scoring of offense variables must be based on record evidence. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

The PSIR's Victim Impact Statement of the victim's mother, Tywana Jemison, states that she has taken over "raising her two grandsons," and that "the youngest grandson stated to her, 'My daddy killed my mommy and left her in the bath tub.'" Ms. Jemison's victim impact statement also states that the youngest son "does not want to visit his father," and that the 15 year old (Charles Ferguson) is temporarily residing in Atlanta.

At trial, the victim's then-fourteen year old son, Charles Ferguson, testified that he had heard defendant threaten to kill his mother several times, including by "blowing her brains out," that he saw his mother with a black eye and bruises, and that he once heard defendant take a gun outside and shoot it in the air. Charles also testified that his mother had told him several days before her death that she and he, and her other son, a four-year old, were going to be moving out of defendant's house.

While direct evidence of serious psychological injury is lacking, we conclude that there was adequate record evidence of the traumatic nature of the events and the impact on the children to support the court's finding that serious psychological injury occurred to either or both of the victim's sons that may require professional treatment. See *Ratkov (After Remand)*, *supra* at 125. Further, even if we were to conclude that the court erred in scoring this variable, no relief would be warranted because defendant's guidelines range would not change.

Next, defendant claims the trial court erred in scoring ten points for OV 10. We disagree. Points are scored for OV 10 when exploitation of a vulnerable victim is a facet of the crime, with ten points scored when the offender exploits a domestic relationship with the victim. MCL 777.40(1)(b). "Exploit" means to manipulate a victim for selfish purposes. MCL 777.40(3)(b). "Vulnerable" means "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). Here, the victim was shot in the bathtub while naked and defenseless. Defendant clearly exploited a uniquely vulnerable situation peculiar to a volatile domestic relationship. Thus, there was sufficient evidence to support the court's score of ten points for OV 10.

Next, defendant claims his written confession was not voluntary, given his minimal previous experience with police and his physical condition at the time the statement was made. We disagree. This Court gives deference to a trial court's ruling on a motion to suppress and will not disturb the ruling unless it is clearly erroneous. *People v Hamilton*, 465 Mich 526, 529, 638 NW2d 92 (2002). Clear error exists where the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998). Whether a confession was voluntary is determined based on the totality of the circumstances. *People v Manning*, 243 Mich App 615, 644; 624 NW2d 746 (2000). The test is whether the confession was the product of an "essentially free and unconstrained choice," or whether the defendant's "will has been overborne and his capacity for self-determination critically impaired." *United States v Culombe*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961).

According to defendant's own account of events, he understood and signed a written consent form allowing police to videotape him during an interview with a police detective at the hospital. He also agreed to talk to the detective and gave a detailed verbal statement of what allegedly occurred. Later the same day, defendant agreed to talk to another officer who wrote down the statement in issue. Defendant testified that his rights were read to him and that he understood them. Defendant told the officer, "I agree to talk to you. I don't have anything to hide. I talked to everybody." All of these circumstances show that defendant was alert, able to communicate, and not in any way prevented by his injury from appreciating and understanding his rights, his legal peril, or the implications of his statements. Deferring to the court's superior position to assess witness credibility, *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997), we conclude that the court did not err in finding the confession voluntary.

Last, defendant claims the trial court relied on inappropriate reasons for departing upward from the sentencing guidelines. We agree in part.

This Court reviews the trial court's factual determinations regarding factors underlying the departure for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

A court may depart from the legislative sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3), *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Babcock*, 469 Mich at 257-258. Objective and verifiable factors are 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).

In *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987), the Supreme Court held that "while a sentencing court cannot, in whole or in part, base its sentence on a defendant's refusal to admit guilt, evidence of a lack of remorse can be considered in determining an individual's potential for rehabilitation." In *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003), this Court noted that a sentencing court "may consider evidence of a lack of remorse in determining an individual's potential for rehabilitation," and that "resentencing is required only if it is apparent that the court erroneously considered the defendant's failure to admit guilt, as indicated by action such as asking the defendant to admit his guilt or offering him a lesser sentence if he did."

The minimum sentence guidelines range was 19 to 38 months. At sentencing, the prosecutor argued for an upward departure to the maximum sentence possible—ten to fifteen years--noting the heinous nature of this crime, the fact that two young boys were left motherless, and that "[t]hirty-eight months for shooting a woman in the back of the head is unconscionable."

The court departed upward by 10 months, sentencing defendant to 48 months' imprisonment for the manslaughter conviction, stating that it had not seen any remorse from defendant, and that defendant had never claimed any responsibility for the crime, except in a statement, in which defendant said that the victim provided him the gun and provoked him. At the sentencing hearing, the court asked defendant twice whether he had anything to say, and he responded negatively both times.¹

¹ The trial court in imposing sentence stated:

The trial court noted in imposing sentence that for defendant to have shot the victim multiple times in the bathtub, having provided as his only explanation that the victim provided him the gun and provoked him, showed how “easily provoked” defendant was. To the extent the trial court concluded that defendant’s lack of remorse and easy provocation signaled that his rehabilitation potential is poor, we find no error. However, the court did not specifically address defendant’s rehabilitation potential, and clarification is required.

Further, the trial court’s reliance on defendant’s failure to accept responsibility for the crime is problematic. See e.g., *People v Hicks*, 149 Mich App 737, 748; 386 NW2d 657 (1986). While in the abstract, the court’s sentence does not seem excessive, the rules for departing from the legislative guidelines are clear, and must be followed. Consequently, we remand for rearticulation or resentencing. *Babcock*, *supra* at 260.

(...continued)

Mr. Daly [*defendant’s counsel*] is right that just because I’m not happy with the jury’s verdict, I cannot depart for that reason and that reason only.

So, I am not going to do that. I’m going to restrain myself.

But I don’t like a few things. I don’t like the fact that the Defendant has never claimed any responsibility for this except to the extent, in one of his statements, which indicated that the Deceased provided the gun and provoked him. And the jury accepted that version. It’s pretty clear by their verdict that they accepted that version.

But beyond that, he hasn’t claimed any responsibility.

The other thing is that I really have not seen any remorse from the Defendant.

He testified. I didn’t see any remorse from the witness stand. And I don’t see any today.

And I think that that’s somewhat indicative of how easy he was –how easily he was provoked. But he didn’t provide the weapon.

And so I’m not doing [sic] to depart to the extent that I had planned to. But I am going to depart slightly.

We note that defendant testified at the *Walker* hearing, but did not testify at trial. We presume that this is the testimony to which the court was referring.

Affirmed, but remanded for rearticulation or resentencing by the trial court. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Helene N. White

I concur in result only.

/s/ William B. Murphy