

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ALLEN ROSS,

Defendant-Appellant.

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UNPUBLISHED

December 11, 2003

No. 227964

St. Clair Circuit Court

LC No. 99-002685-FH

ON REMAND

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

This case returns to us on remand from our Supreme Court<sup>1</sup> for reconsideration in light of *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), (*Babcock III*). We adopt our previous holding and affirm defendant's convictions of felonious assault, MCL 750.82, and assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, and sentence for felonious assault. However, in light of *Babcock III*, we remand for resentencing with regard to defendant's conviction of AWIGBH.

The minimum guidelines' sentencing range for the AWIGBH conviction was 15 to 34½ months' imprisonment. The trial court departed upwards, sentencing defendant to a minimum term of forty-seven months, citing (1) defendant's failure to accept responsibility for his criminal acts, (2) the fact that defendant was the aggressor, (3) the excessive violence of defendant's actions, and (4) inadequacy of the guidelines to protect the community. *Babcock III* provides the framework by which we must review the guidelines departure. Applying the relevant portions of the framework laid out in *Babcock III*, *supra* at 272-274, we reach the following conclusions:

1. Of the factors relied upon as compelling reasons for departure, some were objective and verifiable, while one was not. The transcript of defendant's allocution at sentencing confirms clearly that he did not accept responsibility for his criminal acts and the testimony at trial just as clearly confirmed that he was the aggressor. As noted in our previous opinion,

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<sup>1</sup> *People v Ross*, Order of the Michigan Supreme Court, (Docket No. 121967, issued October 3, 2003).

[w]e find that the trial court articulated a substantial and compelling reason for a departure, defendant's violent behavior—the violence with which defendant perpetrated the act. Although this is accounted for in MCL 777.33, the trial court expressly found that the statutory sentencing guidelines did not adequately address that factor.<sup>2</sup>

These three factors also “grab our attention” as justifications for the length of the sentence. *Id.* at 272. However, whether the guidelines minimum was inadequate to protect the community from defendant is not so susceptible of objective and verifiable confirmation, and we cannot determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons alone.

2. The trial court did not explain why the substantial and compelling reasons for the departure justified the *particular* departure or how the departure contributed to a more proportionate sentence than provided by the guidelines.

Therefore, we remand to the trial court for resentencing on the AWIGBH charge in light of *Babcock III*. The trial court is directed to conduct resentencing within twenty-eight days of the issuance of this opinion, and to issue its opinion and/or order within fourteen days after completion of the proceedings. We retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Janet T. Neff

/s/ Helene N. White

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<sup>2</sup> It should also be noted that defendant had seventeen prior misdemeanor convictions, only seven of which were taken into account in the calculation of the sentencing guidelines and that of the seventeen prior convictions four were for assaultive crimes, one was for the unlawful discharge of a firearm, and one was for fleeing and eluding.