

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

CAROL AL-KASSAB,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

December 23, 2003

No. 239512

Wayne Circuit Court

LC No. 01-006044-01

ON REMAND

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

PER CURIAM.

On October 3, 2003, the Michigan Supreme Court issued an order vacating this Court's opinion dated March 25, 2003, and remanding for reconsideration based on *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). Because the remand order is for reconsideration based on *Babcock, supra*, which is related to the sentencing issue, we adopt our prior opinion affirming defendant's convictions (*People v Al-Kassab*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2003 (Docket No. 239512)), with regard to all issues except the sentencing issue.

Defendant was convicted of arson, the burning of personal property worth over \$1,000, but less than \$20,000, MCL 750.74(1)(c)(i), and 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. Defendant's minimum sentencing guidelines range was twenty-four to forty months' imprisonment for possession of a Molotov cocktail/other explosive causing property damage conviction. The trial court departed downward and sentenced defendant to five years' probation, and the prosecution sought resentencing on appeal. In our previous opinion we affirmed the trial court's downward departure from the minimum sentencing guidelines range. Upon reconsideration in light of *Babcock, supra*, we again affirm defendant's sentence.

The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is otherwise permitted. MCL 769.34(2); *Babcock, supra* at 259 n 13, 272. A court may depart from the legislative sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3), *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from a sentencing guidelines range based on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds,

based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3); *Babcock, supra* at 258 n 12. Factors meriting departure must be objective and verifiable, must “keenly” attract and “irresistibly” hold the court’s attention, and must be of “considerable worth.” *Babcock, supra* at 257-258. A substantial and compelling reason “exists only in exceptional cases.” *Id.* at 258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

A departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant’s conduct and his criminal history. *Babcock, supra* at 264. If the sentence constituted a departure from the guidelines range and the reasons were not articulated, this Court may not independently determine that a sufficient reason exists, but must remand for rearticulation or resentencing. *Id.* at 258-259. If the reasons articulated by the trial court are partially invalid and this Court cannot determine whether the trial court would have departed from the guidelines range to the same extent regardless of the invalid factors, it must remand for rearticulation or resentencing. *Id.* at 260.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination by the trial court subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, the determination that the factor or factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *Id.* at 264-265; *Abramski, supra* at 74. In terms of sentencing departure review, “[a]n abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *Babcock, supra* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court’s direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

In this case, the sentencing court gave several reasons for departing from the sentencing guidelines, and provided the following reasons in its departure evaluation form:

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

[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).

At sentencing, the trial court also stated the reasons listed above and indicated that defendant confessed at the time she was arrested as a basis for departure.

Our Supreme Court in *Babcock, supra*, provides that, "[a] trial court must articulate on the record a substantial and compelling reason for its particular departure, and explain why this reason justifies that departure." *Id.* at 272, citing MCL 769.34(3) and *People v Daniel*, 462 Mich 1, 9; 609 NW2d 557 (2000). A majority of justices in *Babcock, supra*, also held that:

[I]t is not enough that there exists some potentially substantial and compelling reason to depart from the guidelines range. Rather, this reason must be articulated by the trial court on the record. Accordingly, on review of the trial court's sentencing decision, the Court of Appeals cannot affirm a sentence on the basis that, even though the trial court did not articulate a substantial and compelling reason for departure, one exists in the judgment of the panel on appeal. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation. The obligation is on the trial court to articulate a substantial and compelling reason for any departure.

* * *

Further, the trial court must go beyond articulating a substantial and compelling reason for some departure. Rather, the trial court can depart from the guidelines range only "if the court has a substantial and compelling reason for *that* departure. . . ." MCL 769.34(3) (emphasis added). [*Id.* at 258-259.]

This Court is responsible for determining whether the trial court articulated a substantial and compelling reason to justify its departure from the guidelines range. *Id.* at 261-262.

We find that the trial court adequately articulated substantial and compelling reasons for its departure and adequately explained its reasons for the particular departure. See *Babcock, supra* at 272. In addition, we are satisfied that the majority of the factors articulated by the trial court are objective and verifiable, were not adequately taken into account by the sentencing guidelines, and that the trial court departed to the extent it did based upon these objective and verifiable factors that were not adequately taken into account by the sentencing guidelines. See *id.* at 258-260, 272.

The trial court states defendant's age, employment, and lack of criminal record as a basis for departure. Defendant's age and employment are proper objective and verifiable factors for departure that were not taken into account by the sentencing guidelines. See *Daniel, supra* at 7. Although objective and verifiable, it is improper to rely on a defendant's lack of a prior criminal record because it is taken into account by the sentencing guidelines, unless the trial court makes a specific finding that the characteristic was given inadequate or disproportionate weight. See MCL 769.34(3)(b). However, it is objective and verifiable, and not accounted for in the sentencing guidelines, that defendant was thirty-six years old without a criminal record. The

prior record variable accounted for the fact that defendant had no prior criminal record, but did not account for the objective and verifiable fact that she had no criminal record at age thirty-six.¹ Thus, the trial court properly considered defendant's age relative to lack of a prior criminal record. The trial court also 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 sentencing guidelines. The trial court further notes the romantic relationship between defendant and the victim, and 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.² Finally, 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 trial court's questioning, and in defendant's sentencing memorandum. In addition, the trial court noted the fact that defendant confessed at the time she was arrested. Defendant's acknowledgment after her arrest that her behavior was inappropriate and her confession to law enforcement are factors that are properly considered when determining departure. *Daniel, supra* at 7 (a proper consideration is "cooperation with law enforcement officials"); *Fields, supra* at 77 ("defendant's cooperation with law enforcement officials should be given special attention by the sentencing court").

Several of the factors that are objective and verifiable "keenly" and "irresistibly" grab our attention and are of "considerable worth" in deciding the length of the sentence. *Id.* at 272. We recognize that there may have been a factor taken into account that was already taken into account in the sentencing guidelines. Nevertheless, after reviewing the record in this case, the sentencing departure evaluation form, and examining the sentencing transcript, we are certain the trial court would have departed from the guidelines range by the amount that it departed on the

¹ For example, a thirty-six year old defendant without a criminal record has functioned in society for a longer period of time, without a criminal history, than an eighteen year old defendant without a criminal record, and this is properly considered by a trial court. In *People v Combs*, opinion per curiam of the Court of Appeals, issued August 14, 2003 (Docket No. 239371), a panel of this Court indicated that the "scoring variables do not consider defendant's age relative to his prior record," and, thus, age relative to prior criminal record can be considered a proper reason to depart from the sentencing guidelines. We use this opinion as a guide, and view it as persuasive, because of the limited case law, but note that unpublished opinions are not binding under the rules of stare decisis. MCR 7.215(C)(1).

² Our review of the record reveals that the sentencing court erred in stating that the relationship between defendant and the victim ended "a few months prior to the incident date," as the record indicates that the relationship ended more than a year before the underlying crime. This does not change the objective and verifiable fact that a relationship existed between defendant and the victim.

basis of the proper objective and verifiable factors not already taken into account. See *id.* at 258-260.³

In applying the *Babcock* standard of review, we conclude that the trial court did not clearly err in its factual determinations, its decision to downwardly depart from the guidelines was based on proper objective and verifiable factors, and these factors constituted substantial and compelling reasons to depart downward from the sentencing guidelines. Several of the proper objective and verifiable reasons stated by the trial court on the record, given the facts of this case, "keenly" and "irresistibly" grab our attention and are of "considerable worth" in deciding the length of the sentence; i.e. defendant's cooperation with law enforcement; her age (the fact that she was thirty-six years old without a prior criminal record); her employment; the fact that she had no history drug, alcohol or social/physiological problems; and the fact that there was no financial or material gain. See *Babcock, supra* at 272. Lastly, based on the facts and circumstances of the crime and defendant's lack of a prior criminal record, the sentence was proportionate to defendant's conduct and criminal history. See *id.* at 263-264. The trial court did not abuse its discretion in departing downward from the sentencing guidelines, nor did the extent of the departure amount to an abuse of discretion as the sentence was within the "permissible principled range of outcomes," and represented a principled choice. *Id.* at 269; see also *People v Hicks*, __ Mich App __; __ NW2d __ (Docket No. 239981, issued December 2, 2003) slip op, p 10.

Affirmed.

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

³ We note that in *People v Reich (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2003 (Docket No. 234115), a recent panel of this Court determined that a trial court, which stated a factor or factors taken into account by the guidelines, "did not base its departure merely on factors already taken into account by the offense variable," when it upwardly departed from the sentencing guidelines. (Quoting *People v Reich*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2002 (Docket No. 234115).) We use this opinion as a guide, and view it as persuasive, because of the limited case law, but note that unpublished opinions are not binding under the rules of stare decisis. MCR 7.215(C)(1). Similarly, in the present case the trial court clearly did not base its departure "merely on factors already taken into account" by the prior record variables. The trial court merely noted the factor, together with defendant's age, and then stated the other factors supporting its departure. We recognize that *Reich, supra*, was reviewing an upward departure from the guidelines, but in "MCL 769.34(3), the Legislature states a rule that makes no apparent distinctions between 'upward departures' that increase the sentence beyond the length stated in the guidelines and 'downward departures' that decrease the sentence below the length stated in the guidelines." *Hegwood, supra* at 440 n 16.