

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL ALLISON CORRIN, SR.,

Defendant-Appellant.

UNPUBLISHED

July 27, 2010

No. 290747

Lenawee Circuit Court

LC No. 07-013418-FH

Before: SHAPIRO, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted by a jury as charged of second-degree criminal sexual conduct (“CSC”), MCL 750.520c(1)(a). The trial court departed from the sentencing guidelines range of 29 to 57 months and sentenced defendant to a prison term of 100 to 180 months. Defendant appeals as of right. We affirm defendant’s conviction, but remand for resentencing before a different judge.

Defendant was convicted of sexually touching his three-year-old step-granddaughter. At trial, the victim testified that defendant touched her genital area over her clothing while he was babysitting her and her younger twin sisters. Defendant admitted touching the victim in her genital area, but denied doing so for the purpose of sexual gratification.

I. QUESTIONING DURING VOIR DIRE

Defendant first argues that the trial court’s voir dire examination of the prospective jurors was inadequate. He contends that the trial court erred by failing to ask various questions that he had submitted to the court as questions to be asked during voir dire.

Both the scope and conduct of voir dire is left to the trial court’s discretion. *People v Washington*, 468 Mich 667, 674; 664 NW2d 203 (2003). A defendant does not have a right to have his counsel conduct the voir dire. *Id.* But “where the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause can be intelligently exercised.” *Id.* As explained in *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996):

A defendant who chooses to be tried by a jury has a right to a fair and impartial trial. *Duncan v Louisiana*, 391 US 145; 88 S Ct 1444; 20 L Ed 2d 491

(1968); *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981). The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially. *People v Brown*, 46 Mich App 592, 594; 208 NW2d 590 (1973). In ensuring that voir dire effectively serves this function, the trial court has considerable discretion in both the scope and conduct of voir dire. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994); MCR 6.412(C). What constitutes acceptable and unacceptable voir dire practice “does not lend itself to hard and fast rules.” *Id.* at 623. Rather, trial courts must be allowed “wide discretion in the *manner* they employ to achieve the goal of an impartial jury.” *Id.* (Emphasis in original.)

In reviewing the trial court’s conduct, this Court must determine whether the trial court conducted a voir dire “sufficiently probing . . . to uncover potential juror bias.” *Id.* at 609.

Further, “[a] defendant is entitled to relief from a verdict because of disallowance of voir dire only if he can prove that he was actually prejudiced by the presence of [a] juror . . . or that [a] juror was properly excusable for cause”. *Washington*, 468 Mich at 675.

In this case, defendant submitted an extensive list of proposed questions to be asked during voir dire. Many of the questions involved specific inquiries pertaining to sexual abuse, such as whether any jurors worked in positions where they were required by law to report physical or sexual abuse, or involved probing questions about jurors’ beliefs regarding children and sexual matters, their feelings about sexual abuse and whether children lie, or the physical affection a juror might display with his or her own family members.

The trial court had an obligation to conduct a voir dire that was sufficiently probing to enable defendant to determine whether a potential juror could not be fair and impartial because of the nature of the case. See *People v Manser*, 250 Mich App 21, 24; 645 NW2d 65 (2002), overruled in part on other grounds in *People v Miller*, 482 Mich 540, 561 n 26; 759 NW2d 850 (2008).

Voir dire should be a genuine opportunity for attorneys to determine whether they believe any jurors have bias sufficient for a challenge, whether for cause or just a peremptory. When attorneys are not permitted to ask questions, attorneys should be permitted to submit questions and the trial court ought to at least ask some of them.

The record reveals that the voir dire conducted by the trial court in this case was meager and the trial court’s questions were not as specific as defendant’s proposed questions. The court asked whether any juror had been the victim of the same or a similar crime, whether any juror had friends or relatives who may have either been charged with or a victim of the same or a similar offense, and whether the nature of the case would bother any juror to the extent that he or she could not be fair and impartial. Further, depending on a given juror’s response, the court asked more specific follow-up questions when appropriate.

Ultimately, the court’s questioning covered the general areas requested by defendant and were sufficiently specific to enable defendant to determine whether a given juror’s experiences

with inappropriate sexual activity, either as a victim, an accused, or an acquaintance of either a victim or an accused person, might prevent them from being fair and impartial. Although the trial court's voir dire was rather skeletal and far from the level of inquiry better practice would allow, it comported with the minimal requirements of the rule and does not require reversal.

Furthermore, defendant has not established that he was actually prejudiced by the presence of a particular juror who should not have been allowed to remain on the jury. *Washington*, 468 Mich at 675. Accordingly, defendant is not entitled to relief on this basis.

II. THE VICTIM'S COMPETENCY TO TESTIFY

Defendant next argues that the trial court erred in finding that the victim, who was four years old at the time of trial, was competent to testify. This Court generally reviews a trial court's determination of a witness's competency for an abuse of discretion. *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001). In this case, however, although defendant filed a motion to have the victim submit to a competency hearing before trial, he later withdrew that motion before trial.¹ At trial, the trial court questioned the victim to determine her competency before allowing her to testify. Defendant did not object to the trial court's questioning of the victim or to the victim's competency to testify at that time. After the victim finished testifying and had been excused, however, defendant objected to her testimony on the ground that a sufficient foundation to establish her competency had not been established. As the trial court properly observed, defendant's objection was untimely. Therefore, defendant's claim that there was an inadequate foundation to establish the victim's competency is unpreserved. We review unpreserved issues for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

Defendant further argues, however, that trial counsel was ineffective for not timely challenging the victim's competency. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

MRE 601 provides:

Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

¹ The trial court appropriately observed that because there had been no objection to the victim's competency to testify at the preliminary examination, if the victim had been found incompetent to testify at trial, her preliminary examination testimony could be admitted under MRE 804(b)(1). See *People v Edgar*, 113 Mich App 528, 535-537; 317 NW2d 675 (1982).

The test for competency is whether the witness has the capacity and sense of obligation to testify truthfully and understandably. *Watson*, 245 Mich App at 583.

The record indicates that, upon questioning by the trial court, the victim indicated that she knew the difference between the truth and a lie, and that she gave appropriate responses to questions that were designed to show whether she was capable of distinguishing between the truth and a lie. In addition, she expressed that if she did not tell the truth, she would go to jail, thereby demonstrating her sense of obligation to testify truthfully. Although the victim sometimes gave confusing or inconsistent responses to questioning, those responses relate to her credibility and the weight of her testimony, not her competency to testify. *Id.* at 584. The record as a whole reflects that the victim had both the capacity and sense of obligation to testify truthfully and understandably. See *In the Matter of Wardell Jones*, 142 Mich App 207, 210-211; 369 NW2d 212 (1985). Thus, the trial court did not err in finding that she was competent to testify. Further, because the record adequately demonstrates that the victim was competent to testify, defendant was not prejudiced by defense counsel's failure to further pursue this issue. Accordingly, defendant's ineffective assistance of counsel claim cannot succeed.

III. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to allow the jury to find that he touched the victim for a sexual purpose. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in a light most favorable to the prosecution. *Id.* at 514-515.

Defendant was charged with engaging in sexual contact with a person under 13 years of age. "Sexual contact" is defined as including "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(q); see also *In re Ayres*, 239 Mich App 8, 24; 608 NW2d 132 (1999). Because second-degree CSC is a general intent crime, the jury is not required to find that the defendant specifically intended sexual gratification at the time he touched the victim; rather, it is only required to find that the defendant's conduct, when viewed objectively, could reasonably be construed as being for a sexual purpose. *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997).

In this case, the evidence indicated that defendant touched the victim's vaginal area over her clothing. There was conflicting testimony regarding the circumstances of this touching. Although defendant claimed that the victim initiated the contact by grabbing his hand and placing it over her vaginal area, the victim denied placing defendant's hand there and also denied that her hand was on top of defendant's hand while defendant was touching her vaginal area. If the jury found that the event occurred as the victim described, it would be entitled to infer that defendant's intentional touching of the victim's vaginal area, objectively viewed, could reasonably be construed as being for a sexual purpose. Further, there was also evidence that,

during the same encounter, the victim placed her hand inside defendant's shorts and touched his penis, and that defendant admitted to being aroused by that touching. Although defendant was not charged with that separate incident, the jury could reasonably find that defendant's reported arousal further supported a finding that his touching of the victim's vaginal area was done for a purpose of sexual gratification.

Defendant also argues that there were inconsistencies in the victim's testimony and prior statements, but those inconsistencies only affected the weight and credibility of her testimony, which were issues for the jury to resolve. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant engaged in sexual contact with the victim for the purpose of sexual gratification.

IV. SENTENCING

Defendant next argues that resentencing is required because the trial court erroneously scored several of the sentencing guidelines offense variables, and also improperly departed from the appropriate guidelines range. We agree.

The trial court's scoring of the sentencing guidelines resulted in defendant receiving a total prior record variable score of 0 points, and a total offense variable score of 125 points, placing him in PRV Level A (0 points) and OV Level VI (75+ points), resulting in a guidelines range of 29 to 57 months on the applicable sentencing grid. MCL 777.64. The trial court departed from this range and sentenced defendant to a prison term of 100 to 180 months. We first address defendant's challenges to the scoring of the guidelines.

A. SCORING OF THE GUIDELINES

When scoring the sentencing guidelines, a court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* Questions involving statutory interpretation or application of the guidelines are reviewed de novo. *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009).

Defendant first argues that the trial court erred in scoring ten points for OV 4. A ten-point score for OV 4 is appropriate where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Ten points should be scored if a serious psychological injury *may* require professional treatment. "[T]he fact that treatment has not been sought is not conclusive." MCL 777.34(2). See also *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005). The parties do not dispute that the victim participated in counseling after this offense, but they disagree on whether the counseling was related to this offense. The record discloses that after Protective Services became involved with the family because of this offense, the victim was removed from her family and placed in foster care. The presentence investigation report indicates that, at the time of sentencing, the victim was confused and was undergoing counseling to primarily address her family situation. Although we agree that there is no evidence that the victim displayed any fear of defendant, considering that this offense was a principal reason for the victim's removal from her family and that it contributed to the circumstances that

led to the victim's need for counseling, we conclude that the trial court did not err in scoring ten points for OV 4.

Defendant next argues that the trial court erred in scoring 50 points for OV 7 on the basis that the victim was treated with sadism. MCL 777.37(1). Sadism is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). The trial court found that 50 points was appropriate because sexual abuse by its nature is a humiliating event, and the act was done for defendant's own gratification. We disagree with the trial court's rationale for scoring OV 7. MCL 777.37(1) provides that "[o]ffense variable 7 is *aggravated* physical abuse." In this case, there was no evidence of any conduct beyond that necessary to commit the offense. Further, to the extent that the victim may have felt some humiliation because of the offense, there was no evidence that the victim was subjected to extreme or prolonged humiliation. Compare *People v Blunt*, 282 Mich App 81, 89; 761 NW2d 427 (2009). In addition, it is excessive pain or humiliation that is inflicted for the offender's gratification in the course of the offense that is to be considered, not any gratification that might arise from the commission of the offense itself. For these reasons, the trial court erred in scoring 50 points for OV 7. Instead, OV 7 should have been scored at zero points.

Defendant next argues that the trial court erred in scoring 15 points for OV 8. MCL 777.38(1)(a) provides that 15 points are to be scored for OV 8 if "[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." In this case, the trial court scored 15 points because defendant committed the offense after first placing the victim's younger twin sisters to bed, which the court found resulted in the victim being placed in greater danger. The plain language of OV 8 requires that a *victim* be "asported to another place of greater danger or to a situation of greater danger" before a court may score 15 points on the basis of asportation. Because there was no evidence that defendant asported a victim to a place or situation of greater danger, the trial court erred in scoring 15 points for OV 8, which instead should have been scored at zero points.

Defendant next argues that the trial court erred in scoring 15 points for OV 10 based on a finding that he exploited a vulnerable victim and that predatory conduct was involved. MCL 777.40(1)(a). Although we agree that a ten-point score was appropriate because defendant exploited the victim's youth and abused his authority status, MCL 777.40(1)(b), we agree with defendant that there was no evidence of predatory conduct to support a score of 15 points. "'Predatory conduct' means preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The trial court found that defendant engaged in predatory conduct when he placed the victim's younger sisters to bed before abusing the victim. Although that conduct properly may be considered preoffense conduct, it was not "directed at a victim." Further, to the extent that it facilitated defendant's commission of the offense, it did not involve the exploitation of a vulnerable victim, but rather "run-of-the-mill planning to effect a crime," which is insufficient to support a 15-point score for predatory conduct. *People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008). Neither the prosecutor nor the trial court identified any other conduct that could be interpreted as predatory. Thus, the trial court erred in scoring 15 points for OV 10, which instead should have been scored at ten points.

Defendant next argues that the trial court erroneously scored 25 points for OV 12 based on the commission of three or more contemporaneous felonious acts involving crimes against a person. MCL 777.42(1)(a). We disagree with the trial court's conclusion that there was evidence of an additional uncharged act of criminal sexual conduct that involved the victim touching defendant's penis. The only evidence of that act was defendant's statement to an investigator in which he stated that the victim initiated the act.² Although the trial court expressed that defendant was not credible when he stated that the victim initiated that contact, there was no evidence that the act occurred independent of defendant's statement, which alone did not support a finding that criminal conduct was involved. The victim testified to only one criminal act, which involved defendant touching her vaginal area. Thus, the trial court erred in finding that there was evidence of a contemporaneous act of criminal sexual conduct. However, we agree with the trial court that there was evidence that defendant falsely accused both the victim's father and paternal grandfather of sexually abusing the victim, which would constitute a felony pursuant to MCL 722.633(5)(b), and is categorized as a crime against a person. MCL 777.15g. This evidence supports a finding that two contemporaneous felonious criminal acts involving crimes against a person were committed, thereby supporting a score of ten points for OV 12. MCL 777.42(1)(b). Thus, the trial court erred in scoring OV 12 at 25 points, which instead should have been scored at ten points.

Defendant lastly argues that the trial court erred in scoring ten points for OV 19. A ten-point score for OV 19 is appropriate where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). In *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004), our Supreme Court held that the phrase "interfered with or attempted to interfere with the administration of justice" involves more than just judicial proceedings and may encompass the duties of law enforcement officers, including the investigation of crimes. Thus, "[c]onduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice, and OV 19 may be scored for this conduct where applicable." *Id.* at 288. In *Barbee*, the Court held that OV 19 was properly scored at ten points where the defendant provided a false name to the police.

However, *McGraw*, 484 Mich 120, was decided subsequent to *Barbee*, and held that "[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *McGraw*, 484 Mich at 133. Relying on this language, this Court decided in *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued November 19, 2009 (Docket No. 286479), at 5, that because the instructions for OV 19 do not expressly allow a court to consider any conduct beyond the sentencing offense, courts should not consider such conduct when scoring OV 19. Although *Smith* is not binding on this Court, MCR 7.215(C)(1), we are persuaded that its analysis is correct.³ Accordingly, we conclude that the trial court erred when it scored 10 points for OV 19.

² At the preliminary examination, the district court refused to bind defendant over on a second count of second-degree CSC because there was no evidence that defendant was involved in initiating the alleged act.

³ We also note that our Supreme Court is currently considering this very issue, as it granted the
(continued...)

In sum, the foregoing analysis indicates that defendant should have received a total OV score of 30 points, rather than the 125 points assessed by the trial court. The adjusted scoring places defendant in OV Level III instead of OV Level VI, and reduces his guidelines range from 29 to 57 months to 10 to 19 months. MCL 777.64. Because the scoring errors affect the appropriate guidelines range, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 90-92; 711 NW2d 44 (2006).

B. DEPARTURE FROM THE GUIDELINES RANGE

In addition to challenging the scoring of the guidelines, defendant also argues that the trial court erred in departing from the sentencing guidelines range.

In *People v Kahley*, 277 Mich App 182, 186-187; 744 NW2d 194 (2007), this Court summarized the standards that apply to imposition of a sentence outside the guidelines range:

Generally, a trial court is required to impose a minimum sentence that falls within the recommended minimum sentence range. MCL 769.34(2); [*People v Babcock*, [469 Mich 247, 255; 666 NW2d 231 (2003)]]]. A trial court may only depart from the recommended sentence range if there is a substantial and compelling reason for doing so. MCL 769.34(3); *Babcock, supra* at 255-256. A substantial and compelling reason must be objective and verifiable, *id.* at 257-258, 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 Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In addition, a substantial and compelling reason is one that keenly or irresistibly grabs the court's attention, and one the court recognizes as being of considerable worth in deciding the defendant's sentence. *Babcock, supra* at 257. Substantial and compelling reasons to depart only exist in exceptional cases. *Id.* Further, MCL 769.34(3)(b) provides:

"The 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."

"We review for clear error the trial court's cited factors supporting its departure, we review de novo whether the factors are objective and verifiable, and we review for an abuse of discretion the trial court's determination that the factors constitute substantial and compelling reasons to depart from the recommended range." *People v Horn*, 279 Mich App 31, 43; 755 NW2d 212 (2008).

(...continued)

prosecutor's leave to appeal solely to consider this exact question. *People v Smith*, 485 Mich 1133 (2010). However, until it has rendered its decision, we believe that this Court ought to consistently interpret how guidelines are scored.

Our review of the trial court's reasons for departing from the sentencing guidelines range reveals that the court relied on many factors that either were not objective or verifiable, or did not qualify as substantial and compelling. Many of the court's reasons are directed at its personal dissatisfaction with the sentencing guidelines in general. The court found that although OV 4 scores points for psychological injury to a victim, it does not attempt to differentiate between the degree of psychological injury a victim may experience in a given case. However, the court did not explain why the scoring of OV 4 did not adequately reflect the victim's psychological injury in this case. The court's primary concern was that OV 4 does not account for psychological injury to other members of a victim's or a defendant's family, and that OV 9 likewise does not treat other family members as victims. The court also commented that although victims are permitted to address the court at sentencing,

you will find nothing in these guidelines that scores anything for the statements made by a victim, none, no consideration of any kind. So I have to ask myself, what is the purpose of having victims come to my court and express their feelings, talk about and anguish over things they have gone through. Is it just lip service that the Legislature have us do, have them come and get their feelings off their chest and how they feel about things and have no impact whatsoever on the court's sentence.

Although the trial court appropriately observed that other family members are often affected by a defendant's crime, that is true in every case. However, substantial and compelling reasons for departure are intended only in exceptional cases. While the trial court did not clearly err in finding that other family members were affected by defendant's conduct and the resultant criminal proceedings, it failed to adequately explain why this factor, which is common to any criminal case, provided a substantial and compelling reason for departure in this case. Further, contrary to what the trial court stated, statements by a victim or a victim's family members at sentencing properly may be considered in scoring the guidelines to the extent that they address factors that are addressed by the sentencing guidelines variables (e.g., a victim's psychological injury). In addition, a trial court may consider those statements in deciding where to sentence a defendant within the appropriate guidelines range, or as a basis for departing from the guidelines range when the statements reveal objective and verifiable facts that properly may be considered substantial and compelling.

The trial court also expressed that it believed that defendant was likely to reoffend and that this case involved an "extremely egregious offense." The court's characterization of the offense as extremely egregious was principally based on its subjective views rather than objective facts. A court's belief that a defendant is likely to reoffend may be a proper basis for departure when it is supported by objective and verifiable facts relating to a defendant's past history, past failures at rehabilitation, or an admitted sexual attraction to children. *Horn*, 279 Mich App at 45. Here, the trial court referred to defendant's conduct in trying to shift blame to the child's father and paternal grandfather as being indicative of his likelihood of reoffending, but defendant's false accusations of others was already considered in the scoring of both OV 12 and OV 19. The only objective evidence that defendant might reoffend is evidence that he committed a past act of sexual misconduct with another relative several years earlier, and possibly his statement that he became sexually aroused when the victim touched him. But the

record does not provide objective and verifiable evidence that defendant qualifies as a pedophile. See *Kahley*, 277 Mich App at 188-190.

We believe that the evidence that defendant may have committed a similar offense against another relative in the past is the only objective and verifiable factor identified by the court that may qualify as substantial and compelling. Where a court articulates multiple reasons for departure and this Court determines that some are substantial and compelling and some are not, resentencing is required unless this Court is able to determine that the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone. *Babcock*, 469 Mich at 260. As previously explained, however, resentencing is required in this case due to the trial court's scoring errors.

C. RESENTENCING BEFORE A DIFFERENT JUDGE

Defendant also requests that this Court grant him a resentencing before a different judge. In deciding whether to remand for resentencing before a different judge, this Court considers the following factors:

“(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.” [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (citations omitted).]

In this case, the trial court made several strong statements at sentencing that reflect its extreme dissatisfaction with the sentencing guidelines in general. In addition, it made several strong statements about this case that are not supported by the objective facts. Although the trial court stated that it would nevertheless apply the guidelines in accordance with the Supreme Court's directions, it is apparent that it did not do so. Considering the court's strong comments, we believe that the court would have substantial difficulty setting aside its previously expressed views that we have found were erroneous. Under the circumstances, we believe that reassignment is advisable to preserve the appearance of justice, and would not entail judicial waste. Accordingly, defendant should be resented before a different judge on remand.

Affirmed in part and remanded for resentencing before a different judge. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto