

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ALBERT SIMS,

Defendant-Appellant.

UNPUBLISHED

March 16, 2010

No. 286738

Kent Circuit Court

LC Nos. 06-004396-FH

06-009533-FH

06-009647-FH

Before: Stephens, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from several plea-based convictions. In circuit court no. 06-004396-FH, defendant pleaded nolo contendere to obtaining money by false pretenses in an amount of at least \$1,000 but less than \$20,000, MCL 750.218(4)(a), and the trial court sentenced him to 387 days in jail and restitution in the amount of \$601,248.33. In both circuit court nos. 06-009533-FH and 06-009647-FH, defendant pleaded nolo contendere to uttering and publishing, MCL 750.249, and forgery, MCL 750.248. The trial court sentenced defendant in each case as a second habitual offender, MCL 769.10, to concurrent terms of 10 to 21 years' imprisonment for each of his convictions. In circuit court no. 06-009647-FH, the trial court also ordered defendant to pay restitution of \$28,310.24.¹ We vacate defendant's sentences and remand for resentencing.

Defendant first contends that the trial court failed to address his challenge to the accuracy of the information contained in his PSIR, specifically the amount of restitution regarding Jean and Steve Morin.² A trial court must exercise its discretion in determining whether a defendant's

¹ As part of the plea agreement, the prosecutor dismissed other charges and cases against defendant. Notably, the prosecutor dismissed charges of obtaining money by false pretenses in an amount more than \$20,000, MCL 750.218(5)(a), in circuit court nos. 06-004393-FH, 06-004394-FH, and 06-004395-FH.

² At the sentencing hearing, defendant conceded that he did not dispute the restitution award to victim Charles Cherney. Even though defendant subsequently disputed that award in his motion for resentencing, a defendant may not acquiesce to an issue and then claim error involving that issue on appeal. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Defendant has waived any allegation of error regarding Cherney's restitution award. *People v Carter*, 462

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allegations of inaccuracies in sentencing information have merit. *People v Edenburn*, 133 Mich App 255, 257-258; 349 NW2d 151 (1983). “The sentencing court must respond to challenges to the accuracy of information in a presentence report; however, the court has wide latitude in responding to these challenges. The court may determine the accuracy of the information, accept the defendant’s version, or simply disregard the challenged information.” *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). A defendant bears the burden of effectively challenging the inaccurate information. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). But “[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.” MCL 780.767(4).

In this case, in both a written response to the presentence information report (PSIR) and orally at the sentencing hearing, defendant disputed the PSIR’s restitution recommendations of \$541,248.33 to Jean Morin and \$60,000 to Steve Morin. In the face of defendant’s challenges, the trial court had three options: to determine the accuracy of the information, to accept defendant’s version, or to disregard the challenged information. *Spanke*, 254 Mich App at 648. The trial court referenced and recited the restitution-related information contained in the PSIR, which set forth lump sums requested by the victims, and the prosecutor’s memorandum of “corrections” to the PSIR, which included several paragraphs documenting purported transactions between defendant and the Morins; the prosecutor described that “[t]his information can be obtained in the police report, or the preliminary exam held in these matters.” However, the trial court did not specifically address or accept the accuracy of the restitution-related information in the PSIR and the prosecutor’s corrections. The court simply and improperly accepted the prosecutor’s proffered restitution amounts and incorporated them into the judgments of sentence.

Furthermore, the figures delineated in the prosecutor’s corrections and recited by the trial court at the sentencing hearing do not even approximate the restitution total of \$601,248.33 that the PSIR recommended the Morins receive.³ Notably, a substantial discrepancy exists between the amount of restitution sought by Jean Morin and the amount that the record evidences defendant obtained from Jean Morin. Before defendant entered his plea, he faced charges of obtaining money by false pretenses in three cases against Jean Morin, which involved a total of \$229,000.⁴ At defendant’s preliminary examination, Jean Morin testified about his provision of the \$229,000 to defendant, and that he gave defendant another \$102,000 as part of a partnership agreement, a transaction that did not spawn additional charges. Adding together all the figures discussed at the preliminary examination relating to Jean Morin, the total of \$331,000 still leaves a discrepancy of more than \$150,000 in the trial court’s award of restitution to Jean Morin. Regarding the charge against defendant for obtaining \$60,000 by false pretenses from Steve Morin, Steve Morin acknowledged at the preliminary examination that defendant had given him six checks of \$3,000 each, \$18,000 in total, for payments toward their agreement, and eight

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Mich 206, 215-216; 612 NW2d 144 (2000).

³ The PSIR perfunctorily states that “[r]estitution on this docket number [06-004396-FH] and other dismissed in the plea agreement total \$541,248.33 to Jean Morin and \$60,000 to Steve Morin.”

⁴ Two of the three cases ultimately were dismissed.

checks of \$1,376 each, \$11,008 in total, to pay for Steve Morin's automobile. The amounts of record undoubtedly reduce Steve Morin's restitution award by nearly one-half.

In summary, because the trial court did not address the accuracy of the restitution figures it awarded in this case, despite defendant's objection to these amounts, we vacate the restitution awards to the Morins. We remand to permit the trial court to either "determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information," *Spanke*, 254 Mich App at 648, while keeping in mind the parameters of proper restitution awards. See *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006) ("Restitution encompasses only those losses that are easily ascertained and are a direct result of a defendant's criminal conduct.").

Defendant next submits that the trial court offered no objective and verifiable reasons in support of the upward departure in his sentences. 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.*

At sentencing hearing, the trial court recited the following reasons for its decision to depart in this case: "a pattern of criminality," the number of subsequent or concurrent convictions not accounted for in the sentencing guidelines, and the amount of restitution here, which the guidelines also did not entirely take into account. The departure evaluation form similarly documented that the trial court premised the departure on the inadequacy of offense variable (OV) 16, MCL 777.46, and prior record variable (PRV) 7, MCL 777.57, in reflecting the circumstances of this case. The trial court emphasized that OV 16 did not take into consideration the severity of defendant's offenses, given that the PSIR called for restitution in the amount of \$629,558.57, an amount "over 30 times the \$20,000 maximum for which points are allocated in Offense Variable 16." As we have discussed, a substantial discrepancy existed between the amount of restitution recommended in the PSIR and the amount actually taken by defendant, at least as supported by evidence of record. Consequently, the \$629,558.57 figure

that formed the basis for the court's departure did not qualify as objective and verifiable on this record, and cannot constitute a substantial and compelling reason for a sentencing departure.

With respect to PRV 7, the trial court correctly observed that defendant had a total of five felony convictions in the current circuit court files and a prior felony conviction in 2002 for attempted embezzlement. On the departure evaluation form, the trial court's reference to PRV 7 also seems related to the court's finding that defendant had engaged in "a pattern of similar criminality." The trial court expressed concern over the "high restitution" and "about the similarity and continuing pattern of criminality."⁵ While defendant's pattern of criminality could form a basis for an upward departure in this case, the trial court clearly erred when it determined that the recommended restitution of \$629,558.57 contained in the PSIR also served as a basis for the departure. The record as developed simply does not support this amount, and the uncertainty of the restitution amount undermines the trial court's "pattern of criminality" reasoning, at least to the extent that the trial court expressed its concern over the "high restitution" recommended in this case.⁶

In summary, the reasons articulated by the trial court for its upward departure in this case are at least partially invalid. Because we cannot ascertain whether the trial court would have departed from the sentencing guidelines range to the same extent regardless of the invalid factors, we remand for rearticulation or resentencing. *Babcock*, 469 Mich at 260. On remand, we advise the trial court to utilize our Supreme Court's summary as articulated in *People v Smith*, 482 Mich 292, 318-319; 754 NW2d 284 (2008), in determining and setting forth on the record both the reasons warranting any sentence departure and the reasons why the extent of a particular sentence departure selected amounts to a proportionate sentence.

Defendant additionally raises two allegations of error regarding the scoring of OV's 9 and 16. When scoring the guidelines, "[a] sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision

⁵ After a brief paragraph identifying the inadequacy of PRV 7 in this case, the relevant portion of the trial court's departure evaluation form reads as follows:

I also departed over the Guidelines as there was a pattern of similar criminality with regards to the defendant's prior conviction and these five felonies. As previously stated, he had been convicted in 2002 of an attempted embezzlement, and was ordered to pay restitution of \$18,800. The fact that these, again, were property crimes in which there was high restitution caused me to be concerned about the similarity and continuing pattern of criminality.

⁶ The trial court makes much of the dollar amounts taken in the cases involving the Morins. However, defendant's false pretenses offenses against the Morins carry lesser maximum sentences than the offenses defendant committed against Cherney. A false pretense conviction carries a maximum sentence of five or ten years' imprisonment, depending on the amount of money or property involved. MCL 750.218(4), (5). The offenses of uttering and publishing and forgery are felonies with 14-year maximum sentences. MCL 750.248, MCL 750.249.

“for which there is any evidence in support will be upheld.” *Id.* (internal quotation omitted). We review scoring decisions “to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The interpretation and application of the sentencing guidelines present questions of law subject to de novo appellate review. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

In light of the fact that defendant’s charges stem from his conduct in 2004, 2005, and 2006, the version of the sentencing guidelines in effect on the dates defendant committed the crimes controls the appropriate variable scoring. MCL 769.34(2). The plain meaning of the relevant version “of MCL 777.39 require[d] OV 9 to be scored only when there is a danger of physical injury.” *People v Melton*, 271 Mich App 590, 592; 722 NW2d 698 (2006) (opinion by Davis, P.J.).⁷ Because none of defendant’s crimes placed any victims in danger of physical injury, the trial court erroneously scored OV 9 at 10 points. The erroneous scoring of OV 9 improperly increased defendant’s minimum sentencing guideline range from 7 to 28 months to 10 to 28 months. However, we reject defendant’s allegation of error as to OV 16, which authorizes a 10-point score when the property involved in the case “had a value of more than \$20,000.00.” MCL 777.46(1)(b). Because the stipulated facts at defendant’s plea hearing demonstrated that he obtained \$22,500 from the victims, we uphold the trial court’s scoring decision with respect to OV 16. *Hornsby*, 251 Mich App at 468. Nevertheless, given that a scoring error changed the recommended minimum sentence range under the guidelines, resentencing is required. *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

Defendant lastly suggests that the trial court improperly departed from the sentencing guidelines range based on unproven allegations. We initially observe that defendant has abandoned this issue by supplying less than cursory treatment of the issue in his appellate brief. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). More importantly, defendant’s suggestion lacks merit. While facts supporting a departure from a maximum sentence term must be admitted by the defendant or found by a jury beyond a reasonable doubt, *Blakely v Washington*, 542 US 296, 301; 124 S Ct 2531; 159 L Ed 2d 403 (2004), this rule does not apply to the minimum sentence of an indeterminate sentence under Michigan’s sentencing scheme. See *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

We vacate defendant’s sentences and remand this case for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

⁷ The current version of MCL 777.39, effective March 30, 2007, permits scoring of OV 9 for property loss.