STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2019
v	No. 345910 Ingham Circuit Court
JACOB DANIEL MCKAY, Defendant-Appellant.	LC No. 15-001126-FH

Before: BORRELLO, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his sentence imposed at his resentencing hearing that was conducted following remand from this Court. For the reasons set forth in this opinion, we vacate defendant's sentence and remand for resentencing before a different judge.

I. PROCEDURAL BACKGROUND

A jury convicted defendant of three counts of second-degree child abuse, MCL 750.136b(3). The trial court originally sentenced defendant as a third-offense habitual offender, MCL 769.11, to concurrent terms of 160 months to 240 months' imprisonment on each conviction, which represented an upward departure of 31 months above the high end of the recommended guidelines range of 43 months to 129 months.

Defendant appealed, and this Court affirmed his convictions, vacated his sentence, and remanded for resentencing. *People v McKay*, unpublished per curiam opinion of the Court of Appeals, issued March 6, 2018 (Docket No. 335417), p 1. We vacated defendant's sentence because "the trial court's imposition of the maximum possible sentence was summarily lodged in subjective conclusions rather than objective findings that [were] capable of appellate review" and the trial court thereby " 'abused its discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed.' " *Id*. at 7, quoting *People v Steanhouse*, 500 Mich 453, 476; 902 NW2d 327 (2017). We stated, "[R]egardless of the closeness of our review, if the trial court fails to provide an adequate explanation for the fact and extent of a departure sentence, this Court cannot supplement the trial court's reasoning with its own." *McKay*, unpub op at 8. We stated further that "[e]ven if we

were inclined to conclude that the trial court's implication that the seriousness of defendant's offenses exceeded that contemplated by the sentencing guidelines adequately explained why the court imposed a departure sentence, nothing in the court's comments articulates objective grounds for the particular extent of the departure." *Id*.

On remand, the matter was assigned to a different judge for resentencing because the original trial judge had retired. The resentencing hearing was held on September 19, 2018. Defendant's recommended minimum guidelines range remained 43 to 129 months, and defendant was again sentenced to concurrent terms of 160 to 240 months' imprisonment for each conviction.[1] In imposing this upward departure sentence, the trial court explained as follows:

> *The Court*: We are all as lawyers and judges familiar with the *Lockridge*[2] and *Steanhouse.* I appreciate the record that you made, counsel, but I am very thankful that guidelines are gone. I don't understand the Court of Appeals here. They apparently didn't read the transcript, because [the former judge] got it right. I do have to look at . . . the *Snow*[3] factors, which, counsel, you did, but we look at the ability to have defendant be reformed. Well, I think he needs a long prison stay. You can talk about all the good things you're doing now but taking control over children, you didn't just control them, you brutalized them and stole their lives. Not just their childhood but their lives. You can stand there with your brain intact and your feelings intact and tell me how much you are going to change for you and all these things so you can get out. You didn't say anything about those kids, about how emotionally and physically damaged they are because of you, because you wanted to control little people that made you feel like a big man. I don't know if you are ever going to be able to be out in society with children.
>
> I do understand how you're doing well in prison now. There are bigger, meaner people than you. I suspect you are learning a little humility because of that.
>
> *The Defendant*: Yes, ma'am.
>
> *The Court*: Because you have to survive there. That doesn't tell me anything about how you're going to survive in the world with infants, with toddlers, with children, with handicapped people, with women. I don't think you've learned your lesson or you ever will learn your lesson, because how you

[1] Defendant was also still sentenced as a third-offense habitual offender.

[2] *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

[3] In *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), our Supreme Court stated that proper factors to consider in determining an appropriate sentence were "(a) the reformation of the offender, (b) protection of society, (c) the disciplining of the wrongdoer, and (d) the deterrence of others from committing like offenses."

couldn't help a child and how you made people, children, not speak, not go out and play, not thrives [sic] tells me a whole lot.

This record is one of the worst I've ever read. I'm not sure the people got it right. I think there should have been more charges. I think there should have been higher penalties. These children really lost their lives, but I'm locked into the record, and the record shows that for protection of society you need to go away for as long as possible. I've seen nothing in here that says you can be rehabilitated. Doing good in prison, expected, as I said.

The discipline to the wrongdoer, I don't have any reason to believe that you're not doing well in prison but this discipline needs to be imposed for a long time because the words that you even uttered were really all about you, and the protection of society, yes, there needs to be a message that when you take a child's life, because that's what you did, you go in for the maximum.

The fact that you treated dogs better than humans tells me a whole story. It's in the transcript. The fact that you touched those children, beat them with belts hundreds of times, no one in prison is beating you. No one is treating you with disrespect or putting feces in your face. Those are vial acts that show that you don't have a consideration for human beings.

* * *

Now, I don't know why the Court of Appeals wanted [the former judge] to talk more about these things. You read a couple of those pages of transcript and you want to vomit. I can't imagine those children living through what you put them through, and how you could be rehabilitated after a short amount of prison after what you've done to human beings, I don't understand.

You need to be away for the longest time. You exploited the children, and your counsel is right, and, sir, you've done a good job in terms of the [offense variables] and the [prior record variables]. It's all accounted for. The problem is, and I think why sentencing guidelines went out, is because we have to look at reasonableness, and this isn't an accident where, sir, you got mad and slapped a child. You physically beat them down. You emotionally beat them down. You harmed them so bad they may never be rehabilitated into society to have a normal life again, and the record speaks to that.

You also had a prior domestic assault. I don't know what happened there, you didn't get treated for that, but you knew clearly that you had a volatile temper, you had some demons inside, you're an adult and you could have sought treatment and you did not, not to the degree that your anger was let out and you knew it could be out that way, and you got some sort of thrill, heightened thrill of beating children, emotionally tearing them down. What on earth were they going to do to you ever, even if you didn't do that? Children are powerless. You took your power and you beat them to a pulp.

> You need the maximum time to really be away, to get older, to get wiser, to send a message that this will never be tolerated, so doing well in prison, expected.
>
> The seriousness of this offense is—it's one of the worst I've seen. I agree with [the former judge] on that, and this is so very serious. It really is as serious as murder, maybe more so, because a victim who passes is put out of their misery. These children have a lifetime of misery. A lifetime of pain, bad memories. You should share in that behind bars.
>
> So you will serve 160 to 240 with credit for 771 days, and if the Court of Appeals wants more, I ask them to turn to the pages of the transcript, read them with a box of Kleenex. For me, I've read the transcript. There's nothing redeeming in here that means you should be receiving any less of a sentence than what was imposed.

Additionally, the trial court stated that it was adopting the prosecution's argument that the 10-points assessed for offense variable (OV) 4—which permits a maximum of 10 points to be scored if a victim suffers serious psychological injury requiring professional treatment, MCL 777.34(1)(a)—did not sufficiently reflect the effect defendant had on the victims because two of the three victims had been placed in institutions after multiple suicide attempts and the third victim was undergoing "weekly severe treatment for PTSD along with many other [mental] ailments." The trial court also stated without any further elaboration that it did not think that "the other [offense] variables . . . account[ed] adequately for what's gone on here."

Defendant now appeals as of right the sentence that was imposed at his resentencing hearing.

II. STANDARD OF REVIEW

"A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). "[T]he proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), 'which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *Steanhouse*, 500 Mich at 459-460. "[T]he legislative sentencing guidelines are advisory *in all applications*," *id.* at 459, and a "sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so," *Lockridge*, 498 Mich at 392.

However, while the guidelines are no longer "mandatory," they still "remain a highly relevant consideration in a trial court's exercise of sentencing discretion." *Lockridge*, 498 Mich at 391. " 'Sentencing courts must . . . continue to consult the applicable guidelines range and take it into account when imposing a sentence . . . [and] justify the sentence imposed in order to facilitate appellate review.' " *Steanhouse*, 500 Mich at 470, quoting *Lockridge*, 498 Mich at 392 (ellipses and alteration in original).

III. ANALYSIS

Because it is evident from the trial court's stated sentencing rationale that it operated under a fundamental misperception of sentencing law, the trial court abused its discretion in imposing defendant's sentence and we must again vacate defendant's sentence and remand for resentencing.

The trial court explicitly stated—twice—that the guidelines had no bearing on its sentencing decision. The court stated, "I am very thankful that guidelines are gone." The court also stated, "I think why sentencing guidelines went out, is because we have to look at reasonableness . . . ." The trial court's statements reflect a profoundly flawed understanding of our Supreme Court's holdings in *Lockridge* and *Steanhouse*. The guidelines are still a "highly relevant consideration" that trial courts must take into account as part of their discretionary sentencing decisions. *Lockridge*, 498 Mich at 391-392; *Steanhouse*, 500 Mich at 470. By treating the guidelines as nonexistent, the trial court in this case made an error of law. "A trial court necessarily abuses its discretion when it makes an error of law." *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012). It is for this reason that we must vacate defendant's sentence and remand this matter for resentencing. On remand, the trial court must properly apply the relevant law and "justify the sentence imposed in order to facilitate appellate review." *Steanhouse*, 500 Mich at 470 (quotation marks and citation omitted).

From this sentencing transcript it becomes apparent that the trial court did not engage in any meaningful analysis of the proportionality of its departure sentence and why it was more proportionate than a different sentence would have been, *Dixon-Bey*, 321 Mich App at 525, and as a result, the trial court failed to provide an adequate rationale for the extent of its departure sentence and thereby abused its discretion in this manner as well. *Steanhouse*, 500 Mich at 476.[4]

Next, defendant requests that he be resentenced before a different judge. We apply the following three-part test to determine whether resentencing should occur before a different judge:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

[4] Clearly, the trial court does not need to state substantial and compelling reasons to justify a departure sentence, *Lockridge*, 498 Mich at 392, and nothing in our opinion should be understood as imposing such a requirement.

[*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (quotation marks and citation omitted).][5]

Because the trial judge's statements at resentencing lead us to conclude that the judge evidenced an inability to set aside personal and subjective feelings on this matter, reassignment to a different judge is "advisable to preserve the appearance of justice." *Id*. (quotation marks and citation omitted). Reassigning this matter to a different judge solely for the purpose of resentencing will not "entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Id*. (quotation marks and citation omitted). We therefore grant defendant's request to be resentenced before a different judge.[6]

In light of this remand resulting in what will be the third attempt to sentence defendant, some further instruction to the trial court seems warranted. It is insufficient for a sentencing court to simply refer generally to "the transcript" of the trial as a whole as a basis for supporting its sentencing decision. The question to be considered on appellate review is not whether this Court would have imposed the same sentence as the trial court; rather, the question for our review is "whether the trial court abused its discretion by violating the 'principle of proportionality' . . . ." *Steanhouse*, 500 Mich at 459-460, quoting *Milbourn*, 435 Mich at 636. A trial court abuses its discretion in its application of the principle of proportionality if it "fail[s] to provide adequate reasons for the extent of the departure sentence imposed," and an appellate court cannot conclude that a reason supports a departure if the trial court did not articulate that reason. *Steanhouse*, 500 Mich at 476. In order to review a trial court's discretionary decision, the trial court must have set forth *its own* reasons for its decision. See *People v Norfleet*, 317 Mich App 649, 664; 897 NW2d 195 (2016).

Although the Legislature "incorporated the principle of proportionality into the legislative sentencing guidelines," *People v Dixon-Bey*, 321 Mich App 490, 524; 909 NW2d 458 (2017), sentencing judges obviously "may continue to depart from the guidelines when, in their judgment, the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime," *Milbourn*, 435 Mich at 657. See also *id*. at 661 ("[T]rial judges shall remain entitled to depart from the guidelines if the recommended ranges are considered an inadequate reflection of the proportional seriousness of the matter at hand."). However, in justifying the sentence imposed so as to facilitate appellate review, the trial court must include "an explanation of why the sentence imposed is more proportionate to the offense and the

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[5] Our Supreme Court has also indicated that this is the appropriate test to apply in determining whether resentencing should occur before a different judge. See *People v Beck*, ___ Mich ___, ___ n 2; ___ NW2d ___ (2019); slip op at 3 n 2.

[6] In light of our above conclusions, defendant's additional argument regarding the propriety of the trial court's decision to allow certain family members to give victim impact statements at the resentencing hearing is moot, and we decline to address it. *People v Sours*, 315 Mich App 346, 352; 890 NW2d 401 (2016).

offender than a different sentence would have been." *Dixon-Bey*, 321 Mich App at 525 (quotation marks and citation omitted). The trial court should also explain the extent of any departure it deems warranted. *Id*. at 529; see also *Milbourn*, 435 Mich at 660 ("Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality.").

Lacking from the trial court's explanation on resentencing in this case was a consequential examination of how the sentence was imposed, and how the extent of the departure from the guidelines rendered the sentence more proportionate than a different sentence would have been. The trial court identified what it considered to be circumstances justifying a departure but did not relate its discussion to the guidelines in any meaningful way, perhaps because the trial court erroneously believed that the guidelines were "out." However, "[b]ecause the guidelines embody the principle of proportionality and trial courts must consult them when sentencing, it follows that they continue to serve as a 'useful tool' or 'guideposts' for effectively combating disparity in sentencing." *Dixon-Bey*, 321 Mich App at 524-525.

On remand, the sentencing court should base its sentence on reasoned judgment rather than injecting its own subjective philosophy. "[T]he purpose of discretionary sentencing [is] not to accommodate subjective, philosophical differences among judges." *Milbourn*, 435 Mich at 652-653. "The trial court appropriately exercises the discretion left to it by the Legislature *not* by applying its own philosophy of sentencing, but by determining where, on the continuum from the least to the most serious situations, an individual case falls and by sentencing the offender in accordance with this determination." *Id*. at 653-654. "[A] judge helps to fulfill the overall legislative scheme of criminal punishment by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing. In making this assessment, the judge, of course, must take into account the nature of the offense and the background of the offender." *Id*. at 651.

We vacate defendant's sentence and remand for resentencing before a different judge consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto