

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 13, 2012

v

JEFFERY TODD BARNES,

Defendant-Appellant.

No. 307372
St. Joseph Circuit Court
LC No. 03-011781-FC

Before: SERVITTO, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Defendant Jeffery Todd Barnes appeals as of right his sentences for four counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1). Defendant was also convicted of and sentenced for one count of second-degree CSC, MCL 750.520c(1)(b); however, this sentence is not at issue in this appeal. We affirm.

Following a jury trial in 2004, defendant was convicted and the trial court departed upward from the recommended minimum sentence range under the legislative guidelines, and sentenced defendant, as a second habitual offender, MCL 769.10, to life imprisonment for his first-degree CSC convictions. Defendant appealed as of right to this Court and, based on a scoring error relating to offense variable (OV) 11, we remanded for resentencing. *People v Barnes (Barnes I)*, unpublished opinion per curiam of the Court of Appeals, issued June 19, 2007 (Docket No. 266170). On remand, the trial court again departed upward and sentenced defendant as a second habitual offender, MCL 769.10, to life imprisonment for each of first-degree CSC convictions. Defendant again appealed to this Court. On appeal, this Court concluded that although the trial court articulated substantial and compelling reasons for the departure, the trial court failed to articulate justification for the extent of the departure as required by *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008). We therefore vacated defendant's first-degree CSC sentences and remanded "so the trial court can explain the extent of the departure." *People v Barnes (Barnes II)*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 288711). At the second resentencing, the trial court again departed upward and sentenced defendant as a second habitual offender, MCL 760.10, to life imprisonment for each of his first-degree CSC convictions. Defendant again appeals his life sentences for the convictions.

The trial court is required to impose a minimum sentence within the legislative guideline range absent a “substantial and compelling reason” to deviate from the guidelines. *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003), citing MCL 769.34(3). Where the trial court finds a substantial and compelling reason to depart from the sentencing guidelines, the court must specify on the record both the reasons supporting departure and justification for the proportionality of the particular departure sentence imposed. *Babcock*, 469 Mich at 258-260; *Smith*, 482 Mich at 313-314. On appeal, the Court reviews the existence of such a reason for clear error. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). Whether a factor constitutes a substantial and compelling reason to depart from the sentencing guidelines is reviewed for an abuse of discretion. *People v Lucey*, 287 Mich App 267, 270; 787 NW2d 133 (2010).

In addition, only factors that are “objective and verifiable” may be considered for purposes of departing from the guidelines. *Babcock*, 469 Mich at 257. Whether such a factor is objective and verifiable is a question the Court reviews de novo. *Young*, 276 Mich App at 448. The amount by which a trial court departs is reviewed for an abuse of discretion. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

In this case, we begin by noting that law of the case prevents our reconsideration of factors which we previously determined to be substantial and compelling. Whether factors constitute substantial and compelling reasons for departure is a question of law. *People v Hendrick*, 472 Mich 555, 559-560; 697 NW2d 511 (2005). “[I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.” *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995). In this case, the facts remain materially unchanged and we see no reason to consider anew whether defendant’s argument that the number of instances of abuse (an estimate of 57 to 114), his providing drugs to the victim, the victim was a very close family member, his continued threat to society, or his lack of potential for rehabilitation were substantial and compelling reasons for departure. *Id.*; see *Barnes II*, unpub op at 2-3.

However, we reject the prosecution’s assertion that review of all factors cited by the trial court is precluded merely because we previously ruled that specific previously articulated characteristics provided substantial and compelling reasons for departure. During the second resentencing, the trial court offered specific analysis of OV’s and PRV’s and their inability to adequately account for the offender and offense characteristics of defendant’s case as contemplated by MCL 769.34(3)(b). This was not something the trial court discussed during the first resentencing and it was not an issue considered by this Court in *Barnes II*. Because we have not previously considered whether these factors constituted substantial and compelling reasons for departure, this issue is properly reviewed on appeal. See *Fisher*, 449 Mich at 444-447.

To the extent the trial court suggested that an upward departure would be justified based upon points that could have been assessed under offense variables that were not in fact scored, the trial court erred. Specifically, the trial court suggested that points could have been assessed under OV’s 7 (aggravated physical abuse) and 8 (asportation or captivity), and that OV 13 could have been scored at 50 (for a pattern of sexual penetrations involving a person under 13) rather than 25 points. MCL 769.34(3)(b) allows courts to consider characteristics inadequately

accounted for or disproportionately weighted as a basis for departure. However, this provision does not authorize courts to fail to score or underscore variables and then use the score to depart upward. This practice runs contrary to the basic process the trial court is required to follow in calculating defendant's minimum sentence. See MCL 777.21(1).

Criminal sexual conduct is a crime against a person, MCL 777.16y, and, for crimes against a person, the trial court is required to score particular OVs, including, 7, 8 and 13. MCL 777.22(1). This Court has held that "trial courts do not have any discretion in the scoring of the listed variables—each variable must be scored." *People v Bemer*, 286 Mich App 26, 32; 777 NW2d 464 (2009). Moreover, the trial court was required to assign the highest number of points applicable under OVs 7, 8, and 13. MCL 777.37(1); MCL 777.38(1); MCL 777.43(1). Without a proper scoring of these variables, the trial court could not properly consider how the relevant characteristics were scored and what affect those scores had on defendant's sentence. See *Young*, 276 Mich App at 450-451. It follows, that a trial court may not underscore a variable and then base an upward departure upon the low score. Accordingly, the trial court erred in citing the underscoring of OVs 7, 8, and 13 as a basis for departing upward. MCL 769.34(3)(b).

In addition, the trial court also noted that OV 4 (victim's psychological injury) did not account for the psychological injury suffered by "everyone else." However, the trial court offers no explanation of who "everyone else" would include or what psychological harm they may have suffered. This Court may not hypothesize as to who else suffered emotional harm as a result of defendant's conduct, and without more information, their psychological harm cannot be affirmed as a basis for departure.

The trial court also, however, concluded that PRV 7, OV 4, OV 10, and OV 13 did not adequately account for the offender and offense characteristics at issue here. MCL 769.34(3)(b) expressly permits a trial court to consider whether a characteristic has been given inadequate weight and we find no error in the trial court's analysis. *People v Petri*, 279 Mich App 407, 421-422; 760 NW2d 882 (2008). The trial court appropriately considered the scoring of each variable and considered whether that score was reflective of what occurred in this case. *Young*, 276 Mich App at 450-451.

More specifically, the court concluded that a score of 10 points for OV 4 did not account for the fact that the victim (defendant's own daughter) became addicted to drugs and needed extensive counseling for years. The court also found that this was a particularly egregious instance of predatory conduct, not accounted for by a scoring of 15 points for OV 10. The court noted that defendant's conduct went "beyond just predatory conduct," and indeed, defendant sexually abused his own daughter for a number of years, providing her methamphetamine and other drugs in the process. Turning to OV 13, the trial court assessed a score of 25 points. Although, as discussed, it was not proper to depart upward based on the conclusion that OV 13 could have been scored at 50 points, there was nothing improper in the trial court considering the extent to which OV 13 (and defendant's PRV score generally¹) did not adequately account for

¹ The trial court noted the applicable scores under PRVs 2, 6, and 7, and indicated that none of these variables adequately reflected the multitude of times defendant sexually abused his

defendant's pattern of felonious activity. OV 13 is scored 25 points for three or more crimes against a person committed within a five year period, regardless of whether the offense resulted in a conviction. MCL 777.43(1)(b); MCL 777.43(2)(a). The trial court concluded that a score of 25 points for three or more crimes against a person did not even begin to account for the 57 to 114 crimes against a person that defendant perpetrated against his daughter. Similarly, the trial court noted that PRV 7 warranted a score of 20 points for 2 or more subsequent or concurrent convictions. MCL 777.57(1)(a). However, in defendant's case, he had five convictions, meaning he had four concurrent convictions, two of which were not adequately accounted for by PRV 7. The factors discussed by the trial court in relation to these variables were objective and verifiable and the trial court did not abuse its discretion in determining that these inadequately accounted for characteristics provided substantial and compelling reasons for departure. MCL 769.34(3)(b); *Petri*, 279 Mich App at 421-422.

In his Standard 4 brief, defendant also claims that the trial court relied on its "belief" that additional sexual penetrations arising from the sentencing offense occurred. This argument distorts the trial court's discussion of OV 11, MCL 777.41. The trial court specifically noted that the record did not support a score for OV 11 and offered a superfluous caution to the attorneys not to be delicate when trying criminal sexual conduct cases. However, the trial court did not find OV 11 should have been scored, nor did it base an upward departure on the scoring of OV 11.

Having concluded that some of the trial court's reasons were substantial and compelling while others were not, we turn to the question of whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons alone. *People v Solmonson*, 261 Mich App 657, 670-671; 683 NW2d 761 (2004). Based on the trial court's reasoning, we conclude, and defendant concedes, that it would have departed to the same extent based only the substantial and compelling reasons provided. In particular, the trial court indicated that this Court should "look at each of these factors individually *or* altogether." From this statement, it is clear that the trial court believed the factors individually provided a basis for the justification. The trial court also provided a mathematical justification, discussed in more detail below, which makes clear that the extent of departure was justified even without those factors which were not substantial and compelling. Lastly, the trial court also repeatedly stated that the reasons for departure which this Court considered in *Barnes II* were the reasons that warranted the extent of the departure. Accordingly, the trial court's improper considerations of the underscoring of variables or the harm to "everyone else" were not necessary to justify the extent of the departure and remand is unnecessary. *Solmonson*, 261 Mich App at 670-671.

daughter and provided her with drugs. Related to PRV 2 and 6, defendant suggests in a Standard 4 brief that these variables could not have been scored higher because earlier convictions could not have resulted. Contrary to defendant's argument, the trial court did not in fact raise the score of these variables--the court merely noted that the vast number of instances of abuse was not accounted for by these variables. Likewise, the trial court found PRV 7 did not account for the number of times defendant abused his daughter. This was permissible under MCL 769.34(3)(b).

Next, we consider whether the trial court offered proper justification for the extent of the departure. Principles of proportionality require that the trial court not only articulate substantial and compelling reasons for “a departure,” but that those reasons justify a “particular departure.” *Smith*, 482 Mich at 303. Accordingly, “[a] sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear.” *Id.* at 304. Proportionality must be judged in light of the principle that the “punishment should be made to fit the crime and the criminal.” *Babcock*, 469 Mich at 262.

In this case the trial court took great pains to quantify the extent of the departure in terms of the sentencing grid and to compare defendant and the facts of his case to others similarly situated. The court’s main reason for departure appeared to be the sheer number of times defendant abused his daughter (57 to 114), all the while supplying her with methamphetamine and other drugs. This number was not reflected in defendant’s PRV score or in the scoring of OV 13. In addition, PRV 7 failed to adequately account for the number of defendant’s concurrent convictions. Based on the inability of these variables to accurately reflect defendant’s true criminal history and the pattern of his criminal conduct, the trial court reasoned that the minimum guideline range was not reflective of defendant’s history or his conduct. To justify the extent of the departure, the trial court assigned values to the inadequately weighted characteristics to determine a more appropriate guideline range.

In *Smith*, 482 Mich at 309, the Supreme Court recognized that the sentencing guideline grid can offer a valuable tool as a “factual guidepost” to justify a sentencing departure. “One potential means of offering such a justification is to place the specific facts of a defendant’s crimes in the sentencing grid.” *Smith*, 482 Mich at 306. Here, comparing defendant to similarly scored defendants, the trial court recognized that defendant’s more egregious conduct warranted a higher sentencing range. The court stated:

But, if the goal of the guidelines is to reflect the degree of injury and damage and to take each defendant individually, then it’s-it’s not fair to those that have committed but three to be treated the same as those that have committed 57 to a hundred. So I think that that is a justification for the amount of the departure and to take him to the bottom end of the offense variables.

The court then mathematically justified the extent of the departure by assigning mathematical values as follows:

And, if you go on the grid for A, if you were to factor in all the subsequent or concurrent convictions and add those in, some kind of multiplier to show that they don’t take into adequate account-You know, it tops out at two, but he’s got five; and it doesn’t include all the ones that he wasn’t convicted of as far as prior record variable, only the ones that he was convicted of. It doesn’t-That doesn’t contemplate his-his lifestyle or degree that he was suffering from.

But it would-He’s currently at 35 points on prior record variables for the CSC-1s. If we’re to add on additional 40 points to it or an additional 20 points, it would take him up to the E point.

And, again if you were to factor in all the offenses that he occurred [sic] of criminal sexual conduct that she talked about, that it would put him at offense variable of over a hundred points. He's maxed out on that grid. And, as a habitual second offender, it would be potentially a life sentence if the guidelines would allow you to score above the maximums that they've arbitrarily set.

Although it appears the trial court would have imposed a life sentence based purely on the inability of the guideline range to reflect the number of abuses, the trial court went further and offered additional justification for the extent of the departure. In particular, the court noted that OV 4 did not adequately reflect the degree of psychological injury and OV 10 did not adequately account for the degree of predatory conduct. In addition, the trial court expressed concern over defendant's potential for rehabilitation and the danger defendant presented to children. The court described defendant's conduct as follows:

A pattern of sexual abuse that cannot be stopped on his own. A pattern of sexual abuse involving not only other children but his own child; that it involves the use of drugs in order to-I don't know that it was in order to do it or part of it, but to provide drugs to children under the age of 13.-to continue this behavior for a period after he's already been convicted of one sex offense justifies a sentence at the top end of the guidelines. And the top end of the guidelines, as the statute indicates, allows a sentence of up to life in prison. I feel that the CSC first degrees justify a sentence of up to life in prison.

Based on the trial court's explanation of its reasons for departure and its efforts to mathematically situate defendant's sentence in the guideline range, we are persuaded that there is a clear connection between the trial court's reasons for departure and the extent of departure. *Smith*, 482 Mich at 303. Accordingly, we affirm defendant's sentences.

In affirming defendant's sentence, we also reject defendant's contention that the trial court disregarded the sentencing guidelines. The trial court simply observed that many of the variables top out a certain number of points based on the number of offenses committed, but that, in this case, defendant committed many more crimes in the same five year period (OV 13) and had more concurrent convictions than contemplated by the Legislature (PRV 7). Recognizing and relying upon factors not accounted for in the sentencing guidelines does not amount to a disregard for the Legislature's authority; such reasoning is, in fact, expressly authorized by the Legislature. See MCL 769.34(3)(b); *Petri*, 279 Mich App at 421-422. The trial court took pains to use the guidelines as a factual guidepost, *Smith*, 482 Mich at 306-310, and described Legislature's sentencing scheme as "the best we have." The trial court did not overstep its judicial authority. Cf. *People v Hegwood*, 465 Mich 432, 436-438, 441; 636 NW2d 127 (2001).

In his Standard 4 brief, defendant also challenges the departure by suggesting that the trial court could not justify the *extent* of the departure based upon the same reasons that the court offered to depart. Defendant's argument incorrectly suggests that the trial court was required to articulate threshold reasons to justify departure and then different reasons for the extent of the departure. There is no such requirement; the court was only required to articulate "justification

for the *particular* departure made.” *Smith*, 482 Mich at 303. As discussed, the court provided ample justification for the extent of the particular departure; nothing further was required.

Also in his Standard 4 brief, defendant claims that he was sentenced on inaccurate information because the trial court labored under a misapprehension relating to variables that could have been scored or scored differently. Defendant’s unpreserved claim of sentencing error is reviewed for plain error effecting defendant’s substantial rights. *People v Kimble*, 470 Mich 305, 311-312; 684 NW2d 669 (2004).

Defendant offered no challenge before the trial court to the accuracy of any information discussed by the trial court. See *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Moreover, in making his argument, defendant relies on *People v Francisco*, 474 Mich 82, 89 n 7; 711 NW2d 44 (2006), for the proposition that “when a trial court sentences a defendant in reliance upon an inaccurate guidelines range, it does so in reliance upon inaccurate information.” However, what defendant ignores is that, unlike *Francisco*, the trial court in this case did not rely on “an inaccurate guidelines range.” Following remand relating to OV 11, the guidelines were appropriately calculated. Because the guidelines were properly scored, defendant’s reliance on *Francisco* is misplaced and his claim is without merit.

Lastly, defendant contends in his Standard 4 brief that trial counsel was ineffective for not objecting to the improper considerations relating to the OVs and PRVS and for not objecting to the use of the inaccurate guidelines. To establish the ineffective assistance of counsel, defendant bears the burden of demonstrating: (1) that “counsel’s representation fell below an objective standard of reasonableness,” and (2) that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011) (citation omitted). The effective assistance of counsel is presumed and defendant bears a heavy burden of proving the challenged conduct was not sound trial strategy. *People v Rockety*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

In this case, because the guideline range relied upon was properly calculated, objection based on the accuracy of the guideline range would have been futile and counsel is not ineffective for failing to raise a futile objection or advocate a meritless position. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Similarly, objection to the court’s consideration of characteristics not accounted for by the legislative guidelines would have been futile. See MCL 769.34(3)(b); *Thomas*, 260 Mich App at 457.

To the extent the trial court improperly relied on variables that it believed might have been scored higher or that it relied on the harm suffered to “everyone else,” trial counsel could conceivably have objected to these items. However, the decision to object is generally a matter of strategy. See, e.g., *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008). Moreover, even supposing trial counsel was objectively unreasonable in not objecting, defendant has failed to show a reasonable probability of a different outcome. As discussed above, the sentence imposed was proportionate and justified based on those reasons that were substantial and compelling. Accordingly, the same sentence would have resulted, regardless of an objection by

defense counsel, and defendant has failed to establish the ineffective assistance of counsel. See *People v Mack*, 265 Mich App 122; 695 NW2d 342 (2005).

Affirmed.

/s/ Deborah A. Servitto

/s/ Jane E. Markey