

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH IVEY,

Defendant-Appellant.

UNPUBLISHED

January 28, 2010

No. 288190

Wayne Circuit Court

LC No. 07-014918-FH

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

PER CURIAM.

Defendant appeals by delayed leave granted the sentences imposed after his no contest plea-based convictions of assault with intent to inflict great bodily harm less than murder, MCL 750.84, and unarmed robbery, MCL 750.530. The trial court imposed concurrent imprisonment terms of 6 to 15 years for the unarmed robbery conviction and 6 to 10 years for the assault conviction. We affirm defendant's sentences, but remand for correction of the judgment of sentence.¹ We have decided this appeal without oral argument pursuant to MCR 7.214(E).

The events giving rise to defendant's plea involved his assault of the victim, a former girlfriend. In a prolonged assault that "took about 15 minutes," defendant repeatedly punched the victim's face and head, and also kicked the victim's body multiple times as she laid on the ground. The assault stopped when the victim "played dead." The victim's injuries required hospitalization for medical treatment. In the course of the assault, defendant took the victim's purse, which contained cash and credit cards.

Defendant's sentencing guidelines recommended a minimum sentence range between 29 and 57 months. The trial court decided to depart upward from the guidelines range, expressing as follows at the sentencing hearing:

I don't think the guidelines fully—even I wasn't sure about the law, so I gave you the benefit of the doubt because I wasn't sure about the law. But at the same time I think justice requires that you pay a penalty for the pain you caused.

¹ The judgment of sentence misstates that defendant pleaded guilty to these charges. We remand for correction of the judgment of sentence to reflect defendant's actual plea.

* * *

I think six, six years . . . which is I believe a year above the guidelines I think is appropriate in this case because I think the criminal history and your prior conduct does not fully mentioned [sic] or tak [sic] into account the prior offense variables as well as in terms of conduct in this case that was charged.

The trial court additionally prepared a written sentence departure evaluation report, which lists the following reasons for departure: (1) “[d]efendant’s uncharged conduct is not adequately reflected in the guidelines (including [the fact that] defendant could have been charged with [assault with intent to commit murder],” (2) “[d]efendant had two separate PPO’s [personal protection orders] stemming from incidents where he committed at least three separate assaults or [incidents of] domestic violence,” and (3) “[d]efendant’s criminal history of past assaultive conduct [was] not adequately reflected” in the guidelines.

Defendant now disputes that the trial court’s reasons for departure were substantial and compelling. A court may depart from a sentencing guidelines range if it has “a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). But a court may not depart from the guidelines range on the basis of “an offense characteristic or offender characteristic already taken into account in” scoring the guidelines, “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). For a factor to qualify as substantial and compelling, it “must be objective and verifiable, meaning that it is external to the minds of the trial court, the defendant, and others involved in making the decision, and is capable of being confirmed.” *People v Kahley*, 277 Mich App 182, 186; 744 NW2d 194 (2007). To qualify as substantial and compelling, the reason also must “keenly” or “irresistibly” grab a court’s attention and be “of considerable worth” in deciding the length of a sentence. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003) (internal quotation omitted). “For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant’s conduct and prior criminal history.” *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008); see also *Babcock*, 469 Mich at 262 n 20, 264.

We review for clear error the reasons the trial court gives for a sentence departure. *Smith*, 482 Mich at 300. We consider de novo as a matter of law a trial court’s determination that a reason for departure qualifies as objective and verifiable. *Id.* “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.” *Id.*

With respect to the trial court’s reliance on defendant’s prior assaultive conduct not taken into account by the guidelines, defendant did not challenge in the trial court that he had committed prior assaults of the victim; he only maintained that the trial court could not use these prior incidents to score offense variable (OV) 13 (continuing pattern of criminal behavior) because they did not result in formal charges against him. The trial court did not clearly err in finding that these assaults had occurred, given that they were referenced in a PPO obtained by the victim. Defendant’s prior assaults of the victim meet the definition of objective and verifiable because they are “external to the minds of the trial court, the defendant, and others . . . and . . . capable of being confirmed.” *Kahley*, 277 Mich App at 186. To the extent defendant

complains that the victim's PPO did not appear in the trial court record, we observe that during sentencing the trial court may rely on hearsay information unchallenged by the defense.² *People v Uphaus (On Remand)*, 278 Mich App 174, 183-184; 748 NW2d 899 (2008); *People v Beard*, 171 Mich App 538, 548; 431 NW2d 232 (1988). Furthermore, the trial court's finding that the guidelines did not take defendant's prior assaults of the victim into account is supported by his own position at sentencing, where he successfully argued that OV 13 did not encompass these uncharged acts. Because defendant's prior assaults of the victim were substantiated in the record, were objective and verifiable, and "keenly" or "irresistibly" grab a court's attention and are "of considerable worth" in deciding the length of a sentence, *Babcock*, 469 Mich at 257, we conclude that the trial court did not abuse its discretion when it invoked defendant's prior assaults of the victim as a substantial and compelling basis for an upward departure.

Regarding the trial court's reliance on the fact that defendant could have faced a charge of assault with intent to commit murder, facts contained in the preliminary examination transcript, the parties' stipulated factual predicate for defendant's pleas, and the presentence information report amply establish that defendant perpetrated an unprovoked, brutal, and extensive attack of the victim. In addition, the victim testified at the sentencing hearing that defendant "didn't mean to just hurt [her], he meant to kill [her]." The guidelines as scored by the trial court did not take into account the brutal and extended nature of the assault or the facts of record reasonably evidencing that defendant intended to kill the victim. Because defendant's assault with intent to murder the victim (1) was substantiated in the record, (2) was objective and verifiable given that "it is external to the mind[] of the trial court . . . and . . . capable of being confirmed," *Kahley*, 277 Mich App at 186, and (3) "keenly" or "irresistibly" grabs a court's attention and is "of considerable worth" in deciding the length of a sentence, *Babcock*, 469 Mich at 257, we conclude that the trial court did not abuse its discretion when it invoked defendant's apparent commission of an assault with the intent to kill the victim as a substantial and compelling ground for an upward sentence departure.

Lastly, our review of the record reveals that the trial court adequately delineated "why the substantial and compelling reason or reasons justify the minimum sentence imposed." *Smith*, 482 Mich at 318. Stated differently, the trial court "justif[ied] why it chose the particular degree of departure." *Id.* Early in the sentencing hearing, the trial court elicited the parties' agreement that the guidelines range for defendant's class C crimes, MCL 777.64, in light of defendant's prior record variable D, equaled 29 to 57 months if the court did not take into account defendant's prior assaults of the victim under OV 13, but 43 to 86 months if the court added points under OV 13. After declining to score OV 13, the trial court considered but rejected a potential sentence at the low end of the guidelines range. In ultimately opting to exceed the guidelines range by imposing minimum terms of 72 months, the trial court expressed cognizance that this minimum term surpassed the guidelines as scored by about a year, and that this minimum term more aptly took into account defendant's history of violence toward the victim and the severity of the assault in this case.³ We thus conclude that the trial court did not abuse its

² Defendant offered no contradiction of the information contained in the victim's PPO or the fact a second woman had obtained a PPO against him.

³ In *Smith*, 482 Mich at 318, our Supreme Court suggested that "[i]t is appropriate to justify the
(continued...)

discretion when it imposed the 6 to 15 year term for the unarmed robbery conviction and the 6 to 10 year term for the assault conviction.

Affirmed, but remanded for correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder

(...continued)

proportionality of a departure by comparing it against the sentencing grid and anchoring it in the sentencing guidelines," and that the "trial court should explain why the substantial and compelling reasons supporting the departure are similar to conduct that would produce a guidelines-range sentence of the same length as the departure sentence." The trial court did so here when it imposed the 72-month minimum terms, which fell within the 43 to 86 month range applicable had the guidelines encompassed defendant's prior assaults of the victim.