

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 17, 2013

v

TERANCE CHARLES HICKS,

Defendant-Appellant.

No. 305203
Wayne Circuit Court
LC No. 05-007825-FC

Before: DONOFRIO, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence of 10 to 15 years' imprisonment imposed at resentencing for his jury trial conviction of second degree criminal sexual conduct, MCL 750.520c(1)(b)(ii). We affirm.

Defendant was charged with several counts of first and second degree criminal sexual conduct based on allegations that his daughter, who was 13 years old at trial, made against him. The jury convicted him of a single count of second degree criminal sexual conduct. At sentencing, the trial court deviated upward from the sentencing guidelines range and sentenced defendant to a term of 10 to 15 years' imprisonment. Defendant appealed his conviction and, in *People v Hicks*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2007 (Docket No. 266510), this Court affirmed defendant's conviction but agreed that two of the sentencing court's proffered reasons for deviating from the guidelines-the nature of the offense and the need to protect society-were not substantial and compelling reasons. However, this Court held that the trial court was within its right to deviate from the guidelines based on its conclusion that Offense Variable (OV) 10, MCL 777.40, did not adequately take into account defendant's exploitation of his daughter's vulnerabilities. *Id.* This Court remanded for resentencing "because it is unclear whether the trial court would have departed to the same extent on the basis of the inadequate weight given to OV 10 alone."

At defendant's resentencing, the trial court again exceeded the recommended minimum sentence range and imposed a term of 10 to 15 years' imprisonment. It explained that it "finds that the scoring of OV-10 does not afford proper weight to the exploitation of the victim's vulnerabilities and that is very clear on this record, very clear."

Defendant again appealed his sentence, arguing that the trial court erred in scoring 50 points for OV 11, MCL 777.41. Defendant also argued that, "even if the trial court's scoring of

OV 11 was proper, resentencing is required because the sentencing court lacked substantial and compelling reasons to deviate from the guidelines and because his sentence of 10 to 15 years' imprisonment is disproportionate.” *People v Hicks*, unpublished opinion per curiam of the Court of Appeals, issued June 25, 2009 (Docket No. 284462) (unpub op at 1) (“*Hicks II*”). This Court found that because the trial court did not articulate why it believed the upward departure represented a more proportionate sentence, remand for resentencing was necessary. While this Court remanded for resentencing before a different judge, the Supreme Court reversed that part of this Court’s opinion. *People v Hicks*, 485 Mich 1060; 777 NW2d 412 (2010).

On remand, the trial court again sentenced defendant to 10 to 15 years’ imprisonment. On appeal, defendant argues that the trial court abused its discretion in failing to articulate sufficient substantial and compelling reasons for imposing a 10 year minimum sentence—an upward departure from the minimum under his calculated guidelines range. We disagree.

Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In reviewing a trial court’s grounds for departing from the sentencing guidelines, this Court reviews for clear error the trial court’s factual finding that a particular factor in support of departure exists. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Whether the factor is objective and verifiable, however, is a question of law that this Court reviews de novo. *Id.* Whether the reasons given are substantial and compelling enough to justify departure is reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). The statutory guidelines “require more than an articulation of reasons for a departure; they require justification for the particular departure made.” *Id.* at 303. “The trial court’s articulation must be sufficiently detailed to facilitate appellate review. This includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been.” *Id.* at 311.

In the instant matter, the trial court gave substantial and compelling reasons for imposing a 10 year minimum sentence on defendant for second-degree criminal sexual conduct. During resentencing, the court cited to defendant’s exploitation of the victim’s vulnerabilities as a substantial and compelling reason to depart from the recommended minimum sentence range. Notably, in *Hicks II*, a panel of this Court found that “the failure of the guidelines to give proper weight to defendant’s exploitation of victim’s vulnerabilities provided a substantial and compelling reason to depart from the recommended minimum sentence range.” *People v Hicks*, unpublished opinion per curiam of the Court of Appeals, issued June 25, 2009 (Docket No. 284462) (unpub op at 3). We see no reason to vary from this finding and defendant has provided this Court with none.

In addition, the trial court cited to defendant’s five other counts of criminal sexual conduct, including three counts of first-degree criminal sexual conduct. A sentencing court may consider offenses established by evidence offered at trial in imposing an appropriate sentence, even if defendant was acquitted of those offenses. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). Thus, defendant is incorrect in his assertion that the court erred in considering the evidence associated with defendant’s five other counts of criminal sexual conduct. Finally, the court cited to defendant’s multiple years of sexual abuse perpetrated on the victim and that the abuse took place in front of the victim’s younger brother.

Based on the above, the trial court did not abuse its discretion in finding substantial and compelling reasons to justify an upward departure from the sentencing guidelines.

Defendant next argues that the extent of the trial court's departure from the guidelines range constituted an abuse of discretion. "When fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure." *Smith*, 482 Mich at 318. "This includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *Id.* at 311. A trial court abuses its discretion when it imposes a sentence which is not proportional to the seriousness of the circumstances surrounding the offense and the offender. *People v Garza*, 246 Mich App 251, 256; 631 NW2d 764 (2001).

With respect to proportionality, the court referenced defendant's sentencing grid if he would have been convicted of the other five counts of criminal sexual conduct with which he had been charged. The trial court commented that if defendant was convicted of the counts of first degree criminal sexual conduct charges he would have been subject to a penalty of life in prison. The court also commented that had defendant been convicted as charged, the sentence guidelines would have been 81 to 135 months. As explained in *Smith*, 482 Mich at 306, one potential means of justifying the extent of a departure or explaining the proportionality of a departure "is to place the specific facts of a defendant's crimes in the sentencing grid." Thus, the trial court met its requirement in explaining and justifying the extent of the particular upward departure by comparing defendant's sentence to the sentencing guidelines applicable to his charged crimes.

Affirmed.

/s/ Pat M. Donofrio
/s/ Karen Fort Hood
/s/ Deborah A. Servitto