

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUPE KLICH,

Defendant-Appellant.

UNPUBLISHED

November 22, 2005

No. 255745

Saginaw Circuit Court

LC No. 02-022374-FC

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant pleaded guilty to assault with intent to commit great bodily harm less than murder, MCL 750.84, firearm discharge from a motor vehicle, MCL 750.234a, carrying a dangerous weapon with unlawful intent, MCL 750.226, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of seventy-eight months to ten years for assault with intent to do great bodily harm less than murder, one to four years for firearm discharge, and one to five years for carrying a weapon with dangerous intent. Defendant also received a consecutive two-year sentence for felony–firearm. He appeals his sentences as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

These convictions arose from defendant’s participation in a drive-by shooting. Defendant was a front passenger in a car occupied by four men. The car approached the home of James Earl McCray. Defendant, who possessed a sawed-off-shotgun, shot at McCray three times. Another man shot at McCray once. McCray was wounded in the back, right arm, and ankles.

First, defendant challenges the scoring of ten points for Offense Variable (OV) 13. We review the scoring of a sentencing guidelines variable for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). A scoring decision is not clearly erroneous if any evidence in the record supports it. *Id.*

MCL 777.43 provides in pertinent part:

(1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(d) The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group..... 10 points

* * *

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

(b) The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense.

(c) Except for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 [criminal sexual penetrations] or 12 [contemporaneous criminal acts].

Here, the facts allowed the trial court to reasonably infer that defendant and the other men acted in concert as an organized criminal group to effectuate a "gang drive-by-shooting." In his statement, attached to the presentence investigation report (PSIR), defendant admitted that he and the others decided to take revenge on members of a gang from "the south side" because they killed his friend. This previous killing allegedly occurred while the rival gang members were trying to kill defendant and another man who had stolen guns from someone from the south side gang. Various members of this rival gang, named in defendant's statement, were the intended victims. McCray was an innocent bystander. The trial court's decision that the offenses were gang-related is supported by this statement, as well as by other portions of the PSIR. Because the contemporaneous offenses were gang-related, and not scored under OV 12, MCL 777.42, which addresses contemporaneous felonious criminal acts, the trial court did not err in including them in OV 13 to find that they were part of a "pattern of felonious criminal activity directly related to membership in an organized criminal group." MCL 777.43(1)(d). The plain language of MCL 777.43(2)(a) indicates that the court must include contemporaneous crimes. See *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). We conclude that the trial court's scoring decision was not clearly erroneous. *Hicks, supra* at 522.

Next, defendant argues that he must be resentenced because the trial court's findings regarding the gang-related nature of the shooting used to support his sentence were not determined by the factfinder, nor did he plead guilty to those facts, as mandated by *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely, supra*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has stated that the holding in *Blakely, supra*, does not

apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).¹ Defendant is not entitled to resentencing on this basis.

Finally, defendant argues that the trial court erred when it exceeded the sentencing guidelines in imposing sentence for assault with intent to do great bodily harm less than murder. As scored, the guidelines for this offense indicated an appropriate minimum sentence range of twenty-nine to fifty-seven months. Defendant's minimum sentence of seventy-eight months represents an upward departure. He maintains that the trial court's reasons for departing from the guidelines were improperly based on factors already taken into account in the scoring variables.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the amount of the departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In ascertaining whether the departure was proper, we must defer to the trial court's knowledge of the facts and familiarity with the offender. *Babcock*, *supra* at 270.

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from a sentencing guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth in deciding the length of sentence. *Babcock*, *supra* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind, and must be capable of being confirmed. *Abramski*, *supra* at 74. In addition, we must review a departure from the guidelines range to determine whether the sentence imposed is proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock*, *supra* at 262 n 20, 264. If a trial court articulates multiple reasons for a departure, and we determine that some of the reasons are invalid, we must determine whether the trial court would have departed, and if so to the same degree, on the basis of the valid reasons alone. *Id.* at 260-261, 273.

Here, the trial court found that various factors justified a departure from the guidelines. The trial court found that the guidelines did not adequately reflect: (1) the severity of defendant's prior offenses; (2) the number of potential victims in close proximity and the severe danger presented by the use of a sawed-off-shotgun; (3) the fact that the crime was an act of

¹ Our Supreme Court granted leave to appeal this Court's decision in *People v Drohan*, 264 Mich App 77; 689 NW2d 750 (2004); "limited to the issue whether *Blakely*[], *supra*], and *United States v Booker*, 543 US ___, 125 S Ct 738; 160 L Ed 2d 621 (2005), apply to Michigan's sentencing scheme." 472 Mich 881; 693 NW2d 823 (2005). However, at present, *Claypool*, *supra*, is controlling.

revenge by defendant's own admission; (4) the danger and cost to the public from gang-style shootings and the need for deterrence, and (5) the fact that defendant was excused from a life offense.

Of the reasons given by the trial court, a number were already factored into other variables. The severity of defendant's prior juvenile offenses was considered in Prior Record Variables 4 and 5. See MCL 777.54; MCL 777.55. The use of a short-barreled shotgun was considered in under OV 2. See MCL 777.32. In addition, the need for deterrence and the protection of society are not objective and verifiable reasons for departure. *People v Babcock (On Remand)*, 258 Mich App 679, 681; 672 NW2d 533 (2003). Likewise, the fact that defendant's plea resulted in a dismissal of a more serious charge, while objective, is not particularly unusual. Therefore, these reasons do not rise to the level of substantial and compelling reasons for departing from the sentencing guidelines.

In contrast, the escalating and cyclical nature of this offense as a drive-by shooting motivated by revenge for a previous shooting, in addition to the fact that the shooting was executed with utter disregard for the number of persons placed in harm, are not adequately reflected by the offense variables.² Furthermore, these circumstances are objective and verifiable reasons that "keenly" and "irresistibly" grab one's attention and are particularly relevant to deciding the length of sentence. *Babcock, supra* at 257-258. Therefore, these two factors constitute substantial and compelling reasons to depart from the guidelines.

Although we have determined that some of the trial court's reasons for exceeding the guidelines were invalid, we need not remand for resentencing if, on the record before us, we are able to conclude that the trial court would deviate from the sentencing guidelines to the same degree on the basis of the valid reasons alone. *Babcock, supra* at 260-261, 273. At the sentencing hearing, the trial court made it abundantly clear that it considered defendant's offenses to be particularly dangerous to society and, therefore, determined that it warranted a tougher sentence. Indeed, the trial court actually stated that it wanted to give defendant the longest minimum sentence permitted by law. Consequently, on this record we conclude that the trial court would depart from the guidelines to the same extent based on the substantial and compelling reasons alone. Therefore, a remand is unnecessary. *Id.*

Affirmed.

/s/ Michael R. Smolenski

/s/ Bill Schuette

/s/ Stephen L. Borrello

² While OV 9, see MCL 777.39, considers the number of potential victims, it does not directly address the fact that defendant's shooting deliberately and callously placed those potential victims at a high risk of death or severe bodily harm.