

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT JAMES ISBY,

Defendant-Appellant.

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UNPUBLISHED

March 26, 2009

No. 283377

Wayne Circuit Court

LC No. 07-013928-FH

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his sentences imposed for his bench trial convictions of unarmed robbery, MCL 750.530, and aggravated assault, MCL 750.81a. We affirm defendant's convictions, but vacate the sentences and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Complainant Kimberly Moon conducted a prolonged house and garage sale at her residence. Defendant, who had come to the sale three or four times previously indicating that he was interested in a car Moon had for sale, arrived with friends, and stated that one of his friends was interested in the car. Moon and defendant entered Moon's home to talk about the price. Defendant asked Moon about a television she had for sale. As she bent down to turn it on, defendant punched her in the right temple with his fist, causing her to fall. Defendant then beat her head with his hands and kicked her body. Defendant grabbed Moon's watch and necklace, and then grabbed her hand and told her that he would break her fingers off if she did not give him her engagement ring. He took the ring after a brief struggle.

The trial court sentenced defendant to four to 15 years in prison for unarmed robbery. Defendant now maintains that the trial court abused its discretion when it sentenced him outside the guidelines, which recommended a minimum term range of 12 to 24 months.<sup>1</sup>

A court may depart from the sentencing guidelines if it has substantial and compelling reasons to do so, and states the reasons for departure on the record. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from the

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<sup>1</sup> This range represents a straddle cell. MCL 769.34(4)(c).

guidelines based on an offense or offender characteristic already considered in scoring the guidelines unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth in determining the sentence. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). To be objective and verifiable, the factors must be actions or occurrences external to the mind, and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). This Court reviews a departure from the guidelines to determine whether the sentence imposed is proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock*, *supra* at 263 n 20, 264.

In reviewing a departure from the guidelines, the existence of a particular factor is a factual determination reviewed for clear error, the determination that the factor is objective and verifiable is reviewed de novo, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *Babcock*, *supra* at 264-265; *Abramski*, *supra* at 74. In ascertaining whether the departure was proper, this Court defers to the trial court's direct knowledge of the facts and familiarity with the offender. *Babcock*, *supra* at 270.

In this case, the trial court found that a departure was warranted due to defendant's predatory conduct, the victim's vulnerability, defendant's lack of remorse, and his perjured trial testimony that he had never seen the victim before the incident occurred. Contrary to the people's arguments, most of the trial court's reasons for departure are taken into account in the guidelines scoring. Offense variable (OV) 7 provides that 50 points can be scored when "a victim is treated with . . . excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1). Offense variable 10 provides that 15 points can be scored when predatory conduct was involved. "'Predatory conduct' means preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Both of these OVs were scored at zero. The trial court did not discuss the scoring of these variables, likely because the parties did not object to the scoring. The facts supported the scoring of these variables. Therefore, we conclude that a remand for resentencing is appropriate. On remand, the trial court should rescore the guidelines in light of its factual findings and resentence defendant accordingly.<sup>2</sup>

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<sup>2</sup> During sentencing, defendant expressed remorse for his crimes and offered to pay Moon for the losses she had suffered. The trial court's indication that defendant expressed no remorse, and its discussion about defendant's perjury during trial in denying responsibility, appear to have been a finding that defendant's stated remorse was insincere. This finding was within the trial court's purview as it was able to observe defendant's demeanor at trial and at sentencing. However, it also appears to have been a subjective observation, and was not a proper reason for departure.

We affirm defendant's convictions, but vacate the sentences and remand for resentencing.  
We do not retain jurisdiction.

/s/ Michael J. Cavanagh

/s/ Karen M. Fort Hood

/s/ Alton T. Davis