STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 29, 2012
V	No. 302625 Calhoun Circuit Court
MICHAEL KEVIN IVES, Defendant-Appellant.	LC No. 2010-002502-FC

Before: RONAYNE KRAUSE, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age). The trial court upwardly departed from the sentencing guidelines and sentenced defendant to 10 to 25 years' imprisonment. Because defendant waived appellate review of his evidentiary challenge and is not entitled to resentencing, we affirm.

Defendant's conviction stems from his conduct involving his niece, "JE," on April 2, 2004, her 11th birthday. Defendant and JE were alone in a hotel room together when he pulled down her pants and performed oral sex on her. Later that night, JE called her friend, Breanna, and told her what had happened. JE soon told her mother about the incident as well, and her mother took her to the police department to report the incident. Because JE refused to tell the police what had occurred, the police ultimately put the investigation "on hold." Over the next several years, JE told her friends Brittney and Kerriee about the incident. In October 2009, JE reported the incident to the police, resulting in defendant's arrest.

Defendant first argues that the trial court erred by admitting the testimony of Breanna, Brittney, and Kerriee regarding statements that JE made to them about the sexual encounter. Defendant contends that the testimony constituted inadmissible hearsay, which did not meet the requirements for admission as prior consistent statements under MRE 801(d)(1)(B). Our review of the record shows that defendant waived appellate review of this issue.

A defendant, through the actions of his trial counsel, may waive appellate review of an issue by affirmatively approving of an alleged error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A defendant who waives a claim of error may not thereafter seek appellate review because "his waiver has extinguished any error." *Id*. (quotation marks and citations omitted). Here, defense counsel initially objected to the admission of the challenged testimony.

Thereafter, the trial court opined that the testimony was admissible for the limited purpose of rebutting the inference that JE fabricated the allegation because her mother wanted defendant "put away." When the court asked defense counsel if he agreed with the court's reasoning, counsel responded, "yes, for that limited scope, your honor." Counsel's agreement that the testimony was admissible on the limited basis indicated extinguished any error. *Id.* Moreover, the trial court instructed the jury that it could consider the testimony only for the limited purpose of determining whether the allegation was the result of recent fabrication, improper influence, or motive. Accordingly, defendant waived appellate review of this issue and is entitled to no relief.

Defendant next argues that he is entitled to resentencing because the trial court erroneously scored ten points under offense variable ("OV") 19 and departed from the sentencing guidelines without articulating substantial and compelling reasons to justify the departure. We first address defendant's challenge to the scoring of OV 19.

Generally, we review de novo the application of the statutory sentencing guidelines. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). A sentencing court has discretion in determining the number of points to score a sentencing variable, provided that record evidence adequately supports a particular score. *Id.* Thus, we review a scoring decision "to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score." *Id.* "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

MCL 777.49(c) directs a sentencing court to score ten points under OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice[.]" This phrase "includes acts that constitute obstruction of justice, but is not limited to such acts." *People v Ericksen*, 288 Mich App 192, 204; 793 NW2d 120 (2010). OV 19 may be scored based on conduct that occurred after the completion of the sentencing offense. *People v Smith*, 488 Mich 193, 195, 202; 793 NW2d 666 (2010).

This Court has recognized that "interfering with a police officer's attempt to investigate a crime constitutes interference with the administration of justice." *People v Passage*, 277 Mich App 175, 180; 743 NW2d 746 (2008). Courts have upheld the scoring of ten points for OV 19 where the defendant told a witness that she "shouldn't talk to anybody" and that the defendant was "innocent" if she remained quiet, *Smith*, 488 Mich at 196, where the defendant "told his victims not to disclose his acts or he would go to jail[,]" *People v Steele*, 283 Mich App 472, 492; 769 NW2d 256 (2009), and where the defendant gave police officers a false name, *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). In *Ericksen*, 288 Mich App at 204, the trial court scored ten points under OV 19 because the defendant asked a companion to dispose of a knife and asked others to lie about his whereabouts on the night of the stabbing. This Court characterized the defendant's conduct as a "self-serving attempt[] at deception obviously aimed at leading police investigators astray or even diverting suspicion onto others and away from him." *Id.*

Here, the record shows that defendant was evasive and uncooperative when Detective Maria Alonso contacted him after JE spoke to the police in October 2009. Defendant asked Alonso where she obtained his phone number. He became agitated and threatened to hang up the

phone if Alonso did not answer his questions. When Alonso attempted to obtain basic information, such as defendant's address, he responded that she should obtain the information from the same source who gave her his phone number. Defendant refused to provide his address and gave evasive answers regarding whether he was employed. When asked whether defendant had a problem with authority or with the police, defendant responded, "Well, I don't get along with people that wanna be smart asses on the phone and over talk you when you're trying to ask questions as well. It ain't like I get a phone call every day from someone that wants to be a jerk on the phone." Although much of this information was contained in the presentence investigation report ("PSIR") rather than admitted as evidence at trial, a sentencing court may consider all record evidence when calculating the sentencing guidelines, including the contents of the PSIR. *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008). Because the record evidence adequately supported the trial court's scoring decision, defendant's challenge to the scoring of OV 19 lacks merit. *Waclawski*, 286 Mich App at 680.

Defendant next challenges the trial court's decision to upwardly depart from the sentencing guidelines. A sentencing court may depart from the appropriate guidelines range if it has a substantial and compelling reason for doing so and articulates that reason on the record. MCL 769.34(3). A "substantial and compelling" reason is "an objective and verifiable reason that keenly and irresistibly grabs [the court's] attention" and "is of considerable worth in deciding the length of a sentence." *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003) (quotation marks and citation omitted). "To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed." *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). A substantial and compelling reason for departure exists only in exceptional cases, *Babcock*, 469 Mich at 258.

Here, the trial court noted that, according to the PSIR, defendant attempted to contact JE through a third party to convince her to drop the charge against him and attempted to contact her earlier in the investigation to find out how much money she would accept to drop the charge. The trial court also identified communications in which defendant, in effect, attempted to bribe his way out of the consequences of his conviction. The trial court noted that all of these facts were "really troublesome." Additionally, the trial court explicitly identified these facts as substantial and compelling; they are objective and verifiable, they keenly and irresistibly grabbled the court's attention, and they were of considerable worth in determining defendant's sentence. *Babcock*, 469 Mich at 258. Thus, the trial court did not clearly err by relying on these facts in support of its departure.

But the parties allude to the articulation of multiple reasons for departure by the trial court, and where the trial court articulates multiple reasons for departure, this Court must determine whether each reason is substantial and compelling. *Babcock*, 469 Mich at 260. If some of the trial court's articulated reasons are substantial and compelling, and some are not, we "must determine whether the trial court would have departed and would have departed to the same degree on the basis of substantial and compelling reasons alone." *Id.*

First, the trial court arguably based its upward departure on defendant's lack of remorse toward the victim because of a letter sent from defendant to his sister, the victim's mother. In it, defendant apologized to his sister, not JE, for past behavior and for the "inconvenience" the

entire situation had become. At great length in the sentencing hearing, the trial court rebuked defendant for his failure to address the victim in the letter, his failure to apologize to her, and his characterization of the situation as an "inconvenience," which the court interpreted as defendant's attempt to ignore the magnitude of the situation. Michigan Courts have held that a defendant's remorse or lack thereof is not an objective or verifiable factor on which a sentencing court may base an upward departure. *People v Daniel*, 462 Mich 1, 8 n 9, 11; 609 NW2d 557 (2000); *People v Fields*, 448 Mich 58, 80; 528 NW2d 176 (1995). But, as previously mentioned, the trial court was simply expressing its abhorrence to defendant's characterization of the situation as an "inconvenience" rather than his overall failure to take responsibility for his actions.

And second, the trial court arguably based its upward departure on its own conclusion that, by some measure, a ten-year sentence was sufficient time to allow the victim to heal. The judge specifically stated that "[t]his sentence is not within the guidelines. I covered the substantial and compelling reasons why I believe I can depart higher, not a lot, but ten years is enough to give [JE] time to heal." In his statement, the judge was clearly referring back to substantial and compelling reasons he *already* enumerated. The judge had exhausted his list of reasons and explicitly acknowledged that fact. His remark as to the sufficiency of the sentence was simply an opinion of the judge himself—an afterthought—and not a reason for the upward departure. Were it so, "[it] must be based on actions or occurrences external to the minds of those involved in the decision" in order to be objective and verifiable, *Horn*, 279 Mich App at 43 n 6.

Remorse and a judge's opinion regarding the sufficiency of a sentence are improper bases for departing from the sentencing guidelines, but even if the trial court's references to defendant's remorse and the sufficiency of the sentence were reasons upon which it based its departure, this Court is convinced that the trial court "would have departed to the same degree on the basis of the substantial and compelling reasons alone." *Babcock*, 469 Mich at 260. We can infer from the trial court's discussion of defendant's multiple attempts to bribe JE and coerce her to drop the charges that the sentence imposed is more proportionate than would be a sentence within the guidelines. *People v Smith*, 482 Mich 292, 303-305; 754 NW2d 284 (2008).

Because it is clear to this Court that the trial court would have departed from the sentencing guidelines, and would have departed to the same extent based on defendant's attempts to "pay off" JE, get JE to drop the charges, and otherwise bribe his way out of facing the consequences of his actions, we affirm.

/s/ Amy Ronayne Krause
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood