

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN MICHAEL MAY,

Defendant-Appellant.

UNPUBLISHED

August 9, 2005

No. 252606

Oscoda Circuit Court

LC No. 02-000752-FH

Before: Cooper, P.J., and Fort Hood and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant Kevin Michael May appeals by delayed leave granted his sentence of forty-two to 180 months imposed on a plea-based conviction of second-degree home invasion, MCL 750.110a(3). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first challenges the trial court's upward departure from the minimum sentencing guidelines range. A sentencing court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted.¹ The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for the departure."² These reasons must be objective and verifiable and keenly or irresistibly grab the court's attention.³ The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines, or where factors considered by the guidelines have been given inadequate or disproportionate weight.⁴ A departure is appropriate if these reasons "lead the trial court to believe that a sentence within the guidelines ranges is not proportionate to the seriousness of the defendant's conduct

¹ MCL 769.34(2).

² MCL 769.34(3); *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003).

³ *Babcock*, *supra* at 258.

⁴ MCL 769.34(3)(a), (b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

and to the seriousness of his criminal history”⁵ The trial court’s determination that objective and verifiable factors present a substantial and compelling reason to depart from the statutory minimum sentence is reviewed for an abuse of discretion, which “occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.”⁶

In departing upward, the trial court relied on the wanton and malicious damage done to the complainant’s property during the commission of this crime. A defendant may be assigned ten points for OV 16 when “wanton or malicious damage occurred beyond that necessary to commit the crime for which the offender is *not* charged and will *not* be charged.”⁷ Defendant was charged and convicted for the crime connected to this damage and, therefore, was only scored five points for this variable. However, due to the nature and extent of the damage done in this case, the trial court properly determined that this factor was given insufficient weight. Defendant and his coparticipants painted, broke, or damaged every item in the complainants’ home and painted racial epithets around the home.⁸ This damage was clearly severe enough to form a substantial and compelling reason for an upward departure.

We further agree with the trial court that the psychological impact of the offense was not adequately accounted for by the ten-point score assessed for OV 4.⁹ Apart from breaking into and completely destroying the home, defendant and his coparticipants painted messages threatening the complainants’ lives and causing extensive fear, mistrust, and insecurity, as attested to by the homeowner in her victim’s impact statement. Accordingly, we find that the trial court did not abuse its discretion in departing upwards from the guidelines.

Defendant also contends that the trial court erred by considering facts not previously found by a jury in scoring and departing from the sentencing guidelines range in violation of the United States Supreme Court’s recent decision in *Blakely v Washington*.¹⁰ However, a majority of the Michigan Supreme Court recently decided that *Blakely* does not apply to Michigan’s indeterminate sentencing guidelines in which the maximum sentence is set by law.¹¹

Furthermore, we find no merit to the issues raised in defendant’s Standard 11 brief, most of which have not been properly preserved or presented for appeal. Defendant first appears to contend that the trial court erroneously found that he engaged in conduct designed to

⁵ *Babcock, supra* at 264.

⁶ *Id.* at 269.

⁷ MCL 777.46(1)(a) (emphasis added).

⁸ Defendant and his coparticipants broke all the furniture, painted ceiling fans, painted family pictures, destroyed clothes, spray painted dishes, and even painted the children’s dolls and toys.

⁹ MCL 777.34(1)(a).

¹⁰ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

¹¹ *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) (Justices Cavanagh, Weaver and Young concurred with Justices Taylor and Markman, writing for the Court, that *Blakely* is inapplicable in Michigan).

substantially increase the fear and anxiety suffered by the victim during the offense. However, this language appears only in OV 7,¹² a variable for which he was assessed no points. Defendant also challenges the trial court's consideration of a victim impact statement in imposing his sentence. However, a victim of a crime has the right to make a written statement to be used in the preparation of the presentence investigation report,¹³ and the actual statement must be included in the report upon the victim's request.¹⁴ Defendant also asserts that the trial court improperly commented on a coparticipant's sentence. However, the record shows that the trial court did not consider the coparticipant's sentence in actually determining defendant's sentence. Finally, we reject defendant's contention that the trial court failed to state any reason for its upward departure. As our previous analysis indicates, this contention is completely without merit.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs

¹² MCL 777.37(1)(a).

¹³ MCL 780.763(1)(c).

¹⁴ MCL 780.764. See also MCL 771.14(2)(b).