

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HUBERT DANIELS,

Defendant-Appellant.

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UNPUBLISHED

August 17, 2004

No. 247033

Wayne Circuit Court

LC No. 02-010937

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life imprisonment for the second-degree murder conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. We affirm.

**I. Facts and Procedure**

After receiving a 911 call regarding a domestic disturbance,<sup>1</sup> police went to the house of defendant and his mother, Mae Francis Daniels. When the police arrived, defendant was standing calmly in the kitchen and Mae's dead body was in the bedroom. Expert testimony revealed that she died from multiple gunshot wounds that had been made from more than one foot away. Defendant told an officer that he had called the police because he had shot Mae. When the police arrested defendant, he shouted two or three times that he was tired of arguing. After arriving at the police station, defendant stated, "I was tired of being pushed." Defendant then gave a signed statement to police stating that he and Mae began arguing after she woke him up and told him to get out of the house. Defendant stated that he hated that he and Mae would argue every day and resented that she did not appreciate what he did for her. He said that the arguing had been going on for years and he became angry. After about an hour of Mae yelling at

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<sup>1</sup> Although a tape of the 911 call was admitted at trial and played for the jury, there is no transcript of the tape's content as part of the lower court record. According to the prosecution, however, the caller began speaking to another person in the room during the 911 call. The caller said, "Please don't do that," before the phone went dead. Defendant does not dispute this fact.

him, defendant pointed his gun at Mae, who was sitting on her bed. Defendant stated that as Mae began to stand up from the bed, he shot and killed her. Defendant stated that he then threw the gun into the sewer.

At trial, defendant testified that the interrogating officer fabricated defendant's statement to police. Defendant asserted that his actual statement explained that the shooting was an accident. Defendant testified that Mae woke him up from a nap and told him to go find their missing dog. Defendant got up, dressed, and retrieved his loaded gun. The two then began to argue, and the argument escalated to the point where Mae threatened to call the police. Defendant walked into Mae's bedroom with his gun in his hand. When Mae saw the gun, she told defendant that he did not need to take the gun and tried to grab it. The two fell onto the bed and were wrestling when gun accidentally went off and shot Mae. Defendant then walked outside and dropped the gun into the sewer. He then went back into the house, shook Mae to see if she was hurt, and called 911. When the police arrived, defendant told them that the shooting was an accident. He then calmly told police that he was tired of arguing and being pushed around.

## II. Analysis

### A. Jury Instructions

Defendant first argues that the trial court erred by failing to instruct the jury on the lesser offense of voluntary manslaughter. We disagree. Defense counsel failed to request an instruction on voluntary manslaughter or to object to the trial court's omission of an instruction on voluntary manslaughter. Moreover, defense counsel affirmatively approved the jury instructions as given by the trial court. Approval of the trial court's jury instructions signifies waiver of any instructional error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Because defense counsel approved the jury instructions that omitted a voluntary manslaughter instruction, we hold that defendant waived this issue for appeal.<sup>2</sup>

### B. Sentencing

#### 1. Scoring

Defendant argues that the trial court erred in assessing him two points for prior record variable 5 (PRV 5) and ten points for offense variable 10 (OV 10). Defendant claims that these scoring errors caused the trial court to base his sentence on an incorrect guidelines range of 144 to 240 months' imprisonment. Defendant argues that, scored properly, his guidelines range should have been 90 to 150 months' imprisonment. The prosecution concedes that the trial court should have scored defendant 0 points for PRV 5 and that defendant's proper guidelines range should have been 90 to 150, rather than 144 to 240, months' imprisonment. However, an improper scoring of the sentencing guidelines range does not warrant resentencing where the trial court would have imposed the same sentence regardless of the error. *People v Mutchie*, 468

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<sup>2</sup> Defendant concedes that his trial counsel's approval of the jury instructions did not rise to the level of ineffective assistance of counsel.

Mich 50, 51-52; 658 NW2d 154 (2003); *People v Hicks*, 259 Mich App 518, 537 n 8; 675 NW2d 599 (2003). Here, the trial court found that the sentencing guidelines failed to reflect the seriousness of the offense and departed from the sentencing guidelines range by sentencing defendant to life imprisonment. The record indicates that the trial court intended to sentence defendant to life in prison regardless of the guidelines range.<sup>3</sup> Therefore, the improper scoring does not warrant resentencing in this case. See *Mutchie*, *supra* at 51-52; *Hicks*, *supra* at 537 n 8.

## 2. Upward Departure

Defendant also argues that he is entitled to resentencing, because his sentence of life imprisonment for second-degree murder is an upward departure from the sentencing guidelines that violates the principle of proportionality. Because defendant committed the crimes after January 1, 1999, the statutory sentencing guidelines apply to his sentence. MCL 769.34(2). A court may depart from the sentencing guidelines range only if it has a substantial and compelling reason to do so and states the reason for departure on the record. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). “[A] ‘substantial and compelling reason’ . . . mean[s] an ‘objective and verifiable’ reason that “‘keenly” or “‘irresistibly” grabs our attention’; is ‘of “considerable worth” in deciding the length of a sentence’; and ‘exists only in exceptional cases.’” *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003), on remand 258 Mich App 679; 672 NW2d 533 (2003), quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). A departure from the legislative guidelines range must render the sentence proportionate to the seriousness of the defendant’s conduct and criminal history. *Babcock*, *supra* at 264. If a departure causes a sentence to be disproportionate, “the trial court’s departure is necessarily not justified by a substantial and compelling reason.” *Id.*

In reviewing a departure from the guidelines range, whether a particular factor exists is a factual determination subject to review for clear error. *Id.* at 264-265. Whether a factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* Whether a factor constitutes a substantial and compelling reason for departure is reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs when the sentence imposed falls outside the permissible principled range of outcomes. *Id.* at 269.

Here, the trial court articulated on the record its reasons for departing from the legislative sentencing guidelines range. Specifically, the trial court stated that defendant callously shot his mother in cold blood while she was begging him not to shoot. Prior relationships between the victim and the offender is a factor that is not contemplated by the guidelines. *People v Moorner*, 246 Mich App 680, 684; 635 NW2d 47 (2001). “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.” *Id.* at 685, quoting *People v Milbourn*, 435 Mich 630, 660-661; 461 NW2d 1 (1990) (emphasis in original). Therefore, it was proper for a trial court to consider the relationship as a factor in determining the appropriate sentence for a

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<sup>3</sup> The trial court stated, “I don’t believe in this case that the guidelines reflect the gravity of the offense. I don’t believe that the Court is in anyway [sic] bound to follow guidelines on [the] case that I’ve heard.”

defendant. We agree with the trial court that, considering the facts and circumstances of this case, the parent/child relationship constitutes an aggravating factor that supports an upward departure from the sentencing guidelines. The trial court explained that these circumstances showed that defendant was a dangerous person who would kill anybody. Defendant lied under oath and showed a complete lack of remorse over the murder of his mother. The trial court properly considered this objective and verifiable factor and did not abuse its discretion in determining that this factor was a substantial and compelling reason for departing from the guidelines.

We also conclude that the sentence imposed by the trial court is proportionate to the seriousness of defendant's conduct and criminal history. Although defendant's prior criminal history is not extensive,<sup>4</sup> he repeatedly lied under oath, took no responsibility for the murder, and showed no remorse for killing his mother. The offense in this case was particularly heinous. Defendant shot and killed his own mother while she begged him not to shoot, and his reason for shooting her was that he was tired of arguing and being "pushed" by her. Taking into account the offender and the seriousness of this offense, we conclude that a sentence of life imprisonment was within the permissible principled range of outcomes. *Babcock, supra* at 269.

Affirmed.

/s/ Janet T. Neff  
/s/ Michael R. Smolenski  
/s/ Brian K. Zahra

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<sup>4</sup> At the time of sentencing, defendant was fifty-nine years old, and his criminal history consisted only of a single misdemeanor conviction from 1965. Defendant also points to the fact that he was retired from a job where he had been gainfully employed for thirty years.