

Court of Appeals, State of Michigan

ORDER

People of MI v Richard Lee Hurst

Docket No. 282834

LC No. 2007-216390-FH

Jane M. Beckering
Presiding Judge

Michael J. Talbot

Pat M. Donofrio
Judges

On the Court's own motion, it is ordered that the April 28, 2009, opinion is hereby VACATED, and a new opinion is attached. References to the completion of a guideline departure form have been omitted given that the form is no longer required in Michigan. Hence, a remand is no longer necessary. In all other aspects, the opinion remains unchanged.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAY 26 2009

Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD LEE HURST,

Defendant-Appellant.

UNPUBLISHED

April 28, 2009

No. 282834

Oakland Circuit Court

LC No. 2007-216390-FH

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree child abuse, MCL 750.136b(2), and sentence of ten to 15 years' imprisonment. We affirm but remand for completion of a guidelines departure form.

First, defendant argues that he was denied a fair trial by the trial court's failure to instruct the jury that first-degree child abuse is a specific intent crime. We disagree.

In order to preserve a challenge to jury instructions on appeal, a party must object to or request an instruction before the jury deliberates. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000); MCR 2.516(C). Furthermore, an affirmative statement by defense counsel that there are no objections to the jury instructions constitutes express approval of the instructions, waiving appellate review. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). In this case, defendant did not request an instruction that first-degree child abuse is a specific intent crime. After the jury instructions were given, the prosecutor stated he had no objection to the instructions and defense counsel stated, "No objection, your honor." Defense counsel expressly approved the jury instructions with the affirmative statement that he had no objection to the instructions after they were given. Therefore, defendant has waived this issue on appeal. See *Id.* Furthermore, even if the issue were not waived, the trial court did not commit plain error by failing to instruct the jury that first-degree child abuse is a specific intent crime. See *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1996) (holding that unpreserved claims of constitutional error are reviewed for plain error). The Michigan Supreme Court held, in *People v Maynor*, 470 Mich 289, 295-296; 683 NW2d 565 (2004), that it is unnecessary to instruct a jury on specific intent for first-degree child abuse "as long as the jury is instructed that it must find that defendant either knowingly or intentionally caused the harm," which the trial court did in this case.

Next, defendant argues that the trial court incorrectly scored five points for Prior Record Variable (PRV) 5, and asserts the correct score is two points because he only has one scoreable misdemeanor conviction. Defendant contends that he is entitled to resentencing because he was sentenced under an incorrect sentencing grid and based on incorrect information. We disagree.

At the outset, we note that defendant's challenge to the scoring of PRV 5 was not raised at sentencing, in a motion for resentencing, or in a proper motion for remand and is, therefore, unpreserved for appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), citing MCL 769.34(10). Generally, 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) (citation omitted). 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.* However, because the challenge to the scoring of this PRV was not preserved, this Court's review is limited to plain error affecting defendant's substantial rights. *Kimble, supra* at 312. A plain error in the calculation of the sentencing guidelines range that increases the length of the defendant's sentence constitutes plain error affecting substantial rights. *Id.* at 313 and n 5.

MCL 777.55 states, in part:

(1) Prior record variable 5 is prior misdemeanor convictions or prior misdemeanor juvenile adjudications. Score prior record variable 5 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(d) The offender has 2 prior misdemeanor convictions or prior misdemeanor juvenile adjudications 5 points

(e) The offender has 1 prior misdemeanor conviction or prior misdemeanor juvenile adjudication 2 points

(f) The offender has no prior misdemeanor convictions or prior misdemeanor juvenile adjudications 0 points

(2) All of the following apply to scoring record variable 5:

(a) Except as provided in subdivision (b), count a prior misdemeanor conviction or prior misdemeanor juvenile adjudication only if it is an offense against a person or property, a controlled substance offense, or a weapon offense. Do not count a prior conviction used to enhance the sentencing offense to a felony.

According to defendant's presentence investigation report (PSIR), defendant has a prior juvenile offense for resisting an officer without violence and one misdemeanor conviction as an adult for

domestic assault and battery. These crimes both constitute offenses against a person. Therefore, under the statute, two qualifying offenses require that defendant be scored five points for PRV 5.

Finally, defendant challenges the trial court's upward departure from the sentencing guidelines, arguing that the departure was based on criteria already considered by the sentencing guidelines and violated the principle of proportionality. Defendant's total PRV score was ten, placing him in level C, and his Offense Variable (OV) score totaled 95, placing him in level VI. Based on this, defendant's minimum sentence range for his conviction of first-degree child abuse was 57 to 95 months' imprisonment. The maximum sentence range for this offense is 15 years. MCL 750.136b(2). The trial court upwardly departed from the sentencing guidelines by sentencing defendant to a minimum term of ten years' imprisonment. While the trial court did not fill out a departure evaluation form, it stated in the judgment of sentence that it based its departure on the "severe and extensive life threatening injuries suffered by the victim, and the extreme vulnerability and indefensibility of the victim, none of which are sufficiently accounted for in the sentencing guidelines." The trial court also commented at the sentencing hearing about the severity of the victim's injuries and that she was only 18 months old at the time of the offense.

The existence of a particular factor supporting a trial court's decision to depart from the sentencing guidelines is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003) (citation omitted). This Court reviews the determination of whether the factor is objective and verifiable de novo. *Id.* Furthermore, 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. However, because this issue is unpreserved, defendant's claim is reviewed for plain error affecting his substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

Under Michigan's legislative sentencing guidelines, a trial court may only depart from the sentencing guidelines if it has a substantial and compelling reason to do so, and it states the reason on the record. 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 OVs or PRVs unless it 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; 754 NW2d 284 (2008).

The trial court, in both its comments at the sentencing hearing and its reasons set forth in the judgment of sentence, made it clear that it based the upward departure on the failure of the sentencing guidelines to fully consider the severity and permanence of the victim's injuries and her vulnerability and indefensibility. These were substantial and compelling reasons for departure from the sentencing guidelines.

In terms of the severity and permanence of the victim's injuries, there was medical testimony that she will likely suffer permanent brain damage as well as permanent vision impairment as a result of the trauma she suffered. Additionally, the evidence showed the victim would have died if not for the medical care that she received. The life threatening nature and permanence of the injuries the victim sustained is an objective and verifiable reason that keenly

grabs one's attention. While defendant was scored 25 points for OV 3, which scores 25 points if "[l]ife threatening *or* permanent incapacitating injury occurred to a victim," the trial court properly concluded that the guidelines did not adequately account for the victim's injuries. MCL 777.33(1)(c) (emphasis added). This is because she suffered both life threatening *and* permanently incapacitating injuries. Again, the record showed that if not for the immediate medical care she received, she would have died, and as a result of her injuries she will suffer from permanent brain damage and have problems with her vision.

In addition, the trial court's rationale that the guidelines did not properly account for the victim's vulnerability and indefensibility is also proper. At the time she sustained her injuries, the victim was an 18 month old in the care of defendant. As an infant, the victim was completely reliant on defendant when she was in his sole care. The victim's age and her complete reliance on defendant make this an objective and verifiable reason that keenly grabs one's attention. Moreover, while defendant was scored ten points under OV 10, MCL 777.40, which takes into account the vulnerability of a victim in terms of age and strength, the trial court properly concluded that the guidelines did not adequately account for the vulnerability and indefensibility of the infant victim in this case. The guidelines do not address when the victim is an infant. The victim was not merely vulnerable, but completely helpless without any means to protect herself from the abuse of defendant.

"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. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear." *Smith, supra* at 304. 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.

While defendant's minimum sentence of ten years' imprisonment exceeded the highest minimum guideline range of 95 months for someone in defendant's PRV level, the trial court properly justified the extent of its departure. The trial court at the sentencing hearing stated that "but for the fact that this Court cannot sentence the defendant to more than two-thirds of the maximum sentence, I would sentence this man to the maximum." The trial court went on to reiterate how defendant had abused a helpless child like she was an animal. Moreover, defendant's total OV score of 95 points, exceeded the 75 points, which is the maximum for defendant's grid. Pursuant to *Smith*, a trial court may render a proportionate judgment above the highest minimum for someone in the same PRV level because "the Legislature did not contemplate a defendant with such a high OV score," since it used 75 points as the maximum for this grid. *Smith, supra* at 308-309. The trial court concluded the severity of abuse suffered by a

helpless child justified the maximum sentence, but it sentenced defendant to a ten-year minimum in order to satisfy the rule that the minimum cannot exceed two-thirds of the maximum sentence. The rationale for the extent of the departure, paired with the fact that defendant's OV score was well in excess of the maximum for his sentencing grid, sufficiently justifies the extent of this departure.

Although the trial court articulated its reasons for departure on the record and in the judgment of sentence, it failed to complete a guidelines departure form as required. *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001). Accordingly, we remand this case for completion of that ministerial task.

Affirmed but remanded for completion of a guidelines departure form. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Michael J. Talbot

/s/ Pat M. Donofrio