

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON NEAL ZAVODSKY,

Defendant-Appellant.

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UNPUBLISHED

November 15, 2005

No. 254995

Wayne Circuit Court

LC No. 03-008914

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

A jury found defendant guilty of two counts of aggravated stalking, MCL 750.411i, and one count of breaking and entering with intent to commit a felony, MCL 750.110. The trial court merged the two stalking convictions before sentencing. Defendant was also charged with kidnapping, MCL 750.349, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The jury found defendant not guilty of felonious assault and felony-firearm, but deadlocked on kidnapping.

The trial court sentenced defendant to serve concurrent terms of imprisonment of six to ten years for breaking and entering, and three to five years for aggravated stalking. In a later proceeding, defendant pleaded guilty to kidnapping, and received a concurrent sentence of six to ten years' imprisonment. Defendant appeals as of right, challenging his sentence for breaking and entering.<sup>1</sup> We affirm.

This case arises from tensions stemming from defendant's estrangement from complainant, his wife. Defendant twice menaced her in violation of a personal protection order. The prosecutor presented evidence that plaintiff repeatedly grabbed complainant, forced her from

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<sup>1</sup> Defendant briefly implies that his lesser sentence for stalking also constitutes an upward departure. It is not clear from the record if in fact any guidelines calculation for that conviction was prepared, and there are varying representations in the record concerning what such a calculation was or would be. However, because defendant posits that the recommendation under the guidelines extended to thirty-eight months' imprisonment, and the three years he actually received falls short of that, and because he frames his argument almost exclusively in relation to the sentence for breaking and entering, we deem any objections to the stalking sentence waived.

place to place, tied her up with duct tape, forced her into the trunk of his car, struck her with a firearm, and threatened to kill her, doing much of this while their infant son was present.

Sentencing was delayed when the defense asserted that complainant had visited defendant in jail. The concern was that if an amicable relationship actually existed between the two, this placed the credibility of complainant's testimony in doubt, and could ultimately influence whether an upward sentencing departure would be imposed. The trial court ordered an investigation, took evidence, and concluded that defendant had wholly fabricated his account.

The recommended sentencing guidelines range for defendant's breaking and entering conviction was zero to seventeen months. The minimum actually imposed, six years, was an upward departure. Defendant's sole issue on appeal is that the trial court failed to articulate substantial and compelling reasons for this departure.

In reviewing a trial court's decision whether to depart from the recommended range under the guidelines, "whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion . . . ." See *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

A sentencing court must state on the record its reasons for departing from the guidelines, and may deviate only for a "substantial and compelling reason . . . ." MCL 769.34(3). See also *Babcock*, *supra* at 255-256, 272. This legislative language indicates that deviations from sentencing recommendations follow from only objective and verifiable factors. *Id.* at 257-258, 272.

In this case, the trial court, in its written departure evaluation, included the following:

Upward departure from sentencing guidelines of 0-17 on breaking & entering conviction justified because there was clear and convincing evidence that defendant terrorized his victim/spouse (who was hiding out from defendant in her father-in-law's house at time of offense) during the break-in by binding her with duct tape and placing her in trunk of his Corvette, then removing her and placing her in bathroom, facts which were clearly and convincingly established at trial with supporting testimony from defendant's son. Violence was not adequately accounted for in the offense variables for B& E, a "crime against property."

Additionally, defendant lied about his spouse/victim visiting him at jail following trial, thus causing a delay in sentencing so that an evidentiary hearing could be held to ascertain truth of that allegation, which, if true would have seriously diminished the victim's credibility. The hearing established by clear and convincing evidence that the defendant had deceived the Court and had attempted to manipulate the sentencing process by making false accusations against his wife about jail visits and when confronted with all the evidence (against his claim) testified that sheriff's deputies and jail personnel were lying and making false entries on visitation records. This effort to undermine the post-conviction process, "keenly grips" the attention of the sentencing court and

supports an upward departure . . . and supports this Court's evaluation of defendant as in [sic] incorrigibly demonic, manipulative and dishonest individual.

From the bench, the trial court additionally opined that if Offense Variable (OV) 7, MCL 777.37, aggravated physical abuse, and OV 8, MCL 777.38, victim asportation or captivity, applied to breaking and entering, they would have been scored, respectively, at fifty and fifteen points.

Defendant argues that the trial court erred in considering variables attendant to crimes for which he was not convicted. However, a sentencing court may take into account facts underlying uncharged offenses, pending charges, and acquittals. *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991), overruled in part on other grounds *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002). For purposes of sentencing, the court's consideration is confined neither to facts determined beyond a reasonable doubt, nor to evidence that would be admissible for determination of guilt or innocence. See MRE 1001(b)(3).

Defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), where the United States Supreme Court held that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 313 (emphasis in the original). However, our Supreme Court has held that *Blakely* is inapplicable to Michigan's sentencing scheme. *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004). Defendant's recourse to *Blakely* is unavailing, and the trial court was within its rights in taking into account all the facts of and circumstances of the crime when fashioning the sentence. Defendant cites no authority for the proposition that a sentencing court may not take guidance from otherwise inapplicable sentencing variables while considering conduct outside that which pertains to the elements of the sentencing offense.

Defendant does not dispute the factual basis for the trial court's observation that he engaged in a great deal of violence in the course of committing what is a property offense. We agree with the trial court that the violence and terror defendant inflicted constituted a substantial and compelling reason to depart from the guidelines in this instance, as did defendant's post-conviction behavior. *Babcock, supra* at 255-256. Defendant is not entitled to resentencing.

Affirmed.

/s/ Hilda R. Gage  
/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray