

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 21, 2010

V

No. 294025
Jackson Circuit Court
LC No. 06-004680-FH

DERRICK QUINN MORGAN,

Defendant-Appellant.

Before: MARKEY, P.J., AND WILDER AND STEPHENS, JJ.

PER CURIAM.

Defendant appeals the sentence imposed on his jury trial conviction of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 280 to 480 months in prison. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction stems from his entry into a window of complainant's home at approximately 4:30 a.m. on November 17, 2006. Defendant was initially sentenced to 40 to 60 years in prison. In *People v Morgan*, unpublished per curiam opinion of the Court of Appeals, issued May 19, 2009 (Docket No. 280889), this Court affirmed defendant's conviction but vacated his sentence and remanded for resentencing. While this Court agreed with a number of the trial court's reasons for departing from the sentencing guidelines, it found that the trial court's decision that defendant was likely entering the home in order to rape complainant was not sufficiently supported by the evidence. Because it could not tell whether the trial court would have imposed the same sentence if it had not inappropriately decided defendant was at the home to rape complainant, this Court remanded for resentencing.

Defendant now argues that the trial court erred in its scoring of offense variables (OVs) 1, 2, and 13, and maintains that the trial court's stated reasons for sentence departure were already accounted for in the guidelines. We disagree.

When scoring the guidelines, "[a] sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Where effectively challenged, a sentencing factor need be proved only by a preponderance of the evidence." *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). See also *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). We review scoring decisions to determine

whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Any statutory interpretation concerning the application of the sentencing guidelines presents a question of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

A trial court's decision to depart from the sentencing guidelines is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 268-269; 666 NW2d 231 (2003). An abuse of discretion occurs when a trial court chooses a minimum sentence that is outside the range of reasonable and principled outcomes. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008), citing *Babcock*, 469 Mich at 269. An appellate court reviews the trial court's reason given for a departure from the sentencing guidelines for clear error, and reviews the determination whether a reason is objective and verifiable as a matter of law. *Id.*

Defendant first challenges the trial court's scoring decisions concerning OV 1 and OV 2. Over defendant's objection, the trial court scored offense variable (OV) 1 (aggravated use of a weapon) at five points, because a weapon was "displayed or implied", MCL 777.31(1)(e). Also over defendant's objection, the trial court scored OV 2 (lethal potential of weapon) at five points, because complainant testified that she saw a knife in defendant's hand as he tried to re-enter the window of her home. MCL 777.32(1)(d). These decisions were supported by complainant's trial testimony. At trial, complainant specifically testified that she went outside while she was getting ready for work, but went back inside when she heard a loud noise inside the house. As she went into the bedroom, she saw a person jumping out of her bedroom window. Complainant said that the person who had been in her bedroom returned when she was on the telephone and that he was trying to reopen the window. Complainant further testified that the person had an object in his hand that he was using to try and open the window. Although some of complainant's testimony was equivocal, she repeatedly stated during direct and cross-examination that she believed the object was a knife:

Q. And were you able to tell whether or not the person had any tool, knives, screwdrivers, anything in the person's hand?

A. This length, it was maybe a knife or something. Bright, polished, shiny.

Q. Okay. Do you know for sure whether it was a knife or not?

A. Yes.

Q. And you think it was a knife?

A. Yes. I ran for the kitchen because I was very scared then.

* * *

Q. Okay, at the preliminary examination you said it might have been a knife. Today, you're telling us you're sure it was a knife. Could you explain how

you were--thought it might have been one then but today you're sure? Can you explain that for us?

A. Because it was * * * because it shines.

Q. I understand, but you weren't sure then but today you said you were sure, so can you tell us, are you or are you not sure that he had a knife in his hand?

A. I'm not real sure but it was something shiny. What else could I say?

Q. Okay. Well, tell us for sure whether you can say it was or it was not a knife.

A. Yes.

Given this testimony, we find that defendant has not shown that the trial court erred in scoring OV 1 and OV 2.

Defendant next argues that the trial court erred when it scored OV 13 (continuing pattern of criminal behavior) at 25 points. Under MCL 777.43(1)(c)¹ the scoring of 25 points is appropriate if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." The instant offense is to be included, as are any other crimes that defendant committed within the five-year period that includes the sentencing offense, regardless of whether the offense resulted in a conviction. MCL 777.43(2)(a); *People v Francisco* 474 Mich 82, 87; 711 NW2d 44 (2006). Here, defendant's instant first-degree home invasion is to be included in this score. Defendant also was found guilty of resisting and obstructing in 2005, which is classified as a crime against a person. MCL 777.16d. The prosecutor argued during sentencing that the trial court could also include a 2005 charge of attempted first-degree home invasion in the scoring of OV 13. Based on our Supreme Court's plurality opinion in *People v Ewing*,² the trial court stated that it would include this offense, provided that the prosecution could produce evidence that defendant was bound over on that charge. The prosecution presented a supplemental sentencing memorandum containing this information. On appeal, defendant incorrectly argues, "[i]t does not appear that any supplement was ever filed or proffered by the People." Because defendant's claim that the court erred in scoring OV 13 appears to be premised solely on this incorrect observation, we find that defendant has failed to establish that the trial court abused its discretion in scoring OV 13.

Defendant lastly argues that the trial court abused its discretion in choosing to depart from the guidelines. A trial court may depart from sentencing guidelines if it has a substantial and compelling reason to do so, and if it articulates on the record the reason for departure. MCL

¹ Previously MCL 777.43(1)(b).

² See *People v Ewing (After Remand)*, 435 Mich 443, 477; 458 NW2d 880 (1990).

769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). The reason used for a departure must be “objective and verifiable” and must keenly grab this Court’s attention. *Babcock*, 469 Mich at 257.

Defendant argues that the trial court’s rationale for exceeding the guidelines was already incorporated into the guidelines. A trial court may not base a departure “on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b); *People v Harper*, 479 Mich 599, 616-617; 739 NW2d 523 (2007) (internal citations and punctuation omitted).

Here, the trial court found that the guidelines did not take into account that defendant was on parole from his last offense, which also involved a breaking and entering, and had committed the crime two months after he had “maxed out” for that offense. Prior Record Variable 6 (offender’s relationship to criminal justice system) ordinarily provides for the scoring of ten points for this variable when an offender is on parole when he commits another offense. MCL 777.56(1)(c). This variable was not scored in the instant case, presumably because defendant had maxed out his ten to 15 year sentence for his 1991 convictions, and also appears to have maxed out a six-month sentence for his 2006 conviction for resisting and obstructing. Thus, we find support for the trial court’s holding that this factor was not accounted for in the guidelines.

The trial court also found that a departure was warranted due to defendant’s “recidivism,” in that he had previously committed a crime shortly after being released from prison from his prior offense and while on parole. This is supported by the information contained in the presentence investigation report. In 1992, defendant violated his probation from a 1988 offense, and in 2006, he violated his parole from a 1991 offense after he was paroled in 2004. Again, this factor is not directly addressed in the guidelines.

The trial court also noted that defendant’s offenses all involved similar conduct of breaking into homes, and found that this was a reason to deviate from the guidelines. Offense Variable 13 does not take into account such specific repeated criminal conduct. MCL 777.43. There is thus also support for the trial court’s statement that this conduct was not accounted for in the guidelines.

These factors are objective and verifiable. Given defendant’s predilection for committing home invasions, which was apparently unaffected by his previous prison sentences, we agree with plaintiff’s assertion that the factors noted by the trial court keenly grab one’s attention. We also find that the sentence is proportionate.

Affirmed.

/s/ Jane E. Markey

/s/ Kurtis T. Wilder

/s/ Cynthia Diane Stephens