

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY RENO ALDERMAN, JR.,

Defendant-Appellant.

UNPUBLISHED

March 17, 2009

No. 281665

Wayne Circuit Court

LC No. 07-008913-FC

Before: Jansen, P.J., and Borrello and Stephens, JJ

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to five to ten years' imprisonment for the assault with intent to do great bodily harm conviction and two years' imprisonment for the felony-firearm conviction. He asks this court to vacate his sentence and re-sentence him. We vacate his sentence for assault with intent to do great bodily harm and remand for resentencing consistent with this opinion.

Defendant argues that the trial court erred in scoring Prior Record Variable (PRV) 4, Offense Variable (OV) 3, OV 12, and OV 14. Defendant contends that once these scoring errors are corrected, his guidelines will be 0 to 17 months, and he will fall into an intermediate sanction cell, precluding prison time. We disagree.

Defendant also challenges the trial court's upward departure from the sentencing guidelines, arguing that the court failed to provide objective and verifiable factors that constituted substantial and compelling reasons for a departure from the sentencing guidelines, or to otherwise justify this particular departure. We agree in part.

We affirm defendant's convictions, but vacate his sentence for assault with intent to do great bodily harm and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

I. Scoring of the Guidelines

This Court reviews a trial court's scoring decision "to determine whether the trial court properly exercised its discretion and whether the evidence of record adequately supported a

particular score.” *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). A trial court’s scoring decision “for which there is any evidence in support will be upheld.” *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Furthermore, this Court reviews “de novo as a question of law the interpretation of the statutory sentencing guidelines.” *Id.*

PRV 4 is scored for prior low severity juvenile adjudications. MCL 777.50. Defendant received five points because the trial court found he had two prior low severity juvenile adjudications of receiving and concealing stolen property and larceny from a motor vehicle pursuant to MCL 777.54(1)(d). Both of these adjudications constitute low severity juvenile adjudications and PRV 4 was properly scored.

OV 3 is scored for degree of physical injury to a victim. Defendant received 25 points because the trial court found that the victim sustained a life threatening injury pursuant to MCL 777.33(1)(c). Testimony showed that the victim sustained two gun shot wounds to his left thigh, and that he was taken to the hospital for treatment and released that night. The victim testified that he did not realize he had been shot until he had escaped from his apartment complex and crossed the street. There was no expert medical testimony. Despite the lack of additional evidence, it is reasonable to infer that multiple gunshot wounds to the leg constitutes a life threatening injury. Therefore, the trial court did not abuse its discretion in scoring OV 3.

OV 12 is scored for the number of contemporaneous felonious criminal acts. Defendant received five points because the trial court found that there was evidence defendant had committed two contemporaneous felonious acts pursuant to MCL 777.42(1)(e). The trial court found evidence of an armed robbery of the victim and that defendant was in possession of marijuana. The court also found that the evidence supported an alternative finding that defendant was in possession of marijuana and committed a breaking and entering with the intent to commit larceny. “A felonious criminal act is contemporaneous if the act occurred within 24 hours of the sentencing offense and the act has not and will not result in a separate conviction.” MCL 777.42(2)(a)(i), (ii). The testimony showed that defendant purchased marijuana from the victim earlier in the day and then returned armed and with an accomplice. Defendant and the other perpetrator proceeded to shoot at the victim, who escaped. The apartment was ransacked and the victim testified that he was missing \$300 in cash as well as marijuana. It is a reasonable inference for the trial court to find that defendant engaged in the armed robbery of the victim and that he was in possession of marijuana. Therefore, there the trial court did not err in its scoring of OV 12.

OV 14 is scored for the offender’s role in the crime. Defendant received ten points because the trial court found that there was evidence he was a leader in a multiple offender offense pursuant to MCL 777.44(1)(a). The entire criminal transaction should be considered when scoring this variable. MCL 777.44(2)(a). The evidence showed that defendant was a regular purchaser of marijuana from the victim and that he arrived at the victim’s apartment an hour and a half before the incident. When defendant came back, he arrived with the other perpetrator. It is reasonable to infer that defendant recruited an accomplice and returned to rob the victim. Therefore, the trial court did not err in scoring OV 14.

II. Reasons for the Departure from the Guidelines

When determining whether a trial court properly departed from the guidelines, this Court applies several different standards of review. First, the trial court's factual findings regarding the factors considered in the departure decision are reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Second, this Court reviews the determination of whether a factor is objective and verifiable de novo. *Id.* at 264. Finally this Court reviews the extent of the trial court's departure from the sentencing guidelines range, and whether the reason for the departure is substantial and compelling, for an abuse of discretion. *Id.* at 264-265. The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *Id.* at 269.

Under Michigan's legislative sentencing guidelines, a trial court may only depart from the sentencing guidelines if it has substantial and compelling reasons to do so and it states those reasons on the record. MCL 769.34(2); MCL 769.34(3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The court is not permitted to use a factor already considered in the offense variables or prior record variables unless the court finds that the characteristic has been given inadequate or disproportionate weight based on the facts of record. MCL 769.34(3)(b); *Abramski, supra* at 74. The trial court's reasons for departing from those guidelines must be objective and verifiable. *Id.* "They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *People v Smith*, 482 Mich 292, 299, 304; 754 NW2d 284 (2008). "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." *Babcock, supra* at 262.

The sentence departure for defendant's conviction of assault with intent to do great bodily harm was significant. The trial court sentenced defendant to five to ten years' imprisonment where the minimum sentence range was ten to 23 months. and the maximum sentence for this conviction is ten years. MCL 750.84. The trial court addressed the reasons for the departure three times: first, at sentencing, next, in a written sentence evaluation and finally, in an opinion denying re-sentencing.

At the sentencing hearing, the trial court stated that it was departing from the guidelines because OV 6 inadequately scored defendant's intent to kill, and OV2 did not adequately score defendant's use of a potato as a silencer on the gun defendant used to shoot the victim. In the trial court's departure evaluation, it cited the inadequacy of these same variables, but changed the rationale for the inadequacy of OV 6 by reasoning that OV 6 failed to adequately account for the seriousness of the injuries and wounds sustained by the victim. However, in its opinion and order denying defendant's motion for resentencing, the trial court cited the following reasons for why upward departure was proper: (1) defendant's preparation for the crime in visiting the victim to make a purchase earlier in the day, recruiting assistance, and using a potato to act as a silencer; (2) the potential injury to others caused by defendant shooting down the hallway; and (3) the fact that the victim could have been killed.

OV 6 scores the offender's intent to kill or injure, and requires that the trial court "score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury." MCL 777.36(2)(a). The jury made a finding regarding intent through its verdict of guilt on the lesser-included offense of assault with intent to do great bodily harm, rather than assault with intent to commit murder. Since the legislature excluded assault with intent to do great bodily harm from this variable, it is inapplicable pursuant to MCL 777.22. Therefore, trial court cannot depart from this conclusion without violating the statute's order to score this variable consistent with the jury's verdict. The other factors for the court's departure based on the inadequacy of OV 6 were the seriousness of the victim's wounds and the possibility of the victim's death. These factors are each accounted for in OV 3, which scores the physical injury to a victim. MCL 777.33. None of these reasons are appropriate for departure because they are already accounted for by the offense variables.

The next reason given by the trial court at the sentencing hearing and in its departure evaluation was the inadequacy of OV 2 in addressing the manner in which defendant used the gun. While the trial court stated during the sentencing hearing that defendant's use of a potato as a silencer was not one of its reasons, it reversed course at the end of the hearing and adopted this as a reason. The court then included this rationale in its departure evaluation. The trial court also elaborated on defendant's preparatory acts as a reason to depart in its post-judgment opinion and order, and included defendant's use of a potato as a silencer, his visit to the victim's apartment earlier in the day, and his recruitment of assistance as part of its rationale.

OV 2 scores the lethal potential of the weapon possessed or used. MCL 777.32. Defendant was scored at five points because he used a rifle. MCL 777.32(1)(d). This variable does not consider whether a defendant attempted to use a potato as a silencer. In addition, defendant attempted to make his rifle more dangerous by trying to muffle its sound in order to avoid detection. This use of a potato as a silencer keenly grabs one's attention and constitutes a substantial and compelling reason to depart.

The trial court also stated as one of its reasons, in its post-judgment opinion and order, the potential of injury to others because defendant was firing his weapon indiscriminately in the hallway of the victim's apartment complex. While OV 9 considers the number of potential victims, it does not directly address the fact that defendant's shooting deliberately placed potential victims at a high risk of death or severe bodily harm. MCL 777.39. Testimony showed spent casings from the rifle defendant was using were found in the hallway and the victim testified that defendant and the other perpetrator were shooting at him as he tried to escape. Also, one of the shooter's bullets pierced the wall of another apartment and embedded itself within that apartment's kitchen wall. This potential harm to others is objective and verifiable and the indiscriminate firing of a gun in the hallway of a residential apartment keenly and irresistibly grabs one's attention and constitutes a substantial and compelling reason to depart.

While the trial court gave multiple reasons for its upward departure in this case, they were not all substantial and compelling. When a trial court relies on multiple reasons and only some of those reasons are substantial and compelling, this Court must remand the case for resentencing or rearticulation if it cannot determine whether the trial court would have departed and departed to the same degree solely on the basis of the legitimate substantial and compelling reasons. *Babcock, supra* at 271.

There is no explicit statement on the record that the trial court would have departed and departed to the same degree based solely on the legitimate substantial and compelling reasons. However, a review of the entire record shows that this is the case. In the trial court's opinion regarding defendant's motion for resentencing, the trial court expressed three distinct reasons for its departure. While one of those reasons is not substantial and compelling, the trial court was not weighing these factors together, but rather, using them as independent justifications for the departure. The trial court's adoption of the prosecution's arguments for departure, even after it had made its own determination, further demonstrates that the trial court was not weighing the factors together, but adopting independent justifications for its decision. Therefore, remand is not necessary on this ground.

The next part of the analysis is whether the trial court justified the *particular* departure in this case. ““A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for *that* departure and states on the record the reasons for departure.”” *Smith, supra* at 303-304, quoting MCL 769.34(3) (emphasis in *Smith*). The statutory language requires the trial court to “justify the particular departure in a case, i.e., ‘that departure.’” *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001) (emphasis in original). “If it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified.” *Smith, supra* at 304. “A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear.” *Id.* In its departure explanation, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *Id.* Thus, the “principle of proportionality” is the standard by which a particular departure is to be judged. *Id.* at 299-300. To help decide whether a sentence is proportionate, “everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment.” *Babcock, supra* at 263.

In this case, the trial court did not provide an explanation for the extent of the departure independent of the reasons to impose a departure sentence. While speaking at length about its displeasure with defendant's actions, how the guidelines provided in this case were inadequate, how it viewed defendant as a danger to society, and that, but for the victim's miraculous escape, defendant would have been a cold blooded killer, the trial court failed to connect its views to why the extent of this upward departure was warranted. Moreover, the trial court's departure from the guidelines range of ten to 23 months to its minimum sentence of 60 months is a severe departure.

In *Smith* the Michigan Supreme Court remanded to the trial court for an explanation of the extent of the departure or resentencing because the trial court did not explain its decision and “comparing defendant's actual minimum sentences to the recommended minimum sentences for offenders with similar criminal histories suggests that defendant's sentences might be disproportionate.” *Smith, supra*, 482 Mich 308-310. The Court in *Smith* outlined possible ways to aid in analyzing whether a departed sentence is proportionate, but the Court explicitly stated that these comparisons were not the only measures of whether a sentence is proportionate. *Id.* at 309. The minimum sentence of the defendant in *Smith* was higher when compared to the highest possible minimum sentences for other defendants with the same PRV level, which suggested that his sentence might be disproportionate. *Id.* at 306-308. Because of the extensive departure in

this case and the lack of an explanation, it was not possible to tell whether the trial abused its discretion in *Smith*. *Id.* at 311.

Like in *Smith*, it is not possible to discern why the trial court here selected a minimum sentence so far in excess of the recommended guidelines range. Defendant was convicted of a class D offense and was assigned seven PRV points, which placed him in PRV level B. Defendant was assigned 70 OV points, which placed him in OV level V. Defendant's minimum sentence range was 10 to 23 months. The highest possible minimum sentence within the guidelines for someone in defendant's PRV level is 38 months. Defendant's minimum sentence of 60 months greatly exceeds this, as was the case in *Smith*. Therefore, due to the lack of an explanation for the extent of the departure and the severity of that departure, defendant's sentence for assault with intent to commit great bodily harm is vacated and this case is remanded for resentencing in order for the trial court to provide an explanation of why this level of departure is warranted or to resentence defendant.

The sentence is vacated and we remand for sentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens