

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ANTHONY ZOULEK,

Defendant-Appellant.

UNPUBLISHED

July 17, 2012

No. 301512

Antrim Circuit Court

LC No. 09-004312-FH

09-004296-FH

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant was charged with criminal sexual conduct with intent to commit sexual penetration, MCL 750.520g(1), and second-degree criminal sexual conduct (CSC II), MCL 750.520c. After plea negotiations with the prosecutor, defendant pleaded guilty to two counts of CSC IV, MCL 750.520e. Defendant was sentenced to 36 months probation in lower court case no. 09-004312-FH and 14 to 24 months in prison in lower court case no. 09-004296-FH. Defendant appeals by leave granted, challenging only his prison sentence. We affirm.

In lower court case no. 09-004296-FH, the victim, who was sleeping over at the home of defendant's ex-wife and their two minor children, claimed that defendant touched her thigh, breast, and underneath her underwear "below the pubic area" at various times during the evening. Defendant had returned to the home after going to a rock concert with his ex-wife. At defendant's plea hearing, he acknowledged that he touched the victim's breast for purposes of sexual gratification. In lower court case no. 09-004312, the victim stated that in 2007, defendant had put his hand under her shirt and touched her breast. Defendant acknowledged in his plea that he touched the victim in a sexual manner for the purpose of sexual gratification.

The recommended sentencing guidelines range for each conviction was 0 to 17 months. In lower court case no. 09-004312-FH, the trial court sentenced defendant within the guidelines to a term of probation. However, in lower court case no. 09-004296-FH, the trial court sentenced defendant to 14 to 24 months in prison. The trial court cited four reasons in support of its

departure. First, offense variable (OV) 12,¹ MCL 777.42, did not in the trial court's judgment adequately account for defendant's concurrent felonious criminal acts of sexual assault and attempted sexual assault on the young victim. Second, the trial court noted that if the case had been scored under the original charge of CSC II, the guidelines would have supported a prison sentence. Third, defendant's total OV score was 55 points, far exceeding the baseline numeric delineating the top OV level for CSC IV (16+ points). Fourth, the trial court found that the offense violated the community trust. The trial court further found that each of these reasons would independently justify the departure.

Defendant asserts on appeal that the guideline departure was not supported by substantial and compelling reasons. In challenging the departure, defendant only challenges two of the four reasons articulated by the trial court. We find no error requiring reversal.

If the upper limit of a recommended minimum range is 18 months or less, the court is to impose an intermediate sanction, which may consist of probation or any sanction including a jail term, but not a prison term. MCL 769.34(4)(a); MCL 769.31(b). If an intermediate sanction is called for, a sentence that exceeds the upper end of the recommended sentencing range or a sentence imposing a prison term constitutes a departure. *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002). A departure is permissible if the court has substantial and compelling reasons for the departure, and if these reasons are articulated on the record. MCL 769.34(3); MCL 769.34(4)(a); *People v Harper*, 479 Mich 599, 637; 739 NW2d 523 (2007).

A substantial and compelling reason that justifies departure must be "objective and verifiable," must be of "considerable worth," must "keenly or irresistibly" grab the court's attention, and will exist only in "exceptional cases." *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003) (internal quotation marks omitted), quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). To be "objective and verifiable," factors must be external to the minds of the decision-maker and capable of verification. *People v Hill*, 192 Mich App 102, 111; 480 NW2d 913 (1991). An appellate court may not consider reasons that were not articulated below. *Babcock*, 469 Mich at 258.

On appeal, whether a factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* at 264. Whether the articulated factors constitute substantial and compelling reasons to depart from the sentencing guidelines is reviewed for an abuse of discretion. *Id.* at 264-265.

At the outset, we note that defendant's reliance on *People v Muttscheler*, 481 Mich 372; 750 NW2d 159 (2008), is misplaced. In *Muttscheler*, the parties reach a plea agreement that the defendant would be sentenced within the guidelines. *Id.* at 376. Thus, because "the trial court violated the agreement" when it sentenced the defendant in excess of the guidelines range, the defendant was entitled either to resentencing within the guidelines range or, if the trial court chose in its discretion not to sentence defendant in accordance with the plea agreement,

¹ The trial court referred to OV 9 at the sentencing hearing but clearly was referring to OV 12 because it noted that this was the variable "which scores the concurrent felon[ies]." OV 9, on the other hand, addresses the number of victims in the offense. MCL 777.39.

defendant was entitled to withdraw his guilty plea. *Id.* However, in the instant case, there was no agreement between defendant and the prosecutor that defendant's sentence would be within the sentencing guidelines range. Thus, *Muttscheler* has no bearing on defendant's claim.

We also note that the trial court explicitly stated that, in its judgment, each of its four articulated reasons "independently" supported the degree of its departure from the guidelines range. When a trial court identifies multiple reasons for departure but states that any single one alone would have justified the departure, only one of those reasons needs to be substantial and compelling in order to support the departure. *Babcock*, 469 Mich at 260. Thus, if we conclude that any one of the trial court's stated "independent" reasons for the departure was substantial and compelling, the basis for an upwards departure will properly be established.

Here, we conclude that the trial court's third articulated reason for departure supported the extent of the guidelines departure. It is well established that departures are appropriate when the recommended guidelines range is disproportionate to the seriousness of the offense, as punishment should fit both the criminal and the crime. *Id.* at 262, 264. The threshold for the top OV level for defendant's convicted crime of CSC IV is 16 points. MCL 777.68. Although the top level is open-ended (16+), the fact that defendant's 55-point OV score is so much higher than the baseline (almost 350% higher) supports the trial court's conclusion that an upward departure would render the sentence more proportionate to the offense committed. MCL 769.34(3)(b). Therefore, we conclude that the trial court did not abuse its discretion when it relied upon this substantial and compelling reason in departing from the sentencing guidelines when sentencing defendant to 14 to 24 months in prison. Because there is at least one substantial and compelling reason supporting the degree of the sentence departure, we need not evaluate the trial court's other stated reasons for departure. *Babcock*, 469 Mich at 260.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray