

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MICHAEL PIERCE,

Defendant-Appellant.

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UNPUBLISHED

January 11, 2002

No. 225889

Muskegon Circuit Court

LC No. 99-043928-FH

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of assaulting a prison employee, MCL 750.197c. The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to six to fifteen years' imprisonment. We affirm.

Defendant first argues that the trial court erred by denying his motion for a continuance to secure the presence of a witness. We review a trial court's decision to grant or deny a continuance for an abuse of discretion. *People v Pena*, 224 Mich App 650, 660; 569 NW2d 871 (1997), modified on other grounds 457 Mich 885 (1998). We discern no abuse of discretion here, because defendant failed to demonstrate that the witness' testimony would be favorable to him. See *People v Lawton*, 196 Mich App 341, 348-349; 492 NW2d 810 (1992);<sup>1</sup> see also *People v Paquette*, 214 Mich App 336, 344; 543 NW2d 342 (1995). As stated by the trial court:

. . . ultimately, the [c]ourt needs to balance the interest of the jurors, interest of judicial economy, remainder of the [c]ourt's docket as well as the fact that these folks may in all likelihood not come back until Tuesday. There's going to be diminished recollection and everything else.

As I balance these factors, and I consider the fact that we really don't even know for sure what [the witness] will say, that's really the primary basis for the [c]ourt's decision, as well as those already described.

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<sup>1</sup> We note that *Lawton* constitutes binding authority on this Court under MCR 7.215(I)(1).

We do not consider this ruling to be without justification or grossly violative of fact and logic. See *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996) (setting forth the “abuse of discretion” standard of review). Reversal is unwarranted.

Next, defendant argues that the trial court erred by admitting evidence of defendant’s prior convictions because their prejudicial effect outweighed their probative value.<sup>2</sup> “The decision whether evidence is admissible is within the trial court’s discretion and should only be reversed where there is a clear abuse of discretion.” *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Once again, we discern no abuse of discretion. The 1997 conviction for breaking and entering was admissible for impeachment purposes,<sup>3</sup> and the trial court did not err in determining that its probative value outweighed its potential for prejudice, especially given the dissimilarity between breaking and entering and the instant offense. See *People v Allen*, 429 Mich 558, 606; 420 NW2d 499 (1988), and MRE 609. The jail escape and first-degree home invasion convictions were allowable as substantive evidence to demonstrate the elements of the charged crime,<sup>4</sup> and given their usefulness in this regard, the trial court did not abuse its discretion in admitting the evidence. At best, whether the evidence was admissible was a close question, and “[t]he decision upon a close evidentiary question by definition ordinarily cannot be an abuse of discretion.” *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995), quoting *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982). We find no error requiring reversal.<sup>5</sup>

Finally, defendant contends that the trial court erred by sentencing him to a minimum of seventy-two months’ imprisonment, when the statutory guidelines produced a range of fourteen to fifty-eight months. Specifically, defendant contends that there were no “substantial and compelling” reasons for departure as required by MCL 769.34(3). We review for an abuse of discretion a trial court’s determination that there was a substantial and compelling reason for departure from the guidelines. *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). An abuse of discretion exists if the result was so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, and the exercise of passion or bias. *Id.* at 76.

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<sup>2</sup> Defendant concedes in his brief that evidence of the convictions was otherwise allowable, if not for the prejudicial effect-probative value balancing test. Defendant states, “Mr. Pierce’s prior convictions, while allowed for admissible impeachment and substantive purposes, constitute highly prejudicial propensity evidence.”

<sup>3</sup> Defendant does not contend otherwise; see footnote 2, *supra*.

<sup>4</sup> Defendant does not contend otherwise; see footnote 2, *supra*.

<sup>5</sup> Moreover, in his appellate brief defendant cites cases solely relating to impeachment evidence, when some of the convictions were admitted not for impeachment but as substantive evidence. Accordingly, defendant has essentially waived the issue of the “substantive evidence” convictions. See *People v Watson*, 245 Mich App 572, 587; 629 NW2d 421 (2001). Defendant’s argument is also inconsistent in that at one point in his brief, he contends that the home invasion charge was properly admitted and then later suggests that it was not. As noted in *Watson*, an appellant may not leave it up to this Court to discover and rationalize his claims. *Id.*

The Legislature has placed the following restrictions on a court's basis for departure:

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.* [MCL 769.34(3)(b); emphasis added.]

Moreover, this Court has explained that the terms “substantial and compelling” “constitute strong language” and evidence the Legislature’s intent that substantial and compelling reasons would exist in only “exceptional cases.” *Babcock, supra* at 75, quoting *People v Fields*, 448 Mich 58, 67-68; 528 NW2d 176 (1995). This Court noted, “[t]he reasons justifying departure should “keenly” or “irresistibly” grab our attention, and we should recognize them as being “of considerable worth” in deciding the length of a sentence.” *Babcock, supra* at 75, quoting *Fields, supra* at 67.

Here, the trial court gave the following reasons for departing from the guidelines:

1. Mr. Pierce has prior crimes of the same nature, and it is important for the security of the penal institution, that violations of the rules be considered important.
2. Mr. Pierce’s prior record variable is 114 points. The top cell, “F”, has an increment for “75+”. Mr. Pierce’s prior record variable, obviously, exceeds the bottom cell increment by almost 40 points. This merits additional sanction than that imposed strictly for falling into the “F” category.

Defendant argues that these reasons were insufficient to justify a departure. Defendant contends that the trial court’s first reason is not substantial and compelling because defendant’s prior crimes were already taken into account. Specifically, defendant states that the nature of the crime itself, assaulting a prison employee, naturally took into account the effect of the crime on the security of penal institutions. Defendant also points out that Offense Variable (OV) 19 (dealing with threat to the security of a penal institution or interference with the administration of justice) was scored at twenty-five points. The court can score twenty-five points if the offender by his or her conduct threatened the security of a penal institution or court.

As noted above, the court can rely on a characteristic already taken into consideration by the guidelines if “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). The trial court made such a finding in this case, and we discern no abuse of discretion with respect to that finding. The presentence investigation report demonstrated that defendant, who was twenty-three years old at the time of sentencing for the instant offense, had several similar convictions. In 1994, defendant was convicted of attempted resisting and obstructing an officer. In 1998, defendant was convicted of two counts of assaulting a prison employee. In 1999, defendant was convicted of escape while awaiting trial for a felony. Thus, although OV 19 took into account the nature of defendant’s present

conviction, it did not take into account the fact that he had several similar convictions; thus, the trial court did not err in concluding that the characteristic had been given inadequate weight.

Defendant contends that the trial court's second reason for departure was also insufficient because the characteristic was already taken into account. We conclude that we need not even reach this claim, because the trial court's first stated reason justified its fourteen-month departure from the guidelines. Because we conclude that a substantial and compelling reason for departure existed, a review for proportionality is unnecessary under *Babcock, supra* at 77-78. In any event, we find the sentence proportionate to the circumstances surrounding the offense and the offender.

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter