

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN CHARLES MEAD,

Defendant-Appellant.

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UNPUBLISHED

December 23, 2008

No. 280638

Kent Circuit Court

LC No. 06-012930-FH

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial conviction of operating a motor vehicle while intoxicated (OWI), third offense, MCL 257.625. He was sentenced to 16 months to 5 years' imprisonment. We affirm.

Defendant first argues that the trial court abused its discretion in excluding his expert witness. At a separate hearing, defendant's expert opined that defendant suffered from a frozen pyloric valve in his stomach, which essentially allowed the alcohol to remain in his stomach for an unusual amount of time before finally releasing it into the small intestine. The expert opined that, when defendant was actually driving, his blood alcohol concentration was "nearly zero," although his blood test registered a blood alcohol concentration of .24.

The trial court did not abuse its discretion in preventing defendant's expert from testifying. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). Despite direct evidence to the contrary, the expert adamantly opined that defendant's driving was not erratic, and that defendant did not have blood shot eyes, slurred speech, problems with balance, or difficulty following directions. The expert believed that defendant suffered from a frozen pyloric valve partly because defendant had been taking Prilosec, which indicated the presence of a gastro-intestinal problem. However, no evidence was presented that defendant suffered from a medical condition. The expert's testimony was properly excluded because it was based on assumptions that did not comport with the record and was derived from unreliable data. *People v Dobek*, 274 Mich App 58, 94; 732 NW2d 546 (2007). The expert also improperly commented on the credibility of other witnesses. *Id.* at 71. The testimony would not have been helpful to the jury, and the trial court did not abuse its discretion in excluding it. MRE 702; *People v Peterson*, 450 Mich 349, 362; 537 NW2d 857 (1995); *Dobek*, *supra* at 93-94.

Defendant next challenges the trial court's upward departure from the sentencing guidelines. 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 departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). To merit departure from the guidelines range, a factor must be "objective and verifiable" and should "keenly or irresistibly grab the court's attention." *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008). To be objective and verifiable, the factors must be "actions or occurrences 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). The court may draw inferences about the defendant's behavior from the objective evidence. *People v Petri*, 279 Mich App 407, 422; \_\_\_ NW2d \_\_\_ (2008). While a trial court's belief that "a defendant is a danger to himself and others" is not in itself objective and verifiable, factors underlying a trial court's belief "such as repeated offenses and failures at rehabilitation" can "constitute an acceptable justification for an upward departure." *People v Horn*, 279 Mich App 31, 44-45; 755 NW2d 212 (2008).

We affirm the trial court's departure from the guidelines while sentencing defendant. As the trial court pointed out, the guidelines scoring failed to consider the nature of defendant's prior convictions, which all included driving while intoxicated or impaired. The trial court's observation that defendant had probably driven drunk on numerous other occasions without being caught was simply a logical conclusion based on defendant's own criminal history and behavior. Defendant's past history of driving while intoxicated, his failure to rehabilitate, and the likelihood of him doing so in the future were objective and verifiable reasons for the trial court to make the upward departure from the sentencing guidelines.

A departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Smith, supra* at 304-305. To be proportionate, the sentence must be more appropriate to the offense and the defendant than a sentence within the guidelines range would have been. *Id.* Had defendant been sentenced in accordance with the guidelines, he would have received a mere 90 days in jail, which did not reflect the seriousness of defendant's conduct and his criminal history. The imposed sentence of 16 months to 5 years' imprisonment was not disproportionate.

Affirmed.

/s/ Christopher M. Murray  
/s/ Jane E. Markey  
/s/ Kurtis T. Wilder