

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS JAMES HARRIS,

Defendant-Appellant.

UNPUBLISHED

November 18, 2003

No. 241758

Isabella Circuit Court

LC No. 01-000252-FH

Before: O'Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant appeals by right his sentences of six to fifteen years' imprisonment for insurance fraud, MCL 500.4511, and conspiracy to commit insurance fraud, MCL 500.4511; MCL 750.157a, to be served concurrently with his sentence of ninety-three days' imprisonment for filing a false report, MCL 750.411a(1)(a). We affirm.

I. Facts and Proceedings

Defendant's convictions arise out of the reporting of a staged and fictitious traffic accident involving a truck owned by defendant's girlfriend, Ruth Fooce. Fooce purchased the truck from Riteway Automotive Credit in July 2001, and defendant and his companions concocted a plan to stage an accident when Riteway refused to repair various parts of the truck, including allegedly defective seatbelts.

Keith Russell, the seventeen-year-old son of defendant's former girlfriend, testified at trial that defendant offered him \$1000 to collide his light blue car with Fooce's truck "to make it look like he got hit." Russell accepted defendant's offer and followed defendant's directions for hitting Fooce's truck. The collision between the two vehicles left blue paint on the truck body. Russell testified that later in the day, while deciding on a place to stage the "accident," defendant, Fooce, Russell, and Rick Albin, one of defendant's friends, discussed the false injuries each would claim and report to the insurance company.¹ After deciding on a location,

¹ Fooce, defendant's sole witness at trial, testified that she reported the accident to her insurance company while at the hospital after the accident. She stated, however, that defendant had not mentioned obtaining insurance money as a result of the plan and was in another room of the

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defendant drove the truck off the road and, with Russell's assistance, rolled the truck over onto its roof. Russell then broke the truck windows and climbed inside, and defendant and Fooce positioned themselves in a nearby ditch. A sheriff's deputy who reported to the scene testified that defendant informed him that a light blue car hit the truck as the car attempted to pass the truck in a no-passing zone. The sheriff photographed the light blue paint and dent on the truck and submitted the photographs to the local newspaper, hoping to find the driver of the light blue car.

Testimony at trial also established that before staging the rollover, but after Russell collided his car with the truck, defendant took the truck to Riteway, asserted that the seatbelts were defective, and implied that he could sue Riteway if the seatbelts were not repaired. The day after the rollover, defendant informed Riteway that he had been in an accident in the truck and that he and Fooce intended to sue Riteway because Fooce had insufficient insurance coverage on the truck. Earlier that day, however, a Riteway employee had read the newspaper article about the accident and saw the photograph of the blue paint that supposedly came from the offending vehicle. This employee remembered seeing blue paint on the truck when defendant brought the truck in before the accident. Another Riteway employee relayed this information to the sheriff's department. While following up on this information, the sheriff's department learned from Russell that the accident had been staged. Defendant was subsequently arrested.

Defendant admitted at trial that the accident had been staged but argued that he did not intend to defraud Fooce's insurance company and had no involvement in Fooce's report of the accident to her insurance company. The jury convicted defendant as charged.

At sentencing, the trial court departed from the applicable sentencing guidelines range of ten to forty-six months' imprisonment for the conspiracy and insurance fraud convictions and imposed a sentence of seventy-two months to fifteen years. The trial court stated that its reasons for departure were: 1) defendant's continued denial of the offense; 2) defendant's prior convictions beyond those accounted for in his sentencing guidelines score; and 3) defendant's decision to negatively influence and involve Russell, who looked up to defendant as a father figure. Defendant now appeals the trial court's departure from the applicable sentencing guidelines range.

II. Standard of Review

This Court reviews for an abuse of discretion whether the trial court's stated reasons for departure from the applicable sentencing guidelines range constitute substantial and compelling reasons to depart. *People v Babcock (Babcock III)*, 469 Mich 247, 264-265; 666 NW2d 231 (2003), quoting *People v Babcock (Babcock I)*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). In the context of departures from the sentencing guidelines, "[a]n abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock III, supra* at 274.

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hospital when she called her insurance company.

III. Analysis

We first address defendant's argument that the trial court improperly relied on his prior convictions as a substantial and compelling reason for departure. Because defendant's prior convictions exceeded the number of convictions accounted for in two prior record variables, the trial court determined that the guidelines inadequately scored defendant's prior record. We find no abuse of discretion. As the trial court stated, defendant had "twenty-eight prior convictions going back to a juvenile history in 1975." Defendant was convicted of at least one crime in nineteen of the twenty-six years between his first conviction and the convictions in this case. Although, as defendant points out, these convictions did not stem from assaultive crimes, the trial court was not obligated to ignore defendant's extensive criminal record and nearly continuous disregard for the law.

Defendant also argues that in drafting the guidelines, the Legislature determined the maximum amount of weight a sentencing court may give to a defendant's prior record. This assertion lacks merit. MCL 769.34(3)(b) permits the sentencing court to find that the guidelines do not give a characteristic adequate weight. The trial court's decision in this case is readily distinguishable from the case defendant cites, *People v Schnepf*, 185 Mich App 767, 770-771; 473 NW2d 183 (1990), where the trial court departed from the judicial sentencing guidelines because it disagreed with the guidelines' treatment of a specific crime. Accordingly, the trial court's departure for this reason constitutes a choice among the principled outcomes and does not constitute an abuse of discretion.

Defendant also argues that the trial court improperly departed from the sentencing guidelines because defendant enticed Russell, who had known defendant since he was approximately five years old, to become involved with the scheme. Defendant states that he received a ten-point score on offense variable fourteen, MCL 777.44, for being a leader in the commission of the offense, so the trial court based its departure on a factor considered in calculating the guidelines score, in violation of MCL 769.34(3)(b). We disagree. The trial court acknowledged during sentencing that defendant received points for being a leader but stated that Russell's involvement constituted "an unusual circumstance that needs to be considered in determining the sentence; not only that you're a leader, but influencing an impressionable young person who looked up to you as a father figure." We perceive this statement as a finding that the guidelines score does not account for defendant's exertion of influence over Russell. Accordingly, the trial court did not violate MCL 769.34(3)(b).

Defendant also briefly claims that this reason for departure is not substantial and compelling. "A substantial and compelling reason must be 'objective and verifiable'; must 'keenly' or 'irresistibly' grab our attention"; and must be 'of "considerable worth" in deciding the length of a sentence.'" *Babcock III, supra* at 272, quoting *People v Fields*, 448 Mich 58, 62, 67; 528 NW2d 176 (1995). Whether this reason for departure is substantial and compelling is a close question. We find, however, that the trial court's decision is within the range of principled outcomes and does not constitute an abuse of discretion.

Finally, defendant argues that the trial court abused its discretion by citing defendant's denial of the charges as a substantial and compelling reason for departure. We agree. During sentencing, the trial court stated:

Mr. Harris, it appears to me that—well it not only appears, but you continue to maintain your innocence. In other words, you’re in denial about this occurrence and your participation in it. There’s clearly evidence. I sat and heard the trial. There’s clearly evidence to demonstrate that you were part of it.

The trial court later stated in its reasons for departure that “[defendant was] still in denial over the offense” and cited “[d]efendant’s denial of the offense” as a reason for departure on the departure evaluation form. Because a defendant’s refusal to admit guilt cannot form the basis of a sentence, *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987), citing *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977), the trial court’s decision to depart from the sentencing guidelines because defendant denied the offense constitutes an abuse of discretion.

Nevertheless, we conclude that remand is unnecessary because the record demonstrates that the trial court would have departed to the same extent had it not considered defendant’s assertion of innocence as a substantial and compelling reason for departure. *Babcock III, supra* at 260-261, n 15. The record reflects that the trial court spent considerable time verifying and reviewing defendant’s prior record, relying primarily on this factor to support its departure. For example, the trial court adjourned the first sentencing hearing so it could obtain accurate information concerning defendant’s record “in case [it] decide[d] to deviate” from the sentencing guidelines range. Additionally, the trial court disputed at length defense counsel’s proposition that defendant was not a threat to society in light of his criminal history. Finally, the trial court stated that it considered defendant’s “potential for reformation” when fashioning his sentence. Although the trial court cannot base its sentence on a defendant’s refusal to admit guilt, the trial court may consider a defendant’s lack of remorse as bearing on his potential for reformation. *Wesley, supra* at 711, 713. Accordingly, we find that the trial court would have imposed the same sentence even if it had not improperly characterized defendant’s denial of the offense as a substantial and compelling reason for departure.

Affirmed.

/s/ Peter D. O’Connell
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder