

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

EBONY SHARDA'E JACKSON,

Defendant-Appellee.

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UNPUBLISHED

May 14, 2009

No. 282708

Wayne Circuit Court

LC No. 05-010849-FC

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EBONY SHARDA'E JACKSON,

Defendant-Appellant.

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No. 284430

Wayne Circuit Court

LC No. 05-010849-FC

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

After a bench trial, the court convicted defendant of arson of a dwelling, MCL 750.72, and intentional discharge of a firearm at a dwelling, MCL 750.234b. The trial court sentenced her to three years' probation for each offense. In Docket No. 282708, the prosecutor appeals as of right challenging the trial court's downward departure from the statutory guidelines when imposing defendant's sentence. In Docket No. 284430, defendant appeals as of right the validity of her convictions.<sup>1</sup> We affirm defendant's convictions and sentences.

We first consider defendant's contention in Docket No. 284430 that the trial court erred in rejecting her alibi defense as incredible. This Court reviews for clear error a trial court's

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<sup>1</sup> This Court consolidated the appeals. *People v Jackson*, unpublished order of the Court of Appeals, entered April 16, 2008 (Docket Nos. 282708, 284430).

findings of fact. *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002); MCR 2.613(C). “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). The trier of fact possesses the authority to resolve questions of credibility and make determinations regarding the weight of the evidence, which this Court generally will not second guess on appeal. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

The trial court found defendant guilty of the charged crimes on a theory that she aided and abetted her boyfriend, Paco Comonte, in an attack on the victim’s house. Comonte fired a gun and threw a Molotov cocktail at the house. Earlier in the evening of the attack, defendant and the victim had a physical altercation, in which the victim had severely beaten defendant. The victim testified that she later observed defendant in Comonte’s car during the attack on her house, but did not see defendant participate in any respect. Defendant presented evidence that when the attack on the victim’s residence occurred, she was at the apartment of her mother’s boyfriend.

The victim’s trial testimony did not pinpoint the time of the attack on her house, although she estimated that the attack took place between 11:30 p.m. and 12:00 a.m. The accounts of several police officers who testified suggested that the attack had taken place around 12:30 a.m. The officers obtained information from the victim and a neighbor that defendant may have gone to a nearby apartment where her mother’s boyfriend lived. Officers promptly went to the apartment building, where they found defendant. Defendant called witnesses, including her mother, her mother’s boyfriend, and a security guard who worked at the apartment building’s front desk, who attested to the facts that defendant’s mother had picked up defendant from near the victim’s residence sometime around 11:00 p.m. on the eve of the shooting, that the security guard signed defendant into the apartment building at 11:17 p.m., and that defendant had remained in the apartment until the police arrived hours later.

In summary, the evidence at trial conflicted with respect to whether defendant was present in her boyfriend’s car at the time of the attack on the victim’s residence. Defendant correctly notes that only the victim, whose trial testimony otherwise contained various inconsistencies, reported seeing defendant when the attack on her house occurred. However, it falls to the trier of fact to resolve credibility determinations and to weigh the evidence. The trial court expressly recognized the conflicting nature of the evidence:

In terms of the alibi presented by the defense, obviously I know the burden . . . the defense has no burden on the alibi. The prosecutor has to prove beyond a reasonable doubt. I know the law. There’s no question that the alibi presented by the defense was considered by the Court, and I reject it. I don’t find it to be of such a kind or nature that it was persuasive in the least. And I do find that the statement given by [the victim], however poor of a witness she was—I do find her identification to be a good and valid identification. And furthermore, that she reinforced it when she gave it to the police the very night that it occurred. . . . And the prosecutor has to prove the defendant committed it, not that the defense has to prove alibi, which everybody knows. And I know that. And I make the point of the fact that I reject that alibi for the reasons that I have already stated . . .

Because the trial court possessed the prerogative to make this credibility finding concerning the alibi defense, and because the trial court's findings had support in the record, we find no clear error in the court's rejection of the alibi defense. MCR 2.613(C); *Rodriguez, supra* at 25.

We next address the prosecutor's argument in Docket No. 282708 that the trial court improperly departed downward from defendant's minimum sentencing guidelines range. While the statutory guidelines recommended sentencing defendant to a minimum term between 45 and 75 months' incarceration, the trial court imposed a term of probation. "A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). However, "[t]he court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record . . . that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. [*People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008) (footnotes omitted).]

The sentencing information report departure evaluation prepared by the trial court listed the following reasons in support of its departure: defendant's age, the assault of defendant before the crimes, defendant's two young children and her recent loss of a child, her lack of a prior record, her good conduct during the more than 1-1/2-year period between the trial and her sentencing, her suicidal ideations after her child died in April 2007, and "[a]ll reasons on the record." The trial court explained at length at the sentencing hearing the grounds for its downward departure. The court specifically emphasized on the record the severe and "merciless" nature of the attack on defendant that precipitated the crimes, the lack of any evidence that defendant physically participated in any of the charged criminal actions, that defendant did not actively participate in the incident, that defendant had acquired her GED "while she was going through what she was going through," and "the employment where she was working." The court concluded that all of these factors taken together constituted "substantial and compelling reasons to depart."

The prosecutor initially complains that two facts cited by the trial court, namely defendant's possession of employment and her GED, have no support in the record. With respect to defendant's employment, the trial court did not observe that she currently had employment, which defendant specifically denied at the sentencing hearing, only that she had in the past had employment, as mentioned in the most recent presentence information report (PSIR).<sup>2</sup> Regarding defendant's education, the PSIRs agree that she completed 11<sup>th</sup> grade at a

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<sup>2</sup> The record contains two PSIRs, one dated May 2006, and a second dated November 2007. The November 2007 PSIR stated that defendant most recently had worked at a Columbus, Ohio  
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Detroit high school. According to the earlier PSIR, defendant “report[ed] currently studying to obtain her GED certificate,” but according to the latter PSIR, defendant had not “received a GED Certificate.” Because no other evidence in the record we received tended to substantiate that defendant obtained her GED, we concur in the prosecutor’s assessment that the trial court clearly erred in finding that defendant had a GED.

The prosecutor also asserts that the trial court inappropriately relied on defendant’s clean criminal record because the scoring of the prior record variables (PRVs) already took into account her lack of a prior criminal record. However, the scoring of the PRVs does not permit a sentencing court to decrease a defendant’s guidelines range on the basis of a clean criminal record. The floor of the guidelines range is determined by statute and can only be *increased* by the scoring of guideline variables. MCL 769.34; MCL 777.21. Furthermore, the PRV scoring only takes into consideration offenses committed within the preceding 10 years; a zero PRV score does not necessarily equate to a “clean” criminal record. MCL 777.50. Therefore, defendant’s entire lack of any prior record is not explicitly accounted for in the scoring of her PRVs. Moreover, our Supreme Court has previously approved the use of a clean criminal record as a factor potentially warranting a downward sentencing departure. *People v Fields*, 448 Mich 58, 77, 80; 528 NW2d 176 (1995).

The prosecutor further maintains that the victim’s assault on defendant does not justify a downward departure because defendant instigated the confrontation. The testimony of the trial witnesses agreed that the victim and her friends beat defendant severely, and that defendant endured kicking, punching, having her face slammed into a stove, and a beating with pots and pans, all of which caused defendant’s eyes to swell shut. Irrespective who started the fight, the evidence objectively reflects that defendant suffered a serious, one-sided beating. The prosecutor ignores that “[i]n evaluating whether a case presents substantial and compelling reasons to depart below the mandatory minimum, courts should place particular emphasis on mitigating circumstances surrounding the offense.” *Fields, supra* at 76.

The prosecutor next suggests that defendant’s lack of criminal entanglements since her conviction does not amount to a substantial and compelling reason to depart. A defendant’s lack of criminal involvements between trial and sentencing in most circumstances may seem unremarkable. But in this case, the period between defendant’s conviction and sentencing encompassed more than 1-1/2 years, a uniquely long period. And consistent with defendant’s prior history, she committed no new crimes before her sentencing hearing.

Regarding the trial court’s observance that no evidence proved that defendant actively participated in the assault, our Supreme Court has explained, “These kinds of circumstances, which fall short of warranting a finding of innocence but render the defendant less culpable are often especially compelling because of the possibility that the Legislature did not consider this type of behavior when it set the statute’s harsh minimum sentences.” *Fields, supra* at 77.

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(...continued)

Subway restaurant, which she managed between July 2006 and October 2006, the month when defendant gave birth to twins. However, the PSIR noted that “this information could not be verified.”

Conviction as an aider and abettor under MCL 767.39 does not necessarily entail or involve only a minimum amount of assistance in committing a charged crime.

The court also mentioned defendant's history of mental health issues following the death of one of her young children. Factors arising after a defendant's arrest or conviction may qualify as relevant to a trial court's departure. *Fields, supra* at 77. The trial court noted, as documented in the PSIRs, that defendant had exhibited suicidal tendencies after her very young child died, at only six months of age. The trial court additionally listed defendant's age as a relevant consideration in its sentencing departure. Our Supreme Court has approved age as a relevant consideration in imposing a downward departure. *Fields, supra* at 77. Defendant, aged 19 at the time of the crimes, was 21 years of age when the court imposed sentence.

In summary, we detect no clear error arising from the court's findings regarding defendant's age, the brutal assault on her before the crimes, her lack of a prior criminal record, her good conduct during the more than 1-1/2-year period between the trial and her sentencing, her recent loss of a child, and her suicidal ideations after her child died. We find that as a matter of law each reason qualifies as objective and verifiable, and that the unique circumstances of this case, either standing alone or taken together, are "of considerable worth in determining the length of the sentence and . . . keenly and irresistibly grab[bed] the court's attention." *Smith, supra* at 299-300. In light of the circumstances emphasized by the trial court, including defendant's age, the "merciless" assault on her, her lack of a criminal record, her past employment, her good conduct after trial, her loss of a child shortly before sentencing, and her resultant mental health issues, we cannot conclude that the trial court abused its discretion in departing downward from the guidelines range. The trial court's rejection of a minimum term of imprisonment between 45 and 75 months as calculated under the sentencing guidelines, and its decision to instead sentence her to a three-year probationary term does not strike us as "fall[ing] outside the range of principled outcomes," because the downward departure was "proportionate to . . . defendant's conduct and prior criminal history." *Id.* at 300. To the extent that the trial court mistakenly found that defendant had received her GED, we remain entirely convinced that even without considering this potentially mitigating factor in any respect, the trial court surely would have imposed the same downward departure. *People v Babcock*, 469 Mich 247, 260-261; 666 NW2d 231 (2003).

Affirmed.

/s/ Jane E. Markey  
/s/ E. Thomas Fitzgerald  
/s/ Elizabeth L. Gleicher