

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO RENA PROPHET,

Defendant-Appellant.

UNPUBLISHED

October 14, 2010

No. 293517

Wayne Circuit Court

LC No. 05-007237-FC

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b) (penetration of victim between age 13 and 16), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b) (sexual contact with victim between age 13 and 16), for sexually assaulting the 13-year-old daughter of his live-in girlfriend. Twice this Court vacated defendant's sentences and remanded for resentencing. On second remand, the trial court sentenced defendant to the same sentences previously imposed—23 to 40 years for the CSC I convictions, and 15 to 22½ years for the CSC II convictions (habitual offender second, MCL 769.10). The minimum sentences for the CSC I convictions represent a 14-month upward departure from the sentencing guidelines range. Defendant appeals as of right. We affirm.

Defendant argues that the trial court did not have substantial and compelling reasons to depart from the guidelines range of 126 to 262 months and that the sentences imposed are not proportionate. We disagree.

In *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995), the Supreme Court set forth the standards for reviewing a trial court's sentencing decision:

[T]he existence or nonexistence of a particular 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.
[Citations omitted.]

The Michigan sentencing law allows a trial court to depart from the recommended minimum sentence range of the sentencing guidelines “if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). “[A] substantial and compelling reason must be construed to be an objective and verifiable reason that keenly or irresistibly grabs [the court’s] attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases.” *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003) (internal quotation marks omitted), quoting *Fields*, 448 Mich at 62, 67-68. A trial court may depart from the guidelines range for nondiscriminatory reasons based on a factor or offender characteristic that was already considered in calculating the guidelines range if the court finds that the factor or characteristic has been given inadequate weight. MCL 769.34(3)(b). The “principle of proportionality” is the standard by which a particular departure is to be judged. *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008). A trial court abuses its sentencing discretion if the minimum sentence imposed falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Here, the trial court’s reasons for the 14-month upward departure from the sentencing guidelines for the CSC I convictions are objective and verifiable. The evidence established all three of the factors listed in subsection b of Offense Variable 10, i.e., defendant exploited not only the victim’s youth, but also their domestic relationship and his authority status over the victim. MCL 777.40(1)(b). The trial court noted that the existence of just one of these factors would require the imposition of points under OV 10. The trial court then concluded that the existence of all three factors warranted an upward sentencing departure. This conclusion comports with this Court’s statement in its second remand opinion: “the scoring of OV 10, MCL 777.40, to reflect exploitation based on age *or* domestic relationship *or* abuse of authority could properly be viewed as inadequate where not only one, but all three of these factors were present.” *People v Prophet*, unpublished opinion per curiam of the Court of Appeals, issued August 22, 2008 (Docket No. 278184, slip op at 2) (emphasis in original).

In addition, the sentences are proportionate. The record indicates that defendant threatened to harm the victim if she told anyone of the abuse. This fact, combined with defendant’s prior criminal record and the circumstances of his sexual abuse of the victim, demonstrates that the sentences the trial court imposed for defendant’s CSC I convictions are within the range of principled outcomes. See *Babcock*, 469 Mich at 261-264.

Affirmed.

/s/ Peter D. O’Connell
/s/ Richard A. Bandstra
/s/ Jane E. Markey