

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS FRANKLIN JOHNSON,

Defendant-Appellant.

UNPUBLISHED
December 9, 2003

No. 237729
Genesee Circuit Court
LC No. 01-007554-FC

ON REMAND

Before: Saad, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

The issue on remand is whether the trial court's upward departure in sentencing defendant comports with our Supreme Court's holding in *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). In *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2002 (Docket No. 237729), this Court affirmed defendant's sentence of 35 to 60 years in prison for second-degree murder. In lieu of granting leave to appeal, our Supreme Court vacated our judgment and remanded this case for reconsideration in light of *Babcock*. Upon reconsideration, we affirm.

Defendant's minimum sentence range was 13.5 to 22.5 years in prison. Under MCL 769.34(3), the statutory sentencing guidelines provide:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in [MCL 777.1 et seq.] if the court has a substantial and compelling reason for that departure and states on the record the reasons for the departure.

In *Babcock*, *supra* at 264-265, our Supreme Court again articulated our standard of review for sentence departures:

“[T]he existence or nonexistence of a particular [sentencing] 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 court 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.” [Quoting *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000), quoting *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995).]

The Supreme Court also explained the abuse of discretion standard in *Babcock*, *supra* at 269:

At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court’s judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. [Citations omitted.]

Here, the trial court articulated the following reasons for imposing a sentence that exceeded the minimum guidelines range: the savage nature of the killing and the overall circumstances of the case, including the age of the victim and the movement of the victim to an isolated location, and the trauma to the victim’s family.

The trial court did not clearly err in its articulation of the factors for sentencing departure. As the record clearly shows, defendant and co-defendant, Louis Jones, went to the fourteen-year-old victim’s house with the purpose of hurting him. Defendant and Jones walked the victim to a secluded tunnel in a nearby park. Defendant argued with the victim and, without physical provocation, defendant stabbed him with a knife multiple times in the face, neck and chest. After the victim fell to the ground, screaming, and after Jones kicked the victim in the head, defendant again stabbed the victim. Defendant and Jones covered the victim with a blanket and Jones continued to kick the victim in the head. Defendant and Jones then dragged the victim’s body to a river, and threw it in. Defendant also admitted to “stomping” on the victim and testified that it was his intent to kill the victim during the assault. Clearly, the factors cited by the trial court regarding the heinous nature of the crime were supported by the record. Moreover, the trial court’s finding regarding the pain suffered by the victim’s family was also clearly supported through statements made by the young victim’s mother and the father’s statements set forth in defendant’s presentence investigation report.

We also hold, as a matter of law, that the factors cited by the trial court are objective and verifiable. “The phrase ‘objective and verifiable’ has been defined to mean that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). On the basis of the record evidence, we conclude that the factors were confirmed by information in the record.

Regarding whether the factors constitute substantial and compelling reasons for the departure, the reason must be one that “ ‘keenly’ or ‘irresistibly’ grabs our attention”; is “ ‘of considerable worth’ in deciding the length of a sentence”; and “exists only in exceptional cases.” *Babcock*, *supra* at 258, quoting *Fields*, *supra* at 62, 67-68. The guidelines also state, pursuant to MCL 769.34(3)(b), that “[t]he 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.”

The offense variables take into account the factors cited by the trial court as substantial and compelling reasons for departure. Defendant scored fifty points for OV 7, “aggravated physical abuse,” because the “victim was treated with . . . excessive brutality” MCL 777.37(1)(a). Defendant scored fifteen points for OV 8, “victim asportation,” because the “victim was asported to another place of greater danger or to a situation of greater danger” MCL 777.38(1)(a). Defendant received ten points for OV 10, “exploitation of a vulnerable victim,” because he “exploited [the] victim’s . . . youth” MCL 777.40(1)(b). Finally, defendant scored fifteen points for OV 5, “psychological injury to a member of a victim’s family,” because of the substantiated pain suffered by the victim’s parents and sibling.

The trial court did not abuse its discretion by finding that the viciousness of defendant’s attack on the victim was given inadequate weight and that it constitutes a substantial and compelling reason for an upward departure. The trial court described in detail the brutality of defendant’s conduct and the extent of the victim’s injuries. While defendant scored 50 points for excessive brutality, defendant’s conduct “keenly” and “irresistibly” grabs our attention and is “‘of considerable worth’ in deciding the length of a sentence.” *Babcock, supra*. The repeated stabbings to the young victim’s face and the continued “stomping” on his head clearly stands out as a disgustingly brutal attack. Therefore, and “recognizing that the trial court was in the better position to make such a determination and giving this determination appropriate deference,” we will not substitute our judgment for that of the trial court in finding that the exceptional brutality of defendant’s actions justified an upward departure. *Babcock, supra* at 268.

We also find that the trial court did not abuse its discretion by finding that the psychological impact on the victim’s family was given inadequate weight by the statutory variables and constituted a substantial and compelling reason for departure. Ample information in the presentence investigation report and the statements at sentencing established that the victim’s parents and sibling have suffered severe psychological trauma by the horrific circumstances of the young victim’s death. Again, “because of the trial court’s familiarity with the facts and its experience in sentencing,” the trial court was in a better position to make this determination and we will not substitute our judgment for that of the trial court. *Babcock, supra* at 268.

However, we hold that the trial court abused its discretion by, or failed to properly articulate the basis for, ruling that the other factors constitute substantial and compelling reasons for departure in this case. Specifically, the trial court did not to explain how the offense variables fail to give adequate weight to the victim’s age and the asportation factor and how those factors constitute substantial and compelling reasons for the departure.

As our Supreme Court directed in *Babcock, supra* at 260, “[b]ecause the trial court must articulate on the record a substantial and compelling reason to justify the particular departure, if the trial court articulates multiple reasons, and the Court of Appeals determines that some of these reasons are substantial and compelling and some are not, the panel must determine the trial court’s intentions.” Here, we conclude that “the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone.” *Id.* The trial court’s remarks at sentencing point to its overriding and unmistakable purpose in

imposing the increased sentence in this case - the shocking brutality of the crime and the attendant psychological impact to the family. While the trial court cited the two other factors during its explanation of the circumstances of the case, the court clearly found that defendant's intentional, unyielding and atrocious attack warranted the 12.5-year departure in this case. Moreover, we are convinced that the sentence imposed by the trial court was proportionate to the seriousness of the offense and offender and clearly did not fall outside the principled range of potential outcomes in this case. *Id.* at 262-264, 269.

Affirmed.

/s/ Henry William Saad

/s/ Michael J. Talbot

/s/ Kurtis T. Wilder