

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNIE RAY BAKER,

Defendant-Appellant.

UNPUBLISHED

March 4, 2010

No. 287849

Wayne Circuit Court

LC No. 07-023800-FH

Before: Hoekstra, P.J., and Stephens and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of negligent homicide, MCL 750.324, operating a motor vehicle while intoxicated causing death, MCL 257.625(4), and operating a motor vehicle while license suspended causing death, MCL 257.904(4). Defendant was sentenced to 16 months to 2 years' imprisonment for the negligent homicide conviction, and to 10 to 15 years' imprisonment for both the operating a motor vehicle while intoxicated causing death conviction and the operating a motor vehicle while license suspended causing death conviction; the sentences to be served concurrently. We affirm defendant's convictions and sentences, but remand for correction of the presentence report.

I. MRE 403

Defendant argues that the trial court erred in admitting portions of the testimony of Dr. Lokman Sung, the medical examiner, and two photographs portraying the victim in her car because the testimony and photographs were more prejudicial than probative. We disagree. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

When a defendant pleads not guilty, "all elements of a criminal offense are 'in issue,'" and "the prosecution may offer all relevant evidence, subject to MRE 403, on every element." *People v Mills*, 450 Mich 61, 69, 71; 537 NW2d 909 (1995) (emphasis in original). A defendant's offer to stipulate to any element does not relieve the prosecution of its burden to prove the element beyond a reasonable doubt. *Id.* at 70, 70 n 5. All the crimes with which defendant was charged had the element of causing the death of another person. Therefore, the prosecution was entitled to offer all relevant evidence establishing that the victim died as a result

of defendant's actions. Any testimony relating to the circumstances of the victim's death and any photographs showing the victim's body at the accident scene would be relevant and, thus, admissible subject only to MRE 403. MRE 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" "Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002).

Defendant claims that any testimony by Dr. Sung that went beyond "a short description of the cause and manner of death" was unfairly prejudicial. Dr. Sung's testimony, detailing the specific injuries that the victim suffered, was not inflammatory, nor was it designed to arouse passions. It was a clinical, unelaborate description of the injuries the victim suffered. Defendant has failed to show how the testimony would be given undue or preemptive weight by the jury. The trial court did not abuse its discretion in admitting the entirety of Dr. Sung's testimony.

Defendant also claims that two photographs of the victim inside her crushed vehicle were unfairly prejudicial. Photographs are not inadmissible simply because a witness can testify about the information contained in the photographs, and a photograph's "[g]ruesomeness alone need not cause exclusion." *Mills*, 450 Mich at 76. One photograph depicted the victim positioned with her head and left arm sticking out of the vehicle's left side; the victim's face cannot be seen. There is nothing particularly gruesome or graphic about the photograph. The other photograph showed how the rear half of the victim's vehicle was crushed. Although defendant claims that the victim's body can be seen through the passenger door, it is not readily apparent that the victim's body is in the photograph. Defendant has not shown how these two photographs would be given undue or preemptive weight by the jury. The trial court did not abuse its discretion in admitting the photographs.

II. Guidelines Departure

Defendant next argues that he is entitled to be resentenced because the trial court failed to articulate substantial and compelling reasons for departing from the recommended minimum sentence range under the legislative guidelines. We disagree.

Under the legislative sentencing guidelines, a trial court is required to impose a minimum sentence that falls within the appropriate sentencing range. MCL 769.34(2); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). A court may depart from the guidelines range if it has a substantial and compelling reason to do so, and it states on the record its reasons for the departure. MCL 769.34(3); *Buehler*, 477 Mich at 24. A substantial and compelling reason must be objective and verifiable, be of considerable worth, and keenly or irresistibly grab the court's attention. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). Substantial and compelling reasons to depart only exist in exceptional cases. *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003).

If a trial court departs from the guidelines range, we "must determine whether the trial court articulated a substantial and compelling reason to justify its departure from that range." MCL 769.34(11); *Babcock*, 469 Mich at 261-262. We review for clear error the trial court's findings that a particular factor in support of the departure exists. *Babcock*, 469 Mich at 264. The determination that a particular factor is objective and verifiable is a matter of law and

reviewed de novo. *Id.* We review for an abuse of discretion a trial court's determination that the objective and verifiable factors constitute a substantial and compelling reason to depart. *Id.* at 264-265.

The minimum sentence range for defendant's convictions for operating a motor vehicle while intoxicated causing death and operating a motor vehicle while license suspended causing death, both class C crimes, MCL 777.12f; MCL 777.12h, was 58 to 114 months. The trial court sentenced defendant to minimum sentences of 120 months, exceeding the guidelines range by only six months. The trial court provided the following explanation for the departure:

First the defendant showed an absolute and reckless disregard for human life and the traffic rules when he drove at the speed he did on Michigan Avenue, on the date in question. Next, the defendant has shown himself to be vague, bordering on untruthful.

And because of his self[-]reported amnesia unrepentant in any meaningful way. The matter of the disregard of human life is serious in this Court's view, because I distinguish purposeful violence from random violence. Purposeful violence in my mind is the attack by a defendant on someone they know. So for example the battering of an ex-spouse by the former partner in the marriage.

The reason that's different from random violence is because there is only an identifiable and intended victim. Random violence, however, involves the totality of people that are in proximity to the wrong[-]doer. And the victim in this case, the death of Marie Barron was a random act against a woman who was simply driving down the street after attending to the needs of her grandchildren.

She having been retired for some years. And was intent upon being involved in her grandchildren's life and in their care. And the third reason that I depart from the guidelines in an upward manner is that Mr. Baker has, by any definition of the term, shown himself to be a scofflaw. Nothing will stop Mr. Baker from driving except the length of incarceration that I impose on him.

He will not obey. And he has not obeyed the traffic laws. He knew he shouldn't be driving. He was driving anyway. So for these three reasons I depart from the guidelines in an upward manner.

The trial court's reasons to depart from the guidelines range can be summarized as follows: (1) defendant had a reckless disregard for human life, which threatened the lives of numerous persons; (2) defendant was vague, and arguably untruthful, when he testified at trial; and (3) defendant is a "scofflaw" and will drive irrespective of any driving prohibitions placed on him. We evaluate each reason to determine whether it is a substantial and compelling reason for departure.

Defendant argues that the trial court's finding that he had a reckless disregard for human life cannot constitute a substantial and compelling reason because the characteristic was already considered by offense variables 9 and 17 in determining the sentence range. A trial court may not base a departure on an offense or offender characteristic already considered in determining

the guidelines range unless the court finds that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007).

OV 9 addresses the number of victims that were either actually harmed or placed in danger by defendant. MCL 777.39; *People v Morson*, 471 Mich 248, 261-262; 685 NW2d 203 (2004). The trial court scored OV 9 at 10 points. Ten points is an appropriate score for OV 9 if “[t]here were 2 to 9 victims who were placed in danger of physical injury or death.” MCL 777.39(1)(c). OV 17 addresses the degree of the defendant’s negligence. MCL 777.47. The trial court scored OV 17 at 10 points, the maximum score allowed, finding that defendant had demonstrated “a wanton or reckless disregard for the life or property of another person.” MCL 777.47(1)(a). The trial court never articulated that OV 17 failed to give proportionate weight to defendant’s reckless disregard of human life or that OV 9 gave inadequate weight to the number of persons placed in danger by defendant’s conduct. Absent such findings by the trial court, we conclude that defendant’s reckless disregard of human life does not provide a valid basis for departing from the guidelines. See *People v Jackson*, 474 Mich 996; 707 NW2d 597 (2006).

Defendant also argues that the trial court’s finding that he was “vague, bordering on untruthful” was not a valid basis for the upward departure because the factor was not objective and verifiable. “To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed.” *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008).

A defendant’s untruthfulness at trial is generally not objective and verifiable unless there is some firm authentication proving the untruthfulness. *People v Kahley*, 277 Mich App 182, 188; 744 NW2d 194 (2007) (because the defendant admitted at his sentencing hearing that he had lied at trial, the defendant’s perjury was objective and verifiable). Defendant did not admit that he lied at trial; rather, he continued to assert that he could not remember the details of the night of the accident. Thus, while the trial judge may have held an internal, subjective belief that defendant lied at trial, defendant’s perjury was not an objective and verifiable factor. Moreover, a defendant’s perjury at trial is not exceptional. If it were, “a departure might be warranted every time a defendant testified and was found guilty.” *Id.* at 188. For these reasons, the trial court’s finding that defendant’s trial testimony was “vague . . . untruthful” was not a valid basis for departing from the guidelines.

Defendant argues that the last factor relied on by the trial court—that he was a scofflaw—was not a valid basis for departing because the factor was already considered by prior record variables 5 and 6 in determining the appropriate sentence range.

The trial court’s finding that defendant was a scofflaw, “a person who flouts the law,” *Random House Webster’s College Dictionary* (1992), was objective and verifiable. At trial, defendant testified that he knew his license was suspended but that he drove anyways because he had “obligations” and “just didn’t have much of a choice.” That defendant flouted the law was confirmed by defendant’s own testimony. We disagree with defendant that his flouting of the law was already taken into consideration by PRVs 5 and 6. Twenty points were scored for PRV 5 because defendant had 7 or more misdemeanor convictions. MCL 777.55(1)(a). Ten points were scored for PRV 6 because the offenses occurred while defendant was on delayed sentencing status. MCL 777.56(1)(c). These prior record variables accounted for defendant’s criminal

record. See *People v Young*, 276 Mich App 446, 454; 740 NW2d 347 (2007). However, the trial court did not base its departure on any aspect of defendant's criminal record; rather, the departure was based on defendant's decision that the law did not apply to him. This flouting of the law by defendant was not encompassed by the sentencing guidelines in determining the minimum sentence range. We conclude that the trial court did not abuse its discretion in determining that defendant's intentional disobedience of the law was a substantial and compelling reason for departure.

Because two of the three reasons proffered by the trial court for departing from the guidelines range were not substantial and compelling, we "must determine the trial court's intentions. That is, [we] must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone." *Babcock*, 469 Mich at 260-261. The departure in the present case was minimal; the trial court only exceeded the guidelines range by six months. This minimal departure was not of the trial court's own choosing. Pursuant to the two-thirds rule, MCL 769.34(2)(b), the trial court could not have departed more than six months from the guidelines range. See *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007) ("[A] minimum sentence, including a departure, may not exceed 2/3 of the statutory maximum sentence."). Because a departure of no more than six months was imposed on the trial court, we believe that the trial court would have departed from the guidelines by six months based solely on its finding that defendant was a scofflaw. Accordingly, remand for resentencing is not necessary, and we affirm defendant's sentences. *Babcock*, 469 Mich at 260-261.

III. Jail Credit

Defendant claims that the trial court erred in applying his 277 days of jail credit to his sentence for negligent homicide rather than to all three of his sentences. Defendant relies on the August 12, 2008 judgment of sentence. However, the trial court amended the judgment of sentence on December 1, 2008. Pursuant to the amended judgment of sentence, defendant's jail credit was applied to all three of his sentences. Accordingly, remand is not necessary for correction of the judgment of sentence.

IV. Presentence Report

Defendant argues that his presentence report should be amended to reflect that he was convicted of negligent homicide, not manslaughter with a motor vehicle. The presentence report indicates that defendant was convicted under MCL 750.325 of "Negligent Homicide; Manslaughter Where Due to Operation of Motor Vehicle." Negligent homicide is a lesser included offense of manslaughter with a motor vehicle, *People v Schaefer*, 473 Mich 418, 425; 703 NW2d 774 (2005), and neither crime is set forth in MCL 750.325.¹ Because the presentence

¹ The statute provides:

The crime of negligent homicide shall be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, and in any case where a defendant is charged with manslaughter

(continued...)

report does not clearly state that defendant was convicted of negligent homicide, MCL 750.324, rather than manslaughter with a motor vehicle, we remand for correction of the presentence report.² The presentence report shall indicate that on charge 1 defendant was convicted of negligent homicide.

Affirmed, but remanded for correction of the presentence report. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Cynthia Diana Stephens

/s/ Michael J. Kelly

(...continued)

committed in the operation of any vehicle, if the jury shall find the defendant not guilty of the crime of manslaughter, it may render a verdict of guilty of negligent homicide.

² We note that according to the Offender Tracking Information System defendant was convicted of manslaughter with a motor vehicle.