

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TAMMY ANN SAURO,

Defendant-Appellant.

UNPUBLISHED

August 4, 2009

No. 284001

Livingston Circuit Court

LC No. 04-014640-FH

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from the sentence imposed, after a remand by this Court, on her jury trial conviction of embezzlement of between \$1,000 and \$20,000 from a vulnerable adult, MCL 750.174a(4)(a). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to six to 20 years in prison. We affirm.

The sentence imposed on resentencing was the same as that initially imposed by the trial court, and reflects a departure from the scored guidelines range of 12 to 48 months. In defendant's initial appeal, this Court affirmed defendant's conviction but remanded for resentencing on the ground that the trial court erroneously based its departure decision on defendant's refusal to admit guilt.¹

On appeal, defendant again contends that the trial court did not have substantial and compelling reasons to depart from the sentencing guidelines. We disagree.

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 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

¹ *People v Sauro*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 265951).

worth in determining a 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). We review a departure from the guidelines to determine whether the sentence imposed is proportionate to the seriousness of the defendant's conduct and criminal history. *Babcock*, *supra* at 263 n 20, 264; *People v Smith*, 482 Mich 292, 299-300, 318-319; 754 NW2d 284 (2008).

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, we defer to the trial court's knowledge of the facts and familiarity with the offender. *Babcock*, *supra* at 270. An abuse of discretion occurs when the trial court chooses an outcome falling outside the "principled range of outcomes." *Id.* at 269.

On remand, the trial court justified its departure by noting that defendant, who was on parole at the time of the instant offense, tested positive for cocaine while on parole. The trial court also based its decision on the facts that defendant had three prior embezzlement convictions, all of which were similar to the instant case, and that one of the prior offenses also involved a vulnerable adult. The trial court's use of defendant's criminal history involved factors for departure that were objective and verifiable and supported by the record. Defendant argues that her prior criminal history was fully accounted for in the prior record variable scoring. However, the trial court's implicit finding that they were not falls within the range of principled outcomes here. Defendant correctly notes that her repeat offender status was generally accounted for in the guidelines scoring. See MCL 777.51; MCL 777.52. However, this Court has held that a defendant's repeated commission of the same crime is a substantial and compelling reason to exceed the guidelines. See, e.g., *People v Solmonson*, 261 Mich App 657, 669, 671-672; 683 NW2d 761 (2004). We cannot find an abuse of discretion here. Defendant's multiple parole violations for cocaine use also constituted an objective and verifiable factor. Prior record variable 6 addresses a defendant's parole status at the time of the offenses, but does not otherwise address the specifics of a defendant's history. MCL 777.56. The trial court's finding that this behavior fell outside the guidelines scoring is supportable.

We also find that the trial court's departure, while significant, was not disproportionate to defendant's circumstances or those of the offense. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant has clearly demonstrated an unwillingness to conform her conduct to the requirements of the law, and has repeatedly betrayed positions of trust, at least twice involving victims who were particularly vulnerable. Under the circumstances, the sentence imposed cannot be said to be outside the range of principled outcomes. *Babcock*, *supra* at 269.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto