

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 12, 2013

v

ELLEN CLARA WATSON,
Defendant-Appellant.

No. 305809
Leelanau Circuit Court
LC No. 10-001686-FH

Before: JANSEN, P.J., and WHITBECK and BORRELLO, JJ.

JANSEN, P.J. (*dissenting*).

I respectfully dissent. I believe that the trial court articulated sufficient reasons to justify its upward departure from the sentencing guidelines and the extent thereof. See MCL 769.34(3); see also *People v Smith*, 482 Mich 292, 299-301, 304-305; 754 NW2d 284 (2008).

As the majority correctly notes, the trial court’s assertions that defendant was “hollow” and without a “soul” were not objective and verifiable. Nor was the trial court permitted to base its upward departure on defendant’s lack of remorse. *People v Daniel*, 462 Mich 1, 8; 609 NW2d 557 (2000). However, the trial court articulated several additional reasons to support its upward departure from the guidelines, including the high dollar value of the embezzled property, the significant number of uncharged crimes committed by defendant, and the fact that defendant would never be able to make restitution for the crime. While OV 16 deals with the degree of property damage, it does not address crimes against property valued at more than \$20,000. See MCL 777.46(1)(b). In this case, the property embezzled by defendant was worth far more than \$20,000, and OV 16 did not take this into account. Similarly, although OV 13 deals with continuing criminal behavior, it only takes into consideration criminal activity involving “3 or more crimes” See MCL 777.43(1). In this case, the record showed that defendant had engaged in far more than three uncharged crimes in the preceding five years, and this was not adequately accounted for by OV 13. Uncharged conduct may be used in the scoring of OV 13. See *People v Bemmer*, 286 Mich App 26, 36; 777 NW2d 464 (2009). Lastly, no offense variable adequately took into account the fact that defendant would never be able to pay restitution for the vast amount of property that was taken.

I find that all three of the reasons offered by the trial court were given “inadequate or disproportionate weight” by the guidelines, MCL 769.34(3)(b), were “objective and verifiable,” *Smith*, 482 Mich at 299, and were “substantial and compelling,” MCL 769.34(3). Further, in my

opinion the trial court's upward departure of 36 months was proportionate to the severity of the sentencing offense, see *Smith*, 482 Mich at 304-305, and I am convinced that the court would have departed to the same extent on the basis of these three reasons alone, see *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004). Accordingly, I would affirm defendant's sentence.

/s/ Kathleen Jansen