

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALSTAIR ALEXANDER RICHARDSON,

Defendant-Appellant.

UNPUBLISHED

August 10, 2010

No. 289067

Wayne Circuit Court

LC No. 08-008157-FH

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. Many of the trial court's reasons for imposing a substantial sentence departure were neither objective nor verifiable. The offense variables already accounted for other grounds invoked by the trial court. The trial court's explanation for the sentence it imposed leaves me unable to ascertain whether the court would have departed to the same degree if it had confined its sentence departure to proper criteria. Furthermore, the trial court failed to articulate a justification for the extent of the departure, independent of the reasons supporting the departure. Consequently, I believe that this Court should remand for resentencing.

The trial court sentenced defendant to 90 months' to 35 years' imprisonment for his first-degree criminal sexual conduct (CSC I) conviction. MCL 750.520b(1)(d). That sentence represented a significant upward departure from the statutory guidelines range, which called for a minimum sentence of 27 to 45 months' imprisonment. In articulating the reasons warranting an upward departure, the trial court commenced its explanation by referencing that the victim's nine-year-old son saw defendant sexually assault the victim:

The Court: I don't think anybody understands what happened to that baby. I read what it says. I'm going to give him an opportunity to respond.

But I don't think anybody understands what happened to that little boy who, in his own house—here, he takes advantage of a friendship. A man who had welcomed him into his house, allowed him to be there. Trusted him in his house with his wife and his children.

And one of the children wakes up and hears the mother, looks and sees her. And he cannot describe it. He did not exactly put it in his mind that it was a rape. He just knew they are hurting Ma.

The two adults in the house, the father and the mother, both take varied medication for pain that's very strong. It looks as if this man was a predator, thinking that she's knocked out. He's in there sleeping with the kids. He'll never know what I did. And they took advantage.

The young man has severe emotional problems stemming from this. To think that the last thing that these children will remember about their mother is her yelling and screaming, trying to keep him in the house while she's talking to the police, trying to get them—and then talking to an idiot. That 911 operator needs more training. She's telling her shhh, calm down.

The woman had woke up, was being raped in her own house. And this idiot on the phone tells her to calm down; because shh, you don't want your kids to know. The kids had to know. This isn't a big house. These aren't wealthy people.

And so now as they, unfortunately, she's not going to be here to give them any more good times not because of this case, other things. And now we've got a group of kids, I think it's five of them or is it just four?

Defense counsel: Four.

The Court: Who are going to have to remember forever, this evening of this terror when they wake up and their dad is in this kind of confrontation with this man who is really, calling his wife a whore telling him, I'm not the only one who had sex with her.

So no. I don't think he knows. Because he says, ah, it was dumb. I shouldn't have done it. And then his fiancée says it was a lapse of judgment. It wasn't a lapse of judgment. It was pure evil. It was pure evil that he would take advantage of a friendship like this. So—

* * *

Defense counsel: Just, your Honor that at Mr. Richardson's age is an opportunity here to take a person who has done something wrong and try to turn around that influence in his life and make him a productive member of society.

The Court: I don't know how. I don't know how you can take somebody who does this to a friend. He didn't break into somebody's house and have sex with a stranger. He did this in a house where he knew all the people. And where children were sleeping. That he knew.

Anything else?

Defense counsel: Mr. Richardson has asked me to ask the court to allow him the opportunity to demonstrate to the court that he can and will put this matter—

The Court: —Can he bring her back so she can see it too?

Defense counsel: Well, your Honor, he did not play any role in that whatsoever.

The Court: I know he didn't. But can you imagine? I heard that lady on that phone. She had been married for years. She hadn't had—she said, not with anybody, but-my-husband. She was a mother of four small children.

If she had been the “W” word, she wouldn't have done it in front of them in their house with her husband there.

So, he'll never make this up. There's no way he can make it up. Not to the children. Not to the man who was his friend. That guy is probably kicking himself everyday. I should have listened to my wife. She said she didn't like this guy in the first place. She didn't like him around. He's doing too much drinking. And I let him stay there and this is what happens.

The prosecutor urged the trial court to exceed the guidelines, “[f]or the reason that the guidelines do not take into account some of the things that were heard in this case.” The trial court responded, “I've already said that. As a matter of fact, I was already articulating the things that I think the guidelines don't address. ... I'm doing what I think this case deserves.” After defendant's allocution, the trial court further detailed the reasons for the sentence departure it imposed:

This [is] one of the cases where everything that came from the witness stand made this man look in a worse and worse and worse light. It's the kind of case where, and I don't remember what the offer was in this matter. I couldn't imagine why we went to trial.

They had his DNA. Then I have to hear the little boy come in and tell me about what happened. Then I have to hear the tape of the woman. And, I have to hear that this man quote, “was a friend of the woman's husband.”

And I'm telling you, when I saw the 108 to the 180, I said you know, that's almost just about where I think it ought to be. I think I've articulated the reasons on the record.

Particularly the fact that this traumatized of [sic] all the children in that home, including the little boy who ran and screamed to his dad; they are hurting mom. Those children will never get over this. Never.

The father will never get over this. And I don't think these kinds of things are taken into account in the guidelines. Yeah, they've got something for psychiatric. But not on the level that this is.

And as I said. This is not just bad. It was not just, a lapse in judgment. This was pure evil to think that you could go into a woman's house, and with her husband and children present, do whatever you wanted to, to her body. Pure evil.

I don't care whether you had alcohol in your system or drugs. And I know that I'm supposed to be putting in a sentence that's going to do rehabilitation, but we haven't had that in Michigan for a long time because of money.

But I'll tell you something else. I don't think that a sentence ought to be something that would cause this victim to be laughed at for the rest of her life. And 45 months in prison is laughable for what was done to her, and the circumstances under which it was done.

And it's also an insult to other women that somebody should think, or the [L]egislature should think that a case like this he ought to get just 45 months in prison.

Well, he says, if the court can't do something for me, who can? He better look to a higher authority. Because see, I'm not in the forgiving business. There is somebody who is. And you need that person or entity in your life because I can't help you.

I am so disgusted by your behavior that I think you need to go away for enough time to demonstrate to you and the rest of the community, you don't do this to a woman. You don't do this to your friend.

How did you think he was going to wake up and look at his wife the rest of his life? How did you think that little boy is going to look at her for the rest of his life? Because eventually, he was going to figure out what you were doing underneath the covers and she's screaming; no, that hurts. And another man at her head.

I think he needs seven-and-a-half-years to 35 years with the Department of Corrections on each count. That's exceeding the guidelines.

Our Legislature has limited a trial court's ability to deviate from the sentencing guidelines by enacting MCL 769.34, which provides, in relevant part:

(3) A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. . . .

* * *

(b) 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.

In *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003), our Supreme Court emphasized that a “substantial and compelling reason” for departure from the guidelines must be “objective and verifiable,” and should “keenly” or “irresistibly” grab a court’s attention. A substantial and compelling reason “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 be “of considerable worth” in deciding the length of a sentence. *Babcock*, 469 Mich at 257. Substantial and compelling reasons for departing from the statutory guidelines exist only in exceptional cases. *Id.* “[W]hether the factor is objective and verifiable is a question of law that this Court reviews de novo.” *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). But “this Court reviews for an abuse of discretion the trial court’s determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence.” *Id.*

The majority summarizes the reasons given for departure as follows: (1) “defendant took advantage of the fact that he was welcomed into the victim’s home as a trusted friend”; (2) “defendant took advantage of a victim who was heavily medicated for pain”; (3) one of the victim’s children, WKJ, “was aware that the victim was being hurt,” and “has severe emotional problems from the assault”; (4) “all of the victim’s children will remember the incident’s occurring at the house”; and (5) “defendant committed this sex crime in a friend’s home where he knew all the people, and he knew where the children were sleeping.” *Ante* at 3.

The psychological problems suffered by WKJ would amount to a substantial and compelling reason for a sentence departure, but for the Legislature’s determination that psychological injury to a victim’s family does not constitute an “aggravating factor” in a case involving a nonhomicide crime against a person. The statutory sentencing variables and guidelines constrain the trial court’s authority to assign the minimum penalties for an offense. Sentencing decisions must rest on calculations derived from statutory variables, defined and weighted by the Legislature, addressing offense characteristics and a defendant’s prior criminal record. “Under the guidelines, offense and prior record variables are scored to determine the appropriate sentence range. Offense variables take into account the severity of the criminal offense, while prior record variables take into account the offender’s criminal history.” *Babcock*, 469 Mich at 263-264. “‘Offense characteristics’ means the elements of the crime and the aggravating and mitigating factors relating to the offense that the legislature determines are appropriate.” MCL 769.31(d). “[T]he term ‘offense characteristics’ includes the characteristics that are taken into consideration under the offense variables.” *People v Sargent*, 481 Mich 346, 349; 750 NW2d 161 (2008).

In *Sargent*, 481 Mich at 349, the Supreme Court instructed that “if anything, MCL 769.31(d) suggests that, generally, only conduct ‘relating to the offense’ may be taken into consideration when scoring the offense variables.” In other words, the aggravating or mitigating factors relevant to the offense being scored, contained within the pertinent offense variables,

form the basis for calculating an offender's minimum sentence. The legislative limitations placed on the relevant sentencing criteria serve to enforce the objective of proportionate sentencing. *Babcock*, 469 Mich at 264 (“[T]he appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant’s criminal history.”). Just as the proportionality principle guides Michigan’s statutory sentencing scheme, proportionality informs a trial court’s ability to depart from the sentence calculated under the guidelines. “In determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.” *Babcock*, 469 Mich at 262.

Defendant was convicted of CSC I, a crime against a person. MCL 777.16y. As directed by MCL 777.21(1)(a), a sentencing court must “[f]ind the offense category for the offense,” then “determine the offense variables to be scored for that offense category *and score only those offense variables for the offender as provided in part 4 of this chapter.*” (Emphasis added). “For all crimes against a person,” the Legislature requires that a sentencing court formulate the minimum sentence range by scoring “offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20.” MCL 777.22(1). Offense variable (OV) 5, concerning psychological injury to a member of the victim’s family, is notably absent from this list. The Legislature envisioned allowing sentencing courts to score OV 5 only “for homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder.” *Id.* When applicable, OV 5 assigns 15 points if “[s]erious psychological injury requiring professional treatment” occurred to a victim’s family.” MCL 777.35(1).

The plain language of MCL 777.21(1)(a) and MCL 777.22(1) precluded the trial court from calculating defendant’s minimum sentence by considering psychological injury to members of the victim’s family. These statutes, read *in pari materia*, reflect a legislative expectation that a family member’s psychological injury does not qualify as an appropriate aggravating factor in calculating the minimum sentence for a crime against a person not involving homicide or assault with intent to commit murder. *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007). Given this plain expression of legislative intent, I cannot agree that the trial court properly employed WKJ’s psychological injury as a ground for deviating from the sentencing guidelines in this CSC I case. In my view, a family member’s psychological injury cannot serve to enhance a defendant’s minimum sentence through the avenue of a *departure*, when applicable and controlling statutes forbid trial courts from taking into account this factor in calculating the appropriate minimum sentence. “[T]he Legislature’s purposes in enacting the sentencing guidelines—in particular the attainment of reasonably uniform and proportionate criminal sentences—can only be achieved if the guidelines are understood to mean what they say.” *People v Smith*, 482 Mich 292, 319-320; 754 NW2d 284 (2008) (Markman, J., concurring). While a sentencing court may depart on the basis of an offense characteristic “given inadequate or disproportionate weight” in the guidelines, MCL 769.34(3)(b), by enacting MCL 777.22(1) the Legislature simply took psychological injury to a victim’s family member out of the equation.

Furthermore, the record contains no evidence documenting any psychological injuries sustained by the other children, two of whom were under three years of age when the assault

occurred. The trial court's findings that the assault "traumatized all the children in that home" and that "[t]hose children will never get over this" are neither objective nor verifiable. Nor is the trial court's conjecture that "the last thing that these children will remember about their mother is her yelling and screaming," or the trial court's view that defendant's conduct amounted to "pure evil." Even assuming that the trial court correctly considered WKJ's psychological injury, I believe that the trial court erred by relying on these alternative and inappropriately speculative reasons for departure.

The majority summarizes that other reasons for departure included that defendant "took advantage of the fact that he was welcomed in to the victim's home as a trusted friend," and "took advantage of a victim who was heavily medicated for pain." *Ante* at 3. In articulating the reasons for the sentence departure, the trial court observed, "It looks as if this man was a predator, thinking that she's knocked out. He's in there sleeping with the kids. He'll never know what I did. And they took advantage." The sentencing guidelines address predatory conduct in OV 10, MCL 777.40. Under OV 10, the trial court should score 15 points if "[p]redatory conduct was involved." MCL 777.40(1)(a). If "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status," 10 points are scored. MCL 777.40(1)(b). And if the offender "exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious," the trial court must assess five points. MCL 777.40(1)(c). The trial court scored five points because the victim had taken pain medication and was asleep when defendant commenced the sexual assault. However, the trial court offered no explanation concerning any inadequacy inherent in the guidelines scoring of defendant's conduct in taking advantage of "a victim who was heavily medicated for pain," or who had been welcomed into "the victim's home as a trusted friend" and yet preyed on an unsuspecting victim. *Ante* at 3.

But irrespective whether the trial court relied on some appropriate criteria to impose a sentence departure, it failed to justify the particular sentence it imposed. "[T]he statutory guidelines require more than an articulation of reasons for a departure; they require justification or the *particular* departure made." *Smith*, 482 Mich at 303 (emphasis in original). In *Smith*, the Supreme Court cautioned that

if it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been. [*Id.* at 304.]

The trial court's articulation must include "an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *Id.* at 311.

Aside from the trial court's conclusory comments that "45 months in prison is laughable for what was done to [the victim]," that "it's also an insult to other women that ... the [L]egislature should think that [in] a case like this he ought to get just 45 months in prison," and that "I am so disgusted by your behavior that I think you need to go away for enough time to demonstrate to you and the rest of the community, you don't do this to a woman," the trial court

entirely neglected to articulate “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.” *Smith*, 482 Mich at 318. The trial court also nowhere explained any connection between the reasons supporting the departure and the extent of the particular sentence departure it imposed. *Id.*

Defendant had a prior misdemeanor conviction for operating a vehicle while intoxicated, and was on probation for that offense when he committed the instant crime. As a result, his prior record variable (PRV) score was seven, placing him at PRV level B. MCL 777.62. Defendant’s OV score of 15 placed him in OV level I. *Id.* Given defendant’s placement in OV level I, the recommended minimum sentence could not have exceeded 108 to 180 months, even had defendant been a hardened, recidivist criminal. If OV 5 applied in this case and the court had properly assigned defendant an additional 15 points for psychological injury to the victim’s family, he would have been in OV level II. Assuming the same PRV score of seven, his recommended minimum sentence would have been between 42 and 70 months.

According to the applicable sentencing grid, the trial court’s upward sentence departure of a 90-month minimum sentence corresponded to the I-E and the IV-B cells. A sentence in this range thus would have necessitated the addition of at least 45 additional OV points or 43 more PRV points. The record simply lacks an acceptable basis for punishing defendant to a degree applicable to an offender with the same OV score and a lengthy history of felony convictions, or an offender with the same PRV score and more than double the assigned OV points. Just as this Court may not substitute its own reasons warranting a sentence departure, *Babcock*, 469 Mich at 258-261, *Smith* prohibits appellate courts from justifying the extent of a particular departure when the sentencing court has failed to do so. 482 Mich at 304, 318. In light of the trial court’s lack of explanation why it selected the particular sentence it imposed, which substantially exceeded the minimum sentence dictated by the guidelines, I would remand for resentencing.

/s/ Elizabeth L. Gleicher