

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOD KEVIN HOUTHOOFD a/k/a TODD KEVIN  
HOUTHOOFD,

Defendant-Appellant.

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UNPUBLISHED  
December 2, 2010

No. 269505  
Saginaw Circuit Court  
LC Nos. 02-021097-FH  
04-024765-FH  
05-025865-FH

ON REMAND

Before: BECKERING, P.J., and O'CONNELL and BORRELLO, JJ.<sup>1</sup>

PER CURIAM.

This case comes to us on remand from our Supreme Court<sup>2</sup>, and stems from three lower court cases that were consolidated and tried together in Saginaw County. Defendant was convicted by a jury of obtaining property valued over \$100 by false pretenses, MCL 750.218, witness intimidation, MCL 750.122, and solicitation to commit murder, MCL 750.157b. On appeal, defendant challenged, among other things, whether venue was proper with respect to the witness intimidation and solicitation to commit murder charges. Applying the “effects” analysis of venue set forth in *People v Fisher*, 220 Mich App 133; 559 NW2d 318 (1996), and *People v Flaherty*, 165 Mich App 113; 418 NW2d 695 (1987), we upheld defendant’s witness intimidation conviction but vacated defendant’s solicitation to commit murder conviction.<sup>3</sup> The Supreme Court granted leave to appeal, overruled the “effects” analysis in *Fisher* and *Flaherty*, and found that venue was not proper in Saginaw County for either the witness intimidation or the solicitation to commit murder charge. However, the Supreme Court also held that statutory venue error is not a constitutional error, is subject to the harmless error analysis under MCL

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<sup>1</sup> The Honorable Alton T. Davis served on this panel at the time of the original appeal, but after his appointment to the Michigan Supreme Court, the Honorable Peter D. O’Connell was substituted in his place.

<sup>2</sup> *People v Houthoofd*, 487 Mich 568; \_\_\_ NW2d \_\_\_ (2010).

<sup>3</sup> *People v Houthoofd*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 269505).

769.26, and that MCL 600.1645 applies in criminal venue matters. The Supreme Court found the improper venue errors to be harmless, reinstated defendant's solicitation to commit murder conviction, and remanded this case to us for "consideration of whether the trial court failed to articulate substantial and compelling reasons for upwardly departing from the guidelines" when imposing defendant's sentences for the solicitation to commit murder and witness intimidation convictions. We vacate defendant's sentence for the solicitation to commit murder conviction and remand for resentencing.

## I. FACTS AND PROCEDURAL HISTORY

The facts and procedural history were detailed in this Court's earlier opinion, and will be summarized only briefly here.

In 1998, defendant used the name and driver's license of a coworker, Colin Francis, to rent a tractor and rototiller from a rental equipment store in Saginaw County. Defendant did not return the equipment, and store owner Edward Wurtzel, Jr. later learned that Francis was not the man who had rented the equipment.

In November 2001, Detective Sergeant Michael VanHorn investigated a shooting at the home of Jody Meagher. Someone had fired at Meagher and her husband through a window. Meagher was a coworker of defendant at the General Motors plant in Bay City, Michigan, and her department was responsible for placing defendant on two disciplinary suspensions. Also at that time, defendant was under investigation for violent acts against his former supervisor at a GM plant in Toledo, Ohio. Shortly after plant supervisor Robert Griffith fired defendant, Griffith was assaulted in his home. Later, after defendant was reinstated and began working in Bay City, Michigan, a pipe bomb exploded at Griffith's home.

Defendant was arrested on the night of the Meagher home shooting. Detective VanHorn found a driver's license in defendant's truck bearing the name "Colin Francis." He learned about the tractor case from 1998 and obtained a search warrant for defendant's home and property in Arenac County. Investigators found Wurtzel's tractor and tiller and two pipe bombs. Defendant was arrested and charged with receiving or concealing stolen property and two counts of possessing illegal explosives. He was taken to the Arenac County jail.

On December 6, 2001, Wurtzel identified defendant in a lineup as the person who took his tractor and tiller. The Saginaw County prosecutor charged defendant with obtaining property by false pretenses.

Defendant remained in the Arenac County jail until January 2002. While there, he met prisoner Michael Dotson. Dotson testified that defendant offered him money to shoot out the windows of a Bay City house and kill Wurtzel at his store. Defendant gave Dotson a detailed plan and a copy of a police report with Wurtzel's name and business address. Dotson later stated that he had no intention of assisting defendant with his plan, but he told defendant that a man named Chucky could do the shooting in Bay City.

Dotson cooperated with Detective VanHorn's investigation of defendant. In a tape-recorded phone conversation initiated by Dotson, Dotson and defendant discussed "the shit in Bay City," the money that defendant owed him and Chucky, and Wurtzel's identification of

defendant in the lineup. When Dotson asked if they were going to do anything to Wurtzel, defendant answered, “Nah, nah, no, I, I got a real good case. . . . [M]y lawyer will pick [Wurtzel’s] fucking wings off.”

Defendant was tried in Saginaw County in February and March 2004 for obtaining Wurtzel’s property by false pretenses. Detective VanHorn was a prosecution witness. At one point during the trial, VanHorn saw defendant in the hall and defendant said to him, “Fuck off VanHorn, fuck off.” The trial resulted in a hung jury.

On June 21, 2004, eight days before defendant was scheduled to be retried on the false pretenses charge, Detective VanHorn responded to a page from a telephone number that he did not recognize. The person who answered said, “I want to let you know I saw you in court last week, and I want to let you know that I know where you live, motherfucker.” The detective recognized the voice as defendant’s. He believed that defendant was threatening to kill or harm him or his family. Phone company records showed that the phone used to page Detective VanHorn belonged to a woman who had recently lost her phone. The same phone was used to call the General Motors’ call center, defendant’s girlfriend, a restaurant on the street where defendant’s girlfriend lived, and another person associated with his girlfriend.

In January and February 2006, defendant was tried in Saginaw County in three consolidated circuit court cases. Defendant was retried on the false pretenses charge, and was tried for intimidating witness Detective VanHorn and soliciting Dotson to murder Wurtzel. The jury convicted defendant of all three charges.

## II. SENTENCE

Defendant was sentenced by the trial court on March 21, 2006. The sentencing guidelines dictated minimum sentence ranges of 126 to 210 months (10½ to 17½ years) for the solicitation to commit murder conviction, and 19 to 38 months for the witness intimidation conviction. The trial court departed upward from the guidelines range in sentencing defendant for both offenses. Defendant received prison sentences of 40 to 60 years for the solicitation to commit murder conviction and ten to 15 years for the witness intimidation conviction.

The trial court gave the following reasons for sentencing defendant as it did:

*The Court:* This is probably one of the most interesting cases that I’ve had the occasion to preside over, and I think that the trooper [Detective VanHorn] has got most of it right. I think Mr. Houthoofd is bright. I think that you’re angry about something. I presume it’s something in your childhood because I don’t think anybody becomes as angry with it as you have—you are, Mr. Houthoofd, without it brewing for a long time, and without being injured, and I think that this propulsion has to do with you being hurt. It has to do with—and you—and it may be so deep within you that you don’t even know it now. You don’t even understand it. I think you’re dangerous.

*Defendant:* I’m not, Your Honor.

*The Court:* I suspect you wouldn't [sic] say that. But I think that you are, and I think that you do mean harm to others. There was enough evidence, such as your voice on the tape recording, that told me this is—this is true. I wasn't the fact finder. I had to make legal rulings during this trial, and I tried to do the best that I could, and I know that you and your counsel disagree with many of them. But that's why there is one person that has to make the calls, and now you'll be able to take that to a panel of three people who will make those calls.

It's got to be very difficult for somebody to think about whether they'll be alive tomorrow, whether their family is going to be in danger for the rest of their days. And a person who would go to the lengths that the evidence showed that you did, unless you get a lobotomy, I agree with Detective Sergeant VanHorn. That if you attempted this once and you attempted to have somebody kill the victim in the tractor case, and you also said, you know, go do Ms. Meagher, too, and that was over something as simple as an employment case? People lose their jobs everyday unfortunately, but I think they go home and cry. They don't try to shoot out their employer's or supervisor's window where they know that someone lives.

So I have to—Mr. Houthoofd, I have to look and see whether you can be rehabilitated in prison. And I think either you have such a void of conscience or such a void in your soul, or you are so injured psychically from something that occurred in your past, that you have no regard whether someone else is hurt, and, in fact, I think—I think the opposite. I think you intentionally would try to harm others.

I hope I'm wrong about you. I hope I'm wrong about you, Mr. Houthoofd, but I do feel the same way that Detective Sergeant VanHorn does, and that is that you are very dangerous.

*Defendant:* May I respond?

*The Court:* No, no. You can't now. This is—the procedure is such that—you know, you had an opportunity, your attorneys had an opportunity, he had an opportune—Mr. Duggan, you had an opportunity, the victim under the victim's rights legislation. Now it's my turn.

For obtaining money—the false pretenses case, it is the sentence of this Court that the defendant serve no less than 5 years to no more than 10 years. He will receive credit for 984 days previously served.

For intimidating Detective Sergeant VanHorn, the defendant's sentence is no less than 10 years to no more than 15 years. Credit for 967 days.

For solicitation to commit murder, it is the sentence of this Court that the defendant serve no less than 40 years to no more than 60 years with credit for 967 days.

These sentences are concurrent with one another.

You will pay \$60 to the Crime Victim's Rights Fund on each case number and a \$60 state cost on each case number.

Both defense counsel and the prosecution sought clarification of the court's sentence:

*Mr. James Piazza [defense counsel]:* Your Honor, regarding the solicitation to commit murder, you said four or 40?

*The Court:* Four-zero to six-zero. You are entitled to appeal your sentence and the conviction of each of these cases, Mr. Houthoofd, as this was a trial. If you can't afford an attorney, the Court will appoint one for you free of charge.

*Mr. Patrick Duggan [the prosecutor]:* Your Honor, are the reasons you gave before the sentence the ones that you would count as substantial and compelling reasons for guidelines exceeding if that's the case?

*The Court:* I don't know how they could get any more substantial and compelling.

*Mr. Duggan:* You didn't say the magic words. I wanted to make sure. Thank you.

### III. STANDARDS OF REVIEW

This Court applies three standards of review in considering a trial court's departure from the sentencing guidelines range. This Court reviews for clear error whether a particular factor supporting departure exists. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). This Court reviews de novo whether the factors are objective and verifiable, and reviews for an abuse of discretion the court's determination that the factors constitute substantial and compelling reasons to depart from the recommended range under the guidelines. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). The extent of the departure is also reviewed for an abuse of discretion. *Id.*

### IV. LAW AND ANALYSIS

Defendant argues that the trial court's reasons for departing from the guidelines in sentencing him for solicitation to commit murder were not objective and verifiable, and did not constitute substantial and compelling reasons to depart. Defendant complains that the departure was based solely on subjective factors. The departure was based on the court's subjective conclusions that defendant is dangerous and cannot be rehabilitated. Defendant maintains that these factors are not capable of being confirmed, and therefore do not qualify as substantial and compelling reasons to depart from the guidelines. Defendant also argues that the extent of the court's departure from the guidelines was not proportionate. He emphasizes that he had no prior felonies, and that his crimes were no more serious than other equally serious crimes of a similar nature.

The prosecution argues that the trial court's reasons for departing from the guidelines were based on facts in the record and the evidence at trial. The trial court referred to characteristics of defendant that were revealed during the trial and in the presentence investigation report. The prosecution also notes that the court relied on the victim impact statement of Detective VanHorn to support its conclusion that defendant is dangerous. The evidence showed that defendant's actions progressed and became deadlier over time among the three cases involved here, and the prosecution argues that none of the guidelines factors accounted for defendant's conduct of hiring a person to kill an eyewitness and threatening a police investigator and his family. The prosecution also relies on the trial court's remarks that Wurtzel and Detective VanHorn would live the rest of their lives in fear of defendant.

A trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2); *Babcock*, 469 Mich at 272. A court may depart from the sentencing guidelines range if the court has substantial and compelling reasons to do so and states on the record the reasons for the departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). Factors supporting departure must justify the particular departure made, must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Smith*, 482 Mich at 299, 318. 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 Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). The court may draw inferences about the defendant's behavior from the objective evidence. *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008). Substantial and compelling reasons should be found to exist "only in exceptional cases." *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995).

A departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Smith*, 482 Mich at 300. In addition to articulating its reasons for departure, the sentencing court must explain why those reasons justify the particular departure chosen by the court. *Babcock*, 469 Mich at 272. The court "must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *Smith*, 482 Mich at 304. "[I]f it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified." *Id.* "A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear." *Id.*

In this case the trial court essentially articulated two reasons for sentencing defendant as it did: (1) the court believed that defendant was dangerous, and (2) the court believed that defendant was incapable of rehabilitation. Notably, the court did not give these reasons as substantial and compelling bases to depart from the sentencing guidelines range. Indeed, the record does not reflect that the trial court even knew that it was required to sentence defendant within the guidelines range. The court made no mention of the sentencing guidelines, their inadequacy or departure from them, or the proportionality of defendant's sentence. It was only after the court pronounced its sentence that the prosecution, likely anticipating a potential remand on the given record, asked the court if its explanation of the sentence was meant to constitute substantial and compelling reasons to depart. The court did not offer much in the way of clarification, stating only, "I don't know how they could get any more substantial and compelling."

Assuming that the trial court relied on defendant's dangerousness as a substantial and compelling reason for the upward departure, the court did not err in relying on this factor. A trial court's belief that a defendant poses a danger to others is "not itself an objective and verifiable factor" for purposes of departing from the guidelines, *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004), but objective and verifiable factors underlying the court's conclusion are "an acceptable justification for an upward departure." *Horn*, 279 Mich App at 44-45. See also *Petri*, 279 Mich App at 422 ("The requirement that the trial court base its decision on objective and verifiable facts . . . [does] not preclude the court from drawing inferences about defendant's behavior from objective evidence.").

In *Horn*, this Court affirmed a trial court's upward departure from the guidelines in sentencing a defendant for kidnapping and first-degree criminal sexual conduct. The trial court articulated concern for the intended victim, the defendant's wife, and found compelling the defendant's repeated acts of aggression toward her, including soliciting her murder even while he was incarcerated:

*[P]articularly aggravating is when all this conduct is directed towards your wife and it's within a very short and compressed time frame that these aggressive acts are carried out against her and what's particularly compelling is while you're being held in custody for having assaulted her you're trying to hire someone to kill her. That's staggering. [Horn, 279 Mich App at 44 (emphasis in Horn).]*

This Court agreed:

The trial court emphasized that defendant's incarceration while awaiting trial for the instant offenses did not dissuade him from continuing his course of merciless aggression against his wife, because he tried to solicit her murder while he was incarcerated. Defendant's determined course to terrorize and abuse his wife, clearly evident from the recurring and escalating acts of violence, is an objective and verifiable reason that is based on occurrences external to the sentencing judge's mind, and capable of being confirmed. [*Id.* at 46.]

The *Horn* panel distinguished between impermissible departure factors such as a defendant's dangerousness generally, and danger based on objective and verifiable factors:

[S]pecific characteristics of an offense and an offender that strongly presage future criminal acts may justify an upward departure from the recommended sentencing range if they are objective and verifiable, and if they are not already adequately contemplated by the guidelines. Although a trial court's mere opinion or speculation about a defendant's general criminal propensity is not, in itself, an objective and verifiable factor, objective and verifiable factors underlying that conclusion or judgment are not categorically excluded as proper reasons for an upward departure. These factors include a history of recidivism, and obsessive or uncontrollable urges to commit certain offenses. [*Id.* at 45.]

The trial court's finding that the defendant posed a continuing danger to his wife was objective and verifiable "based on an established pattern of violence" toward her:

[A]nticipatory harm based on an established pattern of violence toward a specific victim is an objective and verifiable factor, not a speculative prediction. The trial court did not depart from the guidelines merely because of a generalized concern regarding defendant's criminal propensities. Rather, the trial court's departure was based on the objective and verifiable factor of defendant's recurring and escalating acts of violence against [his wife]. [*Id.* at 47-48.]

Here, the trial court supported its conclusion that defendant is dangerous with objective and verifiable facts from the record. Defendant was not just a danger to society generally; he was a threat toward specific persons who he perceived as having wronged him. The court noted defendant's pattern of retributive acts toward Meagher and Griffith over employment disciplinary matters. Also, like the defendant in *Horn*, defendant was in custody when he threatened Detective VanHorn and solicited Wurtzel's murder in an attempt to thwart prosecution. The court cited objective and verifiable evidence from which it reasonably inferred that defendant remains a danger. See *Petri*, 279 Mich App at 422. These facts were external to the court's mind and were capable of being confirmed. Accordingly, defendant's dangerousness was an acceptable factor to consider in departing from the guidelines, and was a substantial and compelling reason to do so.

To the extent the trial court based its departure from the guidelines on its conclusion that defendant is incapable of rehabilitation, the court failed to indicate objective evidence supporting this conclusion. A defendant's lack of potential for rehabilitation is a factor that a trial court may consider in deciding whether to depart from the sentencing guidelines, if that determination is supported by objective and verifiable facts. See *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). For example, a sentencing court may consider evidence of a lack of remorse in determining an individual's potential for rehabilitation, *id.*, or his or her past failures at rehabilitation, *Horn*, 279 Mich App at 45. Here, the court made no mention of defendant's lack of remorse or any previous failed attempts at rehabilitation. Rather, the court based its conclusion that defendant could not be rehabilitated on the judge's personal belief that defendant had either "a void of conscience," "a void in [his] soul," or some psychological injury from childhood. While these factors may be thoughtful speculation about the nature of defendant's character based on the acts that transpired, they are opinions that are not external to the mind or capable of being confirmed. See *Smith*, 482 Mich at 299; *Horn*, 279 Mich App at 43 n 6. Although objective evidence may well exist to support a finding that defendant is incapable of rehabilitation, the trial court must articulate such objective findings on the record, as we may not affirm a sentence founded upon subjective opinions.

Even if the trial court articulated substantial and compelling reasons for the upward departure from the guidelines, the court's analysis was incomplete. While the court was not required to use any precise or "magic" words in departing, it was required to justify, with at least some explanation on the record, "why it chose the particular degree of departure."<sup>4</sup> *Smith*, 482

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<sup>4</sup> It should be noted that the trial court sentenced defendant before our Supreme Court released its opinion in *Smith*. While the trial court may not have thought it was necessary to explain why it chose the particular level of departure as justified by substantial and compelling reasons, the Supreme Court has made it clear that failure to do so requires a remand, even for sentences that



Mich at 311, 318. The trial court must provide a valid explanation as to why the sentence imposed is more proportionate to the offense and the offender than a sentence within the guidelines would have been, and this Court may not use its own judgment to justify the extent of the departure. *Id.* at 304. Here, the court made no attempt to explain how it chose the particular degree of departure, which in this case was substantial. Defendant’s 40-year minimum term is more than twice the highest minimum term (17½ years) recommended by the guidelines. “A sentence cannot be upheld when the connection between the reasons for the departure and the extent of the departure is unclear.” *Id.* While we might personally find it “clear” from the facts of the case that an extensive departure is warranted, it is unclear from the sentencing transcript why the trial court chose the particular departure level it did—namely because the court did not give an explanation. Because we may not use our own judgment to justify the extent of the departure, we must vacate defendant’s sentence for the solicitation to commit murder conviction and remand for resentencing.<sup>5</sup>

The Supreme Court’s opinion also remands for our consideration whether the trial court failed to articulate substantial and compelling reasons for upwardly departing from the guidelines when imposing defendant’s sentence for the witness intimidation conviction. Notably, however, that issue was not raised by defendant. Defendant’s appeal brief challenges only the trial court’s departure in sentencing him for the solicitation to commit murder conviction. Because defendant did not raise the issue on appeal, we find it unnecessary to disturb the witness intimidation sentence.

We vacate and remand for resentencing only the solicitation to commit murder conviction.<sup>6</sup> If the trial court finds that a departure from the guidelines is warranted, it must

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preceded *Smith*. See *People v Kurtz*, 482 Mich 1131; 758 NW2d 297 (2008); *People v Howard*, 482 Mich 1125; 769 NW2d 599 (2008).

<sup>5</sup> In dissenting from the majority, our colleague states that “the record amply demonstrates the trial court’s determination that 40 years” was a proportionate sentence under *Smith*, and, therefore, concludes that the sentence should be upheld. While we agree that the trial court cited at least one substantial and compelling reason for departure—defendant’s dangerousness—“the statutory guidelines require more than an articulation of reasons for a departure; they require justification for the *particular* departure made.” *Smith*, 482 Mich at 303 (emphasis in *Smith*). We respectfully disagree with our colleague’s representation that this case turns on whether the trial court abused its discretion in choosing the particular sentence. Rather, it turns on the court’s failure to provide an explanation for the extent of its departure and why the particular departure was more proportionate than any other sentence the court might have imposed. While we might impose the same sentence were we in the shoes of the trial court, we must honor our state’s procedural due process, which does not give us the luxury of filling in the blanks, even though it might be publicly popular or feel good to do so. Regardless of what our personal feelings might be regarding defendant’s dangerousness and the extent of the particular departure, we must remand for the trial court to articulate *its* explanation for any departure pursuant to the dictates of *Smith*.

<sup>6</sup> While the prosecution requests that this Court remand any further proceedings to the original trial court judge in her retired capacity, the prosecution has provided no authority allowing this Court to do so. A party may not leave it to this Court to search for authority to sustain or reject

explain its reasons for doing so, as well as the extent of any departure in accordance with *Smith*. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Stephen L. Borrello

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its position. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). See also *People v Coones*, 216 Mich App 721, 730; 550 NW2d 600 (1996) (defendant’s argument that he should be resentenced before a different judge was considered moot because the original judge had since retired, and thus, defendant would “necessarily be resentenced by a different judge”).