

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD JAMES FARRELL,

Defendant-Appellant.

UNPUBLISHED
February 26, 2008

No. 273907
Oakland Circuit Court
LC No. 2006-206284-FH

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of manslaughter with a motor vehicle, MCL 750.321. The trial court sentenced him, as a second habitual offender, MCL 769.10, to 7 to 22 ½ years' imprisonment. Defendant appeals as of right. We affirm defendant's conviction, but remand for re-sentencing.

I. Basic Facts and Procedure

At around 6:45 a.m. on December 7, 2005, defendant was driving south in a full-size pickup truck on Evergreen Road in Southfield. For about 25 years, he had regularly driven this route to work. On that portion of the road there are two southbound lanes, a center turn lane, and one northbound lane. Also, there are a number of residential homes, and defendant was aware that school buses frequent the area to pick up children. He was driving in the eastern southbound lane, traveling at a distance behind a school bus.

Defendant had noticed a school bus and recalled that it had already made one stop. The school bus was in the western southbound lane, with its yellow warning lights activated, indicating that it would soon be stopping. Defendant claimed that the car in front of him stopped abruptly, and he was unable to stop. He maintained that, in order to avoid colliding with the car in front of him, he moved into the center turn lane. At this time, Tiara Fisher, a 15-year-old girl, was walking in the center turn lane while crossing the street to catch the bus. Defendant struck and killed Fisher.

Although the posted speed limit was 35 miles an hour, the crash data recorder or "black box" from defendant's truck revealed that he was driving 58 miles an hour and accelerating when he struck Fisher. Defendant, however, claimed that he was only driving at a rate of 40 miles an hour. Jurien Phillips, Carolyn Cleveland, and Antonio Record, eyewitnesses to the

collision, agreed that defendant was driving at a speed of 50 miles an hour or more. The black box also revealed that defendant did not apply his brakes before the impact. Cleveland, Record, and Everett Cole, another eyewitness, agreed that defendant had not applied the brakes before striking Fisher, and defendant admitted that he had not braked. According to Timothy Brown, an accident reconstruction specialist with the Michigan State Police, Fisher's body traveled 138 feet after the impact.

A jury convicted defendant of manslaughter with a motor vehicle. On March 9, 2007, defendant moved for a new trial, *Ginther*¹ hearing, and resentencing. In relevant part, defendant asserted that offense variable (OV) 6 and OV 19 were incorrectly scored. Defendant also requested a correction of the judgment of sentence because it stated that he was convicted as a third habitual offender rather than a second habitual offender. The prosecution responded, contending that OV 6 and OV 19 were correctly scored. The prosecution also asserted that the amended judgment of sentence correctly reflected defendant's status as a second habitual offender. After a hearing, the trial court denied his motion for resentencing.

II. Scoring of Offense Variables

Defendant argues that the trial court abused its discretion in scoring OV 6 and OV 19. We disagree. We review a trial court's scoring decision for an abuse of discretion to determine whether the evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004).

A. OV 6

The trial court assigned 25 points for OV 6, which reflects that defendant "had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." MCL 777.36(1)(b). Defendant challenges this score, arguing that he acted without malice. This argument is misplaced. Malice does not require a specific intent to harm or kill. As our Supreme Court has stated with respect to the mens rea for second-degree murder, "malice may be established even absent an actual intent to cause a particular result if there is wanton and wilful disregard of the likelihood that the natural tendency of a defendant's behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 466; 579 NW2d 868 (1998). Further, MCL 777.36(1)(b) specifically states that 25 points are appropriate if the defendant's conduct "created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result."

Defendant was driving 23 miles an hour above the speed limit in an area where many residences were located, he was aware that school buses frequently stopped on that portion of the road, and he knew the bus had already stopped once. Defendant saw the yellow warning lights

¹ *People v Ginther*, 390 Mich 436, 441, 442; 212 NW2d 922 (1973).

on the school bus and failed to slow down, even though he knew that the warning lights meant that the bus was about to stop and children were in the immediate vicinity. Defendant moved into the center turn lane, which was prohibited, and accelerated his vehicle, exhibiting an intent to pass another vehicle that had stopped for the school bus. Defendant never applied his brakes. Therefore, there was evidence to support the trial court's conclusion that defendant "created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." MCL 777.36(1)(b). Accordingly, the trial court did not abuse its discretion in assessing 25 points for this variable.

B. OV 19

Defendant received ten points for OV 19, which reflects that he "otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Defendant challenges this score, asserting that he cooperated with the police in every way and he merely described himself to the police in a positive light, thereby minimizing, rather than denying, his culpability. Defendant told one police officer that he estimated his speed at 40 miles an hour. In his December 7, 2005, statement to the police, defendant claimed that he had applied his brakes and was insured at the time of the collision. However, the black box and eyewitness testimony directly contradict defendant's statements that he was only traveling 40 miles an hour and had applied the brakes. Further, defendant did not have insurance because he could not afford it.

The phrase "interfered with or attempted to interfere with the administration of justice," as used in OV 19, is not limited to conduct performed during the actual judicial process; rather, it includes providing false information to police who are investigating a crime. *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004); *People v Endres (On Remand)*, 269 Mich App 414, 421; 711 NW2d 398 (2006). Here, defendant provided three false statements to police. Therefore, the trial court did not abuse its discretion in assigning ten points for OV 19.

III. Upward Departure

Defendant argues that the trial court abused its discretion in sentencing him to 7 to 22½ years' imprisonment for his manslaughter with a motor vehicle conviction, which constitutes a departure from the sentencing guidelines minimum sentence range of 29 to 71 months. Whether a particular sentencing factor exists is a factual determination for the sentencing court to determine, and it will be reviewed for clear error. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). Whether a particular sentencing factor is objective and verifiable will be reviewed de novo. *Id.* at 77-78. Whether the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence will be reviewed for an abuse of discretion. *Id.* at 78. An abuse of discretion occurs when the sentencing court chooses an outcome that falls outside the permissible principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A trial court must impose a minimum sentence within the sentencing guidelines range unless there are substantial and compelling reasons for a departure and the court states those reasons on the record. *People v Lowery*, 258 Mich App 167, 169-170; 673 NW2d 107 (2003); MCL 769.34(3). To be "substantial and compelling," a reason must be both objective and verifiable. *Babcock, supra* at 257-258. Additionally, it must be a reason that "keenly" or "irresistibly" grabs a court's attention and is of "considerable worth" in deciding the length of a sentence. *Id.* at 258. A trial court may not base its departure on an offense characteristic that

was already taken into account in calculating the appropriate sentence range unless it finds that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b).

The trial court articulated the following reasons for its departure: defendant's speed, his failure to brake, his familiarity with the route and his awareness of the presence of children and school buses, and the number of persons, including children, who witnessed Fisher's death. After the trial court identified these reasons, it stated the sentence it was imposing, and discussed restitution, the crime victim's rights service fee, and the DNA testing requirement. The prosecutor asked a question to verify the sentence and another to verify restitution, and the following discussion occurred:

TRIAL COURT: And I believe I've articulated on the record the necessary basis upon which I've gone above the guidelines.

PROSECUTOR: Does that include the Defendant's driving record—

TRIAL COURT: Yes.

PROSECUTOR: —and criminal past? Thank you.

Defendant claims that the trial court improperly relied on his criminal record and driving record in exceeding the minimum sentencing guidelines range. However, defendant's prior record variable score was zero, which demonstrates that his criminal record was not taken into account in the scoring of his prior record variables, MCL 777.50. Further, the trial court had already listed its reasons for the departure and imposed the sentence before the prosecutor asked these questions, and it interrupted and answered the prosecutor's question before he asked about defendant's criminal past. Moreover, the trial court had previously stated that it would not consider defendant's criminal record because it was "a long time ago" and he had rehabilitated himself and "recovered from that." Therefore, it is clear that the trial court did not actually base its decision to depart on defendant's criminal record.

To the extent that the trial court may have based its departure in part on defendant's driving record, we are not persuaded by defendant's argument that it was taken into account in the scoring of OV 6. Defendant's score for OV 6 reflects that he "had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." As discussed above, OV 6 took into consideration the circumstances of the collision that together provided an indication of defendant's creation of a very high risk of death or great bodily harm. OV 6 makes no mention of a defendant's past conduct, and there is no indication that defendant's driving record was contemplated in scoring OV 6. According to the presentence investigation report, defendant had been involved in nine accidents, had six speeding tickets, and had five or six other technical violations. Defendant's driving record "keenly" or "irresistibly" grabs our attention and is of "considerable worth" in deciding the length of a sentence because it is so extensive. *Babcock, supra* at 258. A driving record is external to the minds of judges and capable of being confirmed. Accordingly, to the extent that the trial court may have relied on defendant's driving record, it was objective and verifiable and was not taken into account in scoring the variables. MCL 769.34(3)(b); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

As mentioned, the trial court stated that the number of persons, including children, who witnessed Fisher's death constituted a reason to upwardly depart from the sentencing guidelines range. Defendant asserts that the trial court erred because OV 5 and OV 9 already took this fact into consideration. Defendant was assessed 15 points for OV 5, which indicates that the victim's family members sustained a psychological injury. MCL 777.35(1)(a). Defendant's argument regarding OV 5 is misplaced because the trial court never stated that it was relying on Fisher's parents witnessing her death; rather, it stated that it was basing the departure in part on the number of persons, including Fisher's friends who were children, who watched her die. The trial court assigned defendant ten points for OV 9, which reflects the fact that between two and nine persons were placed in danger of injury or loss of life as a victim. MCL 777.39(1)(c), (2)(a). Defendant's argument regarding OV 9 is similarly misplaced. This variable does not take into account the number of witnesses to Fisher's death and that so many of the witnesses were children; rather, it takes into account the number of other people who were placed in danger.

Defendant argues that the trial court improperly relied on his speed, failure to brake, and familiarity with the route because these factors supported the scoring of OV 6. MCL 769.34(3)(b) provides:

The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

As mentioned, OV 6 reflects that defendant "had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." MCL 777.36(1)(b). Here, defendant's speed, failure to brake, and familiarity with the route plainly implicate whether defendant "created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." The trial court did not indicate that these aspects of defendant's conduct had been given inadequate or disproportionate weight. Indeed, at the motion for resentencing, in response to defendant's challenge of OV 6, the trial court justified its scoring of OV 6 relying on many of the same facts that justified its upward departure. Because it is not evident that it would have departed to the same degree solely on the basis of the other reasons, we must remand the case to the trial court for resentencing or rearticulation of the reasons for the departure. *Babcock, supra* at 271.

We affirm defendant's conviction, but remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Brian K. Zahra