STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED March 25, 2003
v	No. 239512 Wayne Circuit Court
CAROL AL-KASSAB, Defendant-Appellee/Cross-Appellant.	LC No. 01-006044-01

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of one count of arson, the burning of personal property worth over $1,000 but less than $20,000, MCL 750.74(1)(c)(i), and one count of possession of a Molotov cocktail/other explosive causing property damage, MCL 750.211a(2)(b), for setting fire to the vehicle of her former boyfriend, Thomas Higginbotham.[1] The trial court sentenced defendant to five years' probation, which represented a downward departure from the minimum sentencing guidelines range of twenty-four to forty months. The prosecutor appeals as of right, claiming that the trial court erred in departing from the guidelines. Defendant cross-appeals, arguing that the evidence was insufficient to prove the elements of the crime of possession of a Molotov cocktail. We affirm.

I

The prosecutor asserts that the trial court's stated reasons in support of the departure are neither objective and verifiable, nor substantial and compelling, to justify the downward departure to five years' probation from the sentencing guidelines range of twenty-four to forty months. We disagree.

[1] There were two codefendants in this case. Charges were dismissed against codefendant Michele Marie Ward at the preliminary examination, and codefendant Cynthia Przytula ("Cyndy") pleaded guilty to preparation to burn, MCL 750.77, prior to the trial.

According to *People v Babcock (Babcock I)*, 244 Mich App 64; 624 NW2d 479 (2000), after remand (*Babcock II*) 250 Mich App 463; 648 NW2d 221, lv gtd (*Babcock III*) 467 Mich 872 (2002),[2] the standard of review with respect to sentencing issues is as follows:

> the existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate courts as a matter of law. A 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 shall be reviewed for abuse of discretion. [*Babcock I, supra,* 244 Mich App 75-76, quoting *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995), superceded by statute on other grounds *Babcock II, supra*, 250 Mich App 463[3] (citations omitted; footnote added).]

An abuse of discretion is found where an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

A trial court may depart from the sentencing guidelines range "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). The Legislature, however, intended "substantial and compelling reasons" to exist only in exceptional cases. *Babcock I, supra*, 244 Mich App 75. This Court must follow a two-pronged process in reviewing a departure from the sentencing guidelines. First, this Court determines, as a matter of law, whether the sentencing court's stated factors for departure were objective and verifiable. *Id.* at 78. Second, this Court determines whether the sentencing court abused its discretion in concluding that the objective and verifiable factors in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence. *Id*.

In this case, the sentencing court gave several reasons for departing from the sentencing guidelines:

> [1] The defendant was a 36 year old fully employed female with no criminal record.

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[2] With respect to this Court's recent decision in *Babcock II, supra*, 250 Mich App 463, it must be noted that, in granting leave to appeal, the Michigan Supreme Court expressly indicated that one of the issues to be argued is the standard of appellate review for the Court of Appeals in light of MCL 769.34(11). *Babcock III, supra*, 467 Mich 872. The case was ordered to be placed on the January 2003 Session Calendar for argument before the Supreme Court. *Id*. Until the Supreme Court renders a different conclusion, this Court is bound to follow precedent. MCR 7.215(C)(2).

[3] It should be noted that our Supreme Court, in *People v Daniel*, 462 Mich 1, 10; 609 NW2d 557 (2000), declined to overrule its decision in *Fields, supra,* on the ground that it was properly reasoned.

> [2] The defendant has no history or evidence of a drug or alcohol problem or any other social/physiological difficulties.
>
> [3] The defendant is a lifelong resident [of] Wyandotte, Michigan.
>
> [4] The defendant and the victim had a long-term romantic relationship leading up to the incident on May 7, 2001. The two lovers worked in the same location. The relationship deteriorated and evidentially ended a few months prior to the incident date.
>
> [5] The defendant has finally acknowledged her behavior toward the victim Mr. Higginbotham was inappropriate and for that brief period of her life she was letting her emotions control her life, the lack of financial or material gain, and the motivation for the criminal act being a temporary loss of emotional control (which was contrary to a lifetime of controlled behavior).

We find that the trial court properly articulated objective and verifiable factors for departure.

In paragraph one the trial court states defendant's age, employment, and lack of criminal record as a basis for departure. Although objective and verifiable, it was improper to rely on defendant's lack of a prior criminal record. While "a defendant's prior record is an objective and verifiable factor, . . . it is already taken into consideration in scoring the prior record variables of the sentencing guidelines." *Babcock I, supra*, 244 Mich App 79. "Factors that are considered in scoring the guidelines cannot be used a second time to justify a sentencing departure 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.'" *Id*. quoting MCL 769.34(3)(b). Here, the sentencing court did not make any such finding, contrary to the express requirement of MCL 769.34(3)(b). However, defendant's age and employment are proper objective and verifiable factors for departure that were not taken into account by the scoring guidelines. *Daniel*, *supra*, 462 Mich 7.

In paragraph two and three the trial court states a lack of a prior substance abuse problem or social/physiological problems and the fact that defendant was a lifelong resident of Wyandotte as a basis for departure, both of which were objective and verifiable reasons for departure that were not taken into account in the scoring guidelines.

The fourth paragraph relates to the romantic relationship between defendant and the victim. Our review of the record shows that the sentencing court erred in concluding that the relationship between defendant and the victim ended "a few months prior to the incident date." The record indicates that the relationship ended more than a year before the underlying crime. However, the fact that a romantic relationship existed between defendant and the victim and that they worked in the same location would be objective and verifiable.

The language of the fifth paragraph provides various reasons for departure. The trial court indicates that defendant has acknowledged that her behavior was inappropriate and a result of a temporary loss of emotional control. The language of the last part of the sentence indicates that defendant "has finally acknowledged" that "the motivation for the criminal act being a temporary loss of emotional control (which was contrary to a lifetime of controlled behavior)."

The record supports the statement because defendant acknowledged a loss of control, both in direct responses to the court's questioning, and in defendant's sentencing memorandum. Defendant's acknowledgment after her arrest that her behavior was inappropriate is a factor that is properly considered when determining departure. *Daniel*, *supra*, 462 Mich 1; *Fields*, *supra*, 448 Mich 77.

Based upon the above findings, the trial court properly articulated objective and verifiable factors for its downward departure from the sentencing guidelines.

Second, we must determine whether the sentencing court abused its discretion in concluding that the objective and verifiable factors in this particular case constituted substantial and compelling reasons to depart from the statutory minimum sentence. *Fields, supra*, 448 Mich 77-78. Reasons justifying a downward 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." *Id.* at 67; *Babcock I, supra*, 244 Mich App 75.

It is clear that the trial court, specifically, articulated objective and verifiable reasons that it determined collectively provided substantial and compelling reasons to depart. The Departure Evaluation form along with the statements articulated on the record, at the sentencing hearing, indicate defendant was a middle aged person, with a career, who acknowledged that her behavior was inappropriate. These factors, more so than the other factors listed by the trial court, grab our attention and are of considerable worth in deciding the length of defendant's sentence. Contrary to the prosecution's argument, a person of middle age, with a good record, and a solid career may present substantial and compelling reasons to deviate because the person is "someone with a proven capacity for life within the bounds society has set." *Fields*, *supra*, 448 Mich 78.[4] Further, it is clear the trial court had objective and verifiable factors to depart that were not merely "garden variety" factors. *Daniel, supra*, 462 Mich 9. Defendant's age, employment, and acknowledgment of her inappropriate behavior were all proper objective and verifiable factors that taken together could constitute substantial and compelling reasons for the downward departure. Moreover, the circumstances in this case and the remarks of the trial court convince us that the court did not base its departure merely on factors already taken into account (defendant's lack of a prior criminal record) by the offense variables. *Babcock I*, *supra* at 79.

We find no abuse of discretion in the trial court's determination that there were substantial and compelling reasons for a downward departure. The trial court's result was not 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. *Babcock I*, *supra* at 76. Furthermore, the trial court did not abuse its discretion with regard to the extent of the downward departure.

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[4] We note that defendant's lack of a prior criminal record cannot be taken into account when determining whether there was substantial and compelling reasons for the downward departure, but it is proper to take into account defendant's age and employment, which may indicate that defendant can live within the bounds society has set.

II

On cross-appeal, defendant argues that the evidence was insufficient to prove the following, MCL 750.211a, elements: (1) a device intended or designed to explode, or (2) a device that was highly incendiary. We disagree, and conclude that the evidence was sufficient for a finding, beyond a reasonable doubt, of a device that was intended or designed to explode with the application of a flame.

"In reviewing the sufficiency of the evidence presented in a bench trial, an appellate court views the evidence de novo and in the light most favorable to plaintiff to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39; 642 NW2d 339 (2002).

MCL 750.211a(1), provides, in pertinent part:

> A person shall not manufacture, buy, sell, furnish, or have in his or her possession any device that is designed to explode or that will explode upon impact or with the application of heat or a flame, or that is highly incendiary, with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property without the permission of the property owner . . . . [MCL 750.211a(1).]

Accordingly, the prosecutor was required to prove the existence of (1) a device that was "designed to explode or that will explode upon impact or with the application of heat or a flame" or (2) a device that was "highly incendiary."

Defendant first argues that the prosecutor failed to present any evidence of a "device" for purposes of the statute. Defendant maintains that the only evidence presented was the burn patterns in the vehicle, which indicated that the fire was caused by liquid being poured or splashed into the vehicle and then ignited by a burning cloth. Defendant asserts that the use of a liquid accelerant is not sufficient to constitute a "device." Defendant does not appear to dispute whether a "bottle" may be considered a device.

The victim testified that he saw defendant carrying a bottle of alcohol, out of which a lit and flaming rag was hanging. The victim also testified that defendant threw the bottle into his vehicle. When defendant returned to the victim's backyard, she was carrying a bottle of alcohol with material hanging out of the bottle. The material was lit. When the victim grabbed defendant, defendant dropped the bottle, which broke on impact in the alley. Defendant's own statement to the police indicated that she was carrying a bottle of alcohol with a sweater or a dish towel wrapped around it. Defendant indicated that she broke the vehicle's window with the bottle, used a cigarette lighter to ignite the cloth, and threw the cloth and the bottle into the vehicle.

The arson investigator testified that he found a rag, or an article of clothing on the front passenger seat of the vehicle. The rag had the odor of alcohol. The burn patterns in the car suggested the possible use of an ignitable liquid. The only evidence of a bottle that the arson investigator found was in the alley. The bottle in the alley was a broken Bacardi Rum bottle that

was charred around the spout. There were charred pieces of newspaper in and around the bottle spout, and there was soot on the bottle's label. The arson investigator also recovered a kitchen towel from the alley, located a few feet from the bottle. The towel was not charred or burned. The arson investigator also concluded, on the basis of defendant's statement, that the bottle came apart in defendant's hands, that the alcohol splashed when defendant started the fire in the vehicle, and that she ran away from the vehicle with the bottle in her hands.

From this evidence, a trier of fact may reasonably infer that defendant carried the bottle with her when she fled. Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). As finder of fact, the trial court was charged with making credibility determinations, and nothing in the record suggests that the court erred in its findings. *People v Thenghkam*, 240 Mich App 29, 46; 610 NW2d 571 (2000). When reviewing a trial court's finding of fact, this Court gives deference to the trial court's ability to view the evidence and the demeanor of the witnesses. MCR 2.613(C); *People v Johnson*, 202 Mich App 281, 288; 508 NW2d 509 (1993). Here, the trial court expressly stated that it believed the victim's testimony that he saw defendant carrying a bottle out of which a lit rag was hanging. The trial court also noted that defendant, in her statement to the police, admitted to throwing the bottle into the vehicle. Additionally, evidence of a charred bottle with charred pieces of paper in its spout was also collected in this case, suggesting defendant's intent to burn the vehicle a second time. In this respect, the evidence was sufficient for a finding, beyond a reasonable doubt, that an alcohol bottle was used as a "device" for purposes of the statute.

Defendant next argues that the evidence was insufficient for a finding that she had a device that was "designed to explode or that will explode upon impact or with the application of heat or a flame, or that is highly incendiary." Particularly, defendant asserts that the evidence showed that the alcohol was poured or splashed into the vehicle and used as an accelerant, not as an explosive device, and that the prosecutor presented no evidence that the bottle of alcohol was "highly incendiary."

The fire investigator testified that the alcohol was used as an accelerant. There was sufficient evidence to infer that defendant's plan may not have worked in the manner she intended and she may have carried the bottle with her when she fled after starting the fire. There was also sufficient evidence to show that defendant intended to perfect her plan when she returned the second time with a bottle of alcohol that contained a lit wick. According to *Random House Webster's College Dictionary* (1997), "alcohol" means "a colorless, volatile, *flammable* liquid." (Emphasis added.) The word "flammable" means "easily set on fire; combustible." The word "accelerant" means "a substance that intensifies a fire or accelerates its speed." We conclude the evidence was sufficient to support a finding beyond a reasonable doubt that the device was "designed to explode or . . . will explode . . . with the application of . . . a flame."

Defendant's next claim, that there was no expert testimony pertaining to the "highly incendiary" nature of alcohol, is premised on the assertion that the evidence was insufficient for a finding that there was an "explosive device." In light of the above analysis and conclusion, we need not address this claim.

We affirm.

/s/ Patrick M. Meter
/s/ Kathleen Jansen