

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARLA SUE LOCKMAN,

Defendant-Appellant.

UNPUBLISHED

January 15, 2008

No. 273330

Charlevoix Circuit Court

LC No. 05-005010-FH

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

PER CURIAM.

Defendant was convicted by a jury of two counts of embezzlement, MCL 750.174(5)(a). Defendant was sentenced by the trial court to concurrent sentences of 5 to 10 years' imprisonment, an upward departure from the sentencing guidelines. Defendant appeals her sentences. We affirm.

Defendant was charged with two counts of embezzling funds in excess of \$20,000 from Northern Preferred Title Company, where she was employed as a closing agent. Between January and May 2005, defendant took at least \$859,278.25 of funds belonging to the title company. Defendant did not dispute that she took the money, but rather she asserted an insanity defense. Several mental health professionals and family members provided conflicting testimony regarding defendant's mental state. The jury nevertheless convicted defendant, and her convictions are not at issue in this appeal. The recommended sentencing guideline range was 0 to 17 months. In support of its upward departure from this range, the trial court reasoned, in part, as follows:

The embezzlement of at least \$859,278.25 keenly attracts and irresistibly holds this Court's attention. This is an exceptional case.

The amount involved is not given sufficient weight in the guidelines and is reason, in and of itself, to merit an upward departure.

Further, the guidelines do not consider the widespread path of destruction that these crimes have had on so many people.

Defendant's first argues that the trial court violated her Sixth Amendment¹ right to a jury trial when it departed from the sentencing guidelines on the basis of judicial fact-finding. Defendant raised the same argument in a prior motion to remand filed in this Court. *People v Lockman*, unpublished order of the Court of Appeals, entered August 16, 2007 (Docket No. 273330). Both the prior motion and the issue now on appeal are predicated on *People v Uphaus*, 275 Mich App 158; 737 NW2d 519 (2007), rev'd in part, lv den in part, remanded in part ___ Mich ___ (2007). See *People v Harper*, 479 Mich 599; 739 NW2d 523 (2007). This Court denied the prior motion because our Supreme Court overruled the portion of *Uphaus* on which defendant relies. For the same reason, we reject this argument now on appeal.

Next, defendant argues that the trial court abused its discretion in finding that the amount of money taken by defendant and the injury caused to the victims in this case were substantial and compelling reasons for an upward departure from the sentencing guidelines. We review for clear error the lower court's factual determination of the existence of a particular factor supporting the departure. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). The determination that the factor is objective and verifiable is reviewed de novo 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. *Id.* at 265-266. An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id.* at 269. In ascertaining whether the departure was proper, we must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

A trial court may depart from the sentencing guidelines range if it has a "substantial and compelling reason" to do so, and it "states on the record the reasons for the departure." MCL 769.34(3). Our Supreme Court has stated that "a substantial and compelling reason must be . . . 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." *Babcock*, *supra* at 258 (internal quotations omitted). To be objective and verifiable, the factors "must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Further, the trial court cannot depart from the sentencing guidelines based on a factor or characteristic that was previously taken into consideration in the calculation of the sentencing range unless it has determined that it "has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

Defendant argues that at the time of her sentencing, offense variable (OV) 9, MCL 777.39 (number of victims), could only be scored when the victims were placed in danger of physical injury. Therefore, defendant contends that the trial court erred in considering victims whose only loss was financial. We disagree.

Defendant correctly states that at the time of her sentencing, OV 9 could not – and indeed was not – scored. On July 20, 2006, in *People v Melton*, 271 Mich App 590; 722 NW2d 698 (2006), this Court concluded "that a plain reading of MCL 777.39 requires OV 9 to be scored

¹ US Const, AM VI.

only when there is a danger of physical injury.” *Id.* at 592. Defendant’s sentencing information report (SIR) is dated September 22, 2006. The Legislature has since amended MCL 777.39 to include as victims “each person who was placed in danger of physical injury or loss of life or property as a victim.” 2006 PA 548, effective March 30, 2007. Thus, when defendant’s SIR was scored, OV 9 could not be scored where victims were not placed in danger of physical injury.

However, that fact merely reinforces the trial court’s conclusion that the guidelines did not adequately account for the circumstances of this crime. Defendant’s employer, which went bankrupt because of defendant’s actions, and defendant’s coworkers, whose lives have been significantly disrupted because of defendant’s actions, would be “victims” by a lay definition of persons who “suffer[ed] from a destructive or injurious action” or who were “deceived or cheated” by defendant. *Random House Webster’s College Dictionary* (1997). Because the sentencing guidelines applicable did not contemplate the existence, let alone nature and extent of damage done to the victims of defendant’s crime, the trial court did not err in considering them as independent reasons on which to base its decision to depart.²

Defendant also argues that the amount of money involved is already taken into account by the sentencing guidelines in scoring OV 16, MCL 777.46. Both the *Melton* majority and dissent concluded that OV 16 “measures the aggregate amount of property damage, rather than the number of victims who sustained property damage.” *Melton, supra* at 596; accord *id.* at 602 (Murray, J., dissenting). Defendant received a score of 10 points on OV 16 (SIR), which is provided for when the property in issue “had a value of more than \$20,000.00.” MCL 777.46(1)(b). However, an upward departure may nevertheless be proper where the amount of money taken greatly exceeded the statutory minimum for the offense. *People v Cain*, 238 Mich App 95, 129-132; 605 NW2d 28 (1999). In *Cain*, the defendant took \$250,000, which was more than 40 times the statutory minimum of \$5,000 for which she was convicted. Here, defendant took at least \$859,278.25 in total, and the statutory minimum for her charged offense was \$20,000. Although the fact that she converted more than the statutory minimum was taken into account, the trial court correctly reasoned that the guidelines did not account for the enormity of the conversion. Moreover, OV 16 does not account for the loss of defendant’s coworkers’ livelihoods, health insurance, and physical and emotional well-being.

In sum, the trial court did not err in finding that the suffering experienced by those affected by defendant’s crimes and the amount of money embezzled constituted substantial and compelling reasons to upwardly depart from the sentencing guidelines.

Finally, defendant argues that her sentence was disproportionate to her conduct and criminal history. Again, we disagree. When departing from the guidelines range, the trial court must sentence a defendant to a term that is proportionate to the seriousness of the defendant’s conduct and her criminal history. *Babcock, supra* at 262.

² After reviewing the record, we see no clear error in the court’s factual conclusions on this matter.

The record establishes that defendant embezzled at least \$859,278.25 from her employer, bankrupting an otherwise financially stable title company and robbing many people of their livelihoods. Defendant's conduct also resulted in the severe physical and emotional suffering of her former coworkers, some of whom were also her friends, and resulted in the substantial personal financial liability of the company's founders. Moreover, although there was evidence in the record that defendant suffered from a mental illness at the time of the offense, there was conflicting testimony as to the nature and extent of her impairment. In any event, a jury of her peers concluded that defendant's illness did not relieve her of criminal culpability for her crimes. Accordingly, we conclude that the sentence imposed is proportionate to this defendant and these circumstances.

Affirmed.

/s/ Alton T. Davis

/s/ William B. Murphy

/s/ Helene N. White