

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ANDREWS,

Defendant-Appellant.

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UNPUBLISHED

November 15, 2005

No. 255214

Wayne Circuit Court

LC No. 03-004418

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence of ten to twenty years in prison imposed on his plea-based conviction of first-degree home invasion, MCL 750.110(a)(2). We vacate defendant's sentence and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The sentencing guidelines range established a minimum term range of fifteen to twenty-five months. Defendant's minimum term of ten years, exceeded the maximum minimum by seven years, eleven months. The trial court departed because a deputy testified that on the day of sentencing he observed defendant draw "his index finger from one side—the left side of his throat to the right side of his throat" when he looked back at "his family" or "everyone in the gallery". Complainant was in the front row of the gallery. The deputy could not say whether defendant was looking at complainant when he made this gesture. The trial court concluded that this gesture was directed at complainant, and that it was "an attempt to intimidate and threaten and retaliate."

Defendant argues that the trial court's finding that defendant intended to threaten the victim is not verifiable, and the prosecution offers no argument contrary to defendant's point. Factors meriting departure must, among other requirements, be objective and verifiable. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). To be objective and verifiable, the factors must be 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). Whether a factor is objective and verifiable is reviewed as a matter of law. *Babcock*, *supra* at 264. That defendant made a slashing motion with his finger was objective and verifiable. However, that it was intended to intimidate complainant was a subjective determination made by the trial court. The intent of the gesture was not capable of being confirmed, and therefore was not a proper basis for departure.

Our review of the transcript, however, reveals that the trial court stated another reason for its departure – defendant’s criminal history of four felony convictions. In *Babcock* our Supreme Court indicated that we can affirm a trial court’s departure if we conclude that at least one factor was substantial and compelling, and we can discern from the record that the trial court would have imposed the same sentence had it known of the more limited substantial and compelling factors. *Babcock, supra* at 260. In this case we cannot make that determination from the available record. We recognize that the trial court was much more familiar with this defendant and the circumstances occurring in this case, *Babcock, supra* at 268-269, and that the trial court was firm in rendering this sentence. But, because the trial court focused much more on the threat than the prior record, we cannot conclude that the trial court would have imposed the same departure on the basis of defendant’s record alone.

The sentence is vacated, and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Hilda R. Gage

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray