

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMONE HOWARD

Defendant-Appellant.

UNPUBLISHED

January 19, 2010

No. 287380

Wayne Circuit Court

LC No. 08-002230-FC

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

Defendant was convicted by a jury of felonious assault, MCL 750.82. At sentencing, the trial court departed from the recommended sentencing guidelines range of two to 17 months and sentenced defendant to two to four years in prison. Defendant appeals as of right from his sentence, arguing that the departure was unwarranted. We affirm.

A trial court must articulate substantial and compelling reasons in order to depart from the minimum sentence range indicated by the sentencing guidelines. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008); MCL 769.34(3). To determine whether a reason is “substantial and compelling,” this Court must look to the following factors set forth in *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003): (1) the reason must be objective and verifiable, (2) the reason should keenly or irresistibly grab the attention of the reviewing court, (3) the reason must be of considerable worth in deciding the length of a sentence, and (4) the reason must be something that exists only in exceptional cases. To be objective and verifiable, a departure factor must be external to the minds of the parties involved in the sentencing decision and “must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Also,

[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, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. [MCL 769.34(3)(b).]

We review for an abuse of discretion whether a trial court’s reasons were sufficient to justify a particular departure, and we review de novo whether the reasons were objective and verifiable. *Babcock*, 469 Mich at 264-265.

This case involved a thirteen-year-old victim. She was beaten in the head with butts of guns until she was bleeding profusely. She alleged that two men interrogated her about a drug house and that they threatened to kill her if she were unable to help them break into the house. The victim testified that defendant drove the vehicle from which the two gunmen exited and that he drove in circles around the block while they were beating and interrogating her. According to the victim, defendant then parked the vehicle, and the gunmen threw her against the drug house and began firing at the house. The victim was shot twice – once through her shoulder and once through her lungs. She sustained critical, life-threatening injuries from the gunshot wounds.

One of the gunmen as identified by the victim testified against defendant at trial. He stated that the events occurred as the result of a plan between defendant and him to rob the drug house in order to steal money and drugs. The plan involved abducting a drug addict who left the house and using him or her to gain entry to it.

At sentencing, the trial court stated the following:

You know, the thing that I noticed in this case was that the life of this young woman was nothing. And I don't know whether she's just a junkie, or I don't know whether she's a prostitute, or the "w" word that everybody wants to call people.

But you know what, she had a right to live. She had a right to walk up and down the street without having bullets put in her because somebody wanted to rob a drug house.

The injuries done to her were substantial. . . .

[T]his young man, Mr. Howard, was driving them around. If he hadn't been driving, maybe that young lady would have never been shot.

So, because of the grievous injuries that were done, because of the lawlessness that was shown, the effect that this kind of crime has on the community, I'm going to exceed the 17-month guideline, and make it a two-year to a four-year sentence with the Michigan Department of Corrections.

Defendant, in his appellate brief, does not adequately argue that the trial court's articulated reasons for departing from the guidelines failed to satisfy the general definition for "substantial and compelling reasons" as set forth in *Babcock*, 469 Mich at 257-258. Accordingly, we need not address that issue. See *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (discussing abandonment of issues). Instead, defendant solely argues that the trial court's departure factors were inadequate because they were already taken into account by the sentencing guidelines offense variables (OVs). Specifically, defendant refers to OV 1, OV 2, OV 3, OV 8, OV 10, and OV 12.

OV 1 was scored at 25 points because "[a] firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon." MCL 777.31(1)(a). OV 2 was scored at 5 points because "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d). OV 3 was

scored at 25 points because “[l]ife threatening or permanent incapacitating injury occurred to a victim.” MCL 777.33(1)(c). OV 8 was scored at 15 points because “[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” MCL 777.38(1)(a). OV 10 was scored at 5 points because “[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious.” MCL 777.40(1)(c). OV 12 was scored at 25 points because “[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed.” MCL 777.42(1)(a).

We cannot accept defendant’s argument that the trial court’s reasons for departure were already taken into account by the sentencing guidelines. This was a unique crime, involving a plan to break into a drug house by using an addict as a type of pawn. The trial court recognized the abhorrent nature of defendant’s crime by emphasizing “the grievous injuries that were done, . . . the lawlessness that was shown, [and] the effect that this kind of crime has on the community” This statement, combined with the court’s earlier indication that the victim “had a right to walk up and down the street without having bullets put in her because somebody wanted to rob a drug house,” convinces us that the trial court was focusing on the unusual, dangerous, and repellant scheme defendant was implementing. The existence of this type of scheme is not taken into account by the sentencing guidelines.¹ Moreover, the court focused on the grievous injuries inflicted on the victim and on the fact that the victim did not deserve to “hav[e] bullets put in her” As noted in *People v Lowery*, 258 Mich App 167, 171; 673 NW2d 107 (2003), while the guidelines may take into account that a victim was *shot at* and that a victim was injured, they don’t take into account that a victim was *actually shot*.

Considering all the circumstances, we simply do not find a basis to reverse the trial court’s seven-month departure from the guidelines range.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro

¹ We note that the existence of this scheme was external to the mind of the judge and the scheme otherwise fit the definition for departure factors in *Babcock*, 469 Mich at 257-258.