STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

      Plaintiff-Appellee,

v

MICHAEL JAMES MILLER,

      Defendant-Appellant.

UNPUBLISHED
December 4, 2008

No. 279545
Wayne Circuit Court
LC No. 07-006677-01

Before: Gleicher, P.J., and Kelly and Murray, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of sentence entered by the trial court following his jury trial convictions of unarmed robbery, MCL 750.530, assault with intent to commit criminal sexual conduct (CSC) involving penetration, MCL 750.520g(1), possession of another's financial transaction device with intent to use, deliver, circulate, or sell, MCL 750.157p, and stealing or retaining a financial transaction device, MCL 750.157n(1). Defendant was sentenced concurrently to 57 to 180 months for the unarmed robbery, 60 to 120 months for the assault with intent to commit CSC involving penetration, 24 to 48 months for the possession of another's financial transaction device with intent to use, deliver, circulate, or sell, and 24 to 48 months for stealing or retaining a financial transaction device. We remand for resentencing and for correction, if necessary, of defendant's presentence investigation report (PSIR).

Defendant argues that the trial court erred when it failed to state any reasons on the record justifying its decision to depart from the sentencing guidelines range.[1] We agree. This Court reviews the trial court's decision to depart from the sentencing guidelines for an abuse of discretion. *People v Buehler*, 477 Mich 18, 23-24; 727 NW2d 127 (2007). A trial court may depart from the sentencing guidelines if it "has a substantial and compelling reason for that

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[1] Defendant also argues that trial court erroneously departed from the proposed guidelines that defense counsel recommended, as agreed upon by the parties, which diverged from the Department of Corrections' recommendation. Defendant cites no authority indicating that a trial court must adhere to alternative guidelines agreed upon by the parties and proposed to the court. Accordingly, we consider this portion of defendant's argument abandoned. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

departure and states on the record the reasons for departure." *Id.* at 24 (quotation marks and citation omitted); MCL 769.34(3).

The Department of Corrections determined defendant's minimum sentence range to be 29 to 57 months.[2] However, the trial court sentenced defendant to a minimum of 60 months for his CSC conviction. This minimum sentence of 60 months exceeds the maximum minimum sentence of 57 months by three months. The trial court did not state any reasons for this upward departure. Failure to state any substantial and compelling reasons invalidates a sentence that departs from the minimum guidelines range. *Buehler*, *supra* at 28. Accordingly, the trial court abused its discretion when it failed to articulate reasons for its departure on the record and remand for resentencing is appropriate. MCL 769.34(11).

Defendant next contends that the trial court erred when it failed to address defendant's claims of factual inaccuracies in his PSIR. We agree that the court failed to address these issues, but this error does not require resentencing. This Court reviews a sentencing court's response to a claim of inaccuracy in a PSIR for an abuse of discretion. *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008). If a defendant challenges the accuracy of information included in a PSIR, the sentencing court is required to respond. *Id.* at 182. "The court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information." *Id.* (quotation marks and citation omitted). If the court disregards the information it must clearly indicate that it did not consider the information in determining the sentence. *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003).

At sentencing, defendant objected to the statements that he used cocaine and that he had only attended one year of college, maintaining that the information should be corrected to reflect that he does not use cocaine and has completed three and one-half years of college. The trial court made no response to defendant's objections and it did not indicate that it did not consider the contested information in its sentencing decision. It is not necessary to remand for resentencing where, as here, there is no evidence that the trial court relied upon the controverted information. *Id*. at 650. However, because defendant is otherwise entitled to resentencing, we also direct the trial court to address on remand defendant's objections and to correct the PSIR as necessary.

Finally, defendant argues that Michigan's sentencing scheme violates *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. Defendant correctly notes that *Blakely* prohibits judicial fact-finding that increases an offender's maximum penalty beyond the statutory maximum. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007). Our Supreme Court has determined, however, that under Michigan's indeterminate sentencing scheme, a sentencing court "does not violate *Blakely* by engaging in fact-finding to determine the minimum term of a defendant's indeterminate sentence unless the fact-finding

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[2] For sentencing on multiple concurrent convictions, as is the case here, only the highest class crime is used to compute the minimum sentence range. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Accordingly, defendant's unarmed robbery conviction was used to determine the minimum sentence range of 29 to 57 months.

increases the statutory maximum sentence to which defendant had a legal right." *Id.* at 682. Here, the trial court did not engage in fact-finding that increased the statutory maximum of defendant's sentence. Therefore, there is no *Blakely* violation.

We remand for resentencing and for correction, if necessary, of defendant's PSIR. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray