

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELISSA ANN CASTRO-DAVIS,

Defendant-Appellant.

UNPUBLISHED

March 24, 2009

No. 281576

Monroe Circuit Court

LC No. 06-035494-FC

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321,¹ and possession of a firearm during the commission of a felony, MCL 750.227b. She was sentenced to 10 to 15 years' imprisonment for the manslaughter conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. She appeals as of right. Because the trial court did not abuse its discretion in denying defendant's motion for a mistrial, we affirm defendant's convictions. We also affirm defendant's sentence for her manslaughter conviction. Evidence in the record supports the trial court's scoring of offense variables 9 and 10, and the trial court articulated substantial and compelling reasons to depart from the recommended guidelines range and the imposed sentence was proportionate.

I. Basic Facts

Defendant was convicted of shooting her daughter's former boyfriend. Defendant's family and the victim had a tumultuous history. The victim's friend, GH, testified that on the day of the incident, defendant called both him and the victim, requesting that the victim come to her house to pick up his clothing. One of defendant's friends also called on defendant's behalf and requested that the victim come to defendant's house. Eventually, GH drove the victim to defendant's home. The victim was in the front passenger side on a bench seat next to GH. When they pulled up, GH left the truck running because he expected to be there only a short time. GH saw defendant come down the stairs carrying clothes on top of both of her hands; he did not see a weapon. Defendant bypassed GH's side of the truck and went around the front of

¹ Defendant was originally charged with first-degree premeditated murder, MCL 750.316(1)(a).

the truck to the victim's side. The victim's window was about halfway down. GH testified that the victim did not say anything or make any threatening gestures toward defendant. GH heard defendant ask the victim if the clothes belonged to him and when he responded affirmatively, defendant said, "Well, here's your shirt, motherf*cker," and shot the victim three times, striking the victim once in the ear and once in the cheek. GH saw defendant holding the gun after the first shot, following which GH ducked down and "floored" the truck. GH drove to the end of the block and called 911. GH testified that the victim did nothing to provoke defendant and that he did not have a weapon.

The defense did not dispute that defendant shot the victim, but denied that she planned to do so. The defense argued that the victim had constantly exhibited threatening behavior toward defendant's entire family before the incident, and that defendant had the handgun because of her fear of the victim. In a statement to the police, defendant recounted her fear of the victim, claimed that she called GH and the victim after the victim requested the return of his clothes, and that although she was fearful of the victim coming to her home, she told him to come to retrieve his belongings. The victim declined to come onto defendant's property, and requested that defendant bring his items to the street. She agreed, but said she would "be in the street with [his] things." Defendant claimed that she "was afraid [the victim] would punch [her]," so she retrieved the gun from her safe. When the victim and GH arrived, defendant walked out with the gun hidden underneath some clothes, and walked around the back of the truck to the victim's side. When the victim let his window partially down, defendant pointed the gun at him, intending to scare him. Defendant claimed that the victim "laughed at [her]" and she "went into like a dream" "[i]n [her] head," thought about the victim hurting her family, and wanted to shoot the victim in the arm to scare him. Defendant shot the victim. Defendant claimed to not know how many times she shot the victim, and next recalled GH saying, "What the f*ck Melissa," and speeding away.

II. Sentence

A. Scoring of Offense Variables

Defendant argues that the trial court abused its discretion in scoring offense variables 9 and 10 of the sentencing guidelines. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.*

The trial court scored ten points for OV 9. MCL 777.39 directs a score of zero points for OV 9 if there are fewer than two victims who were placed in danger of physical injury or death, and a score of ten points if there are two to nine victims. MCL 777.39(1) and (2). The instructions state that "each person who was placed in danger of physical injury or loss of life" is to be counted as a victim. MCL 777.39(2)(a). The evidence showed that two people were in the truck during the incident. GH was in close proximity to the victim when defendant fired three shots at the victim. Because there were two persons placed in danger of injury, OV 9 was properly scored at ten points.

The trial court scored 15 points for OV 10. MCL 777.40(1)(a) directs a score of 15 points if "[p]redatory conduct" was involved. "Predatory conduct" is defined as "preoffense

conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). The trial court relied on the evidence that defendant called the victim and GH to draw the victim to her residence under the guise of returning some of his clothes. Defendant also had her friend call the victim on her behalf. There was evidence that the victim told defendant to dispose of his clothing or put them on the street so they could be picked up later, but defendant persisted that the victim come and obtain the clothes. On prior occasions, defendant had summoned the police during their exchanges, but on this occasion she did not contact the police or anyone else. After the final telephone call, defendant armed herself with a loaded handgun and waited for the men to arrive. When they pulled up and stopped in the street, defendant approached the vehicle with the gun concealed beneath a handful of clothes. She bypassed the driver’s side, walked around the truck to the victim’s side, and asked the victim if the clothes belonged to him before firing three times at close range. Under these circumstances, the trial court did not abuse its discretion by assessing 15 points for OV 10.

B. Sentencing Guidelines Departure

Defendant also argues that she is entitled to be resentenced because the trial court did not articulate a substantial and compelling reason for exceeding the sentencing guidelines range of 29 to 57 months. Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the calculated guidelines range. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). A court may depart from the appropriate guidelines range only if it “has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure.” MCL 769.34(3). A court may not depart from the guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). The phrase “substantial and compelling” constitutes strong language intended to apply only in “exceptional cases.” *Babcock*, *supra* at 257-258. The reasons justifying departure should “keenly and irresistibly grab” the court’s attention and be recognized as having “considerable worth” in determining the length of a sentence. *Id.* Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Id.* at 257, 272. Further, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant’s conduct and prior criminal history. *People v Smith*, 482 Mich 292, 300, 305; 754 NW2d 284 (2008).

Whether a factor exists is reviewed for clear error on appeal. *Babcock*, *supra* at 264-265. Whether a factor is objective and verifiable is subject to review de novo. *Id.* The trial court’s determination that objective and verifiable factors constitute a substantial and compelling reason to depart from the minimum sentence range is reviewed for an abuse of discretion, as is the extent of the departure. *Id.*; *Smith*, *supra* at 300. “A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes.” *Smith*, *supra* at 300.

Initially, we agree with defendant that one of the trial court’s articulated reasons for departure, that GH was a victim who was affected by the offense, was not a proper basis for departure. The number of victims is reflected in the scoring of OV 9, for which defendant received ten points because there were “2 to 9 victims.” MCL 777.39(1)(c). Accordingly, this factor, standing alone, does not provide a basis for departing from the sentencing guidelines range.

But the trial court relied on other factors that are objective and verifiable, and the court did not abuse its discretion by finding that these factors amounted to substantial and compelling reasons to depart from the sentencing guidelines. Although the trial court scored 25 points for OV 1 (aggravated use of a weapon), MCL 777.31(1)(a), 25 points for OV 3 (physical injury to a victim), MCL 777.33(1)(c), and fifteen points for OV 10 (exploitation of a vulnerable victim), MCL 777.40(1)(b), the trial court did not err by finding that the offense characteristics unique to this offense were not adequately reflected in the scoring of the guidelines. In other words, although defendant had no prior convictions, the factors did not adequately account for defendant's "very horrible" conduct of luring the victim to her home, approaching the vehicle with a concealed weapon, and using "deadly force" against the victim in this scenario. The court noted that defendant's conduct of summoning the victim to her house, not calling the police or for other assistance as she did on other occasions, bypassing GH's side of the truck to get to the victim, and approaching the victim in close proximity, belied her claim that she feared the victim. Although defendant was acquitted of the higher offense of first-degree murder, a trial court is permitted to consider evidence presented at trial that the defendant committed another crime even if she was acquitted of that charge. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). In addition, the trial court relied on the fact that defendant's total OV score was 30 points higher than the 75 points necessary to place a defendant in the highest level of offense severity. This excessive score is an indication that the offense variables have been given inadequate weight and provides a valid basis for departure. See *People v Stewart*, 442 Mich 937; 505 NW2d 576 (1993). The trial court did not abuse its discretion in concluding that the guidelines inadequately accounted for the circumstances of the offense in this case.²

Although a departure was warranted, "a trial court must justify why it chose the particular degree of departure." *Smith*, *supra* at 318. Given the trial court's valid reasons for departure and the fact that defendant's total OV score was well in excess of the maximum for her sentencing grid, the extent of the departure was not so disproportionate as to constitute an abuse of discretion. The court expressly acknowledged that the sentence must be proportional to the offender and the offense when it stated that "a proportionate sentence would warrant the maximum penalty in this case." The trial court explained its position by way of an accurate recitation of facts in the record, and concluded that the imposed sentence was more proportionate than one within the guidelines, considering the egregious nature of the crime and its circumstances.

Defendant notes her zero PRV score and the corresponding sentencing guidelines range. In *Smith*, the Supreme Court held that one way to determine whether a departure is proportionate

² Although we have concluded that one of the reasons articulated by the trial court is not substantial and compelling, remand for resentencing is unnecessary. If a trial court articulates multiple reasons for a departure, and this Court determines that some of the reasons are invalid, we must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the valid reasons alone. *Babcock*, *supra* at 260, 273. If we cannot determine whether the trial court would have departed from the guidelines range to the same extent, remand for rearticulation or resentencing is necessary. *Id.* at 260-261. Here, having reviewed the record and scrutinized the sentencing transcript, we are satisfied that the trial court would have imposed the same sentence on the basis of the valid factors alone.

is to compare the departure sentence to the recommended minimum sentences for the applicable sentencing class. *Id.* at 307-309. For a Class C felony, the highest minimum sentence on the grid is 114 months and is permitted for those defendants who have a PRV score of at least 50 and an OV score of 75. MCL 777.64. In this case, although defendant had a zero PRV score, she had an OV score of 105 points, well in excess of the 75 point maximum. In that situation, “the court may render a proportionate sentence above the highest minimum for someone with a similar PRV score . . . because the Legislature did not contemplate a defendant with such a high OV score, given that it used [75] OV points as the maximum for the grid.” See *Smith, supra*, at 308-309.

In sum, the extent of the departure was significant, but considering the circumstances surrounding the offense, the sentence imposed is not outside the range of principled outcomes.

III. Mistrial

Defendant also argues that the trial court abused its discretion by denying her motion for a mistrial after the prosecutor made impermissible remarks about her testifying. This Court reviews a trial court’s ruling on a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). “A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.” *Id.* (citation omitted).

During defense counsel’s direct examination of defendant’s husband, the following exchange occurred:

Q. And did you . . . why did your wife call you?

A. She . . . was feeling nervous and scared.

Q. Okay. And did she tell you why she was feeling nervous and scared?

The prosecutor: Objection. Hearsay.

The court: Sustained.

Defense counsel: Your Honor, it’s-- goes to explaining that existing mental state, which is a hearsay exception.

The court: Response.

The prosecutor: Well, the Defendant could testify herself as to the nature of that existing mental state.

Defense counsel: Your Honor, you know that’s-- I believe that to be an improper characterization by the Prosecutor.

The court: I agree. The Defense does not have to take the stand. As the jury was told, the Defendant does not have to produce any evidence whatsoever. Should she choose not to make-- take the witness stand, you can draw no

conclusions from that. It remains to be seen if she's going to testify.
[Emphasis added.]

Subsequently, defendant moved for a mistrial based on the prosecutor's remark. In denying the motion, the trial court noted that it instantly gave a sufficient curative instruction and, therefore, a mistrial was not warranted.

Indeed, a prosecutor may not imply that a defendant must prove something or present a reasonable explanation because such an argument tends to shift the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). But, here, defendant's right to a fair trial was protected by the trial court's immediate curative instruction. In its final instructions, the court again instructed the jury that defendant did not have to offer any evidence or prove her innocence, that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, and that the lawyers' comments are not evidence. The court also reminded the jurors of their oath to return a verdict based only on the evidence and the court's instructions on the law. "Jurors are presumed to follow their instructions." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Affirmed.

/s/ Henry William Saad

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra