

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 31, 2013

v

ROBERT JENSEN SCHWANDER,
Defendant-Appellant.

No. 307921
Grand Traverse Circuit Court
LC No. 2011-011239-FC

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

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

I disagree that the trial court failed to articulate why its departure sentence was proportionate to this specific offense and offender and that remand is necessary; accordingly, I respectfully dissent.

A minimum sentence that departs from the sentencing guidelines recommended range must be supported by a substantial and compelling reason that is articulated by the trial court and justifies the particular departure sentence. *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008); *People v Babcock*, 469 Mich 247, 255-256, 259-260; 666 NW2d 231 (2003). That is, the actual departure sentence imposed because of the substantial and compelling reason must be proportionate to the crime and criminal, i.e., the punishment must fit the crime. *Id.* at 262-264.

Because the trial court has extensive knowledge of the facts involved and is directly familiar with the circumstances of the offender, *Babcock*, 469 Mich at 267, 270, we review whether the reasons given are substantial and compelling enough to justify the departure, and the amount of departure, for an abuse of discretion. *Smith*, 482 Mich at 300. But in our review we need not

examine only the sentencing transcript to determine if the court abused its discretion in imposing a sentence. Under MCL 769.34(11), appellate courts review the record to ascertain if the court articulated adequate reasons for the departure and to justify the extent of the departure. If, after reviewing the whole record, the connection between the reasons given for departure and the extent of the departure is unclear, then the sentence cannot be upheld. [*Id.* at 313-314.]

Accordingly, this Court may not speculate about conceivable reasons supporting the trial court's departure sentence, but we may consider whether the reasons can "reasonably be inferred from what the trial court articulated." *Id.* at 318.

In this case, before the trial court imposed sentence it noted that defendant was convicted of second-degree murder and agreed that the court "certainly [found] it to be at least that." The court also provided a short factual summary of the events that led to defendant facing the charge, including that he had been living on his own, after having disputes with his parents. He had been taken in by a couple of other households in the community before the victim's family provided defendant with a place to live; however, eventually problems developed and defendant was asked to leave their home as well. Shortly after he was asked to leave the victim's mother's house, defendant made a plan to meet with the victim to allegedly smoke marijuana. Then he killed her. The trial court discounted defendant's claim that the 5'2" victim physically attacked, and gained the advantage over, him, a 6' tall man. The trial court also discussed the facts that defendant had "said some very cruel things" about the victim during the investigation, had denied any knowledge about her disappearance over the extended period of time in which her family, friends, and law enforcement were frantically looking for her, and, in fact, had shared his false hope that she would reappear. After stating the facts that defendant buried and then reburied the victim's body, burned her clothes, sent her fake messages, and lied to people about what had happened to her, the trial court recognized that defendant's "motivation throughout the whole affair . . . has been to avoid responsibility for it." Consistent with that motivation defendant claimed that he unknowingly strangled the victim to death but, the court opined, that explanation was incredible in light of the numerous and bleeding stab wounds the victim sustained—wounds which would not have resulted in death for "a period of a half hour to an hour" during which she would have been "struggling to [] breath and to survive," but defendant did nothing to help her. And, the court noted, even if defendant had strangled the victim, it would have taken "a minute and a half to two minutes of continued strangulation before she died." In either case, the court stated, the circumstances of the victim's death were "particularly cruel."

The court then turned to the minimum sentence recommended by the guidelines and concluded that it was "just too light . . . this death is just too cheap for what happened here." In other words, in light of substantial and compelling circumstances, the guidelines recommended sentence would not be proportionate to the crime and criminal. See *Babcock*, 469 Mich at 264. The court then stated two substantial and compelling reasons that justified a departure sentence. First, the victim was in the process of dying for a half-hour to an hour and could have been saved but defendant did nothing to help her. Although the jury convicted defendant of second-degree murder, the court noted that defendant failed to act during the significant amount of time in which he could have acted to save the victim's life—facts consistent with first-degree murder, as charged, and would have resulted in a mandatory sentence of life imprisonment. The second reason given by the trial court in support of a departure sentence was defendant's "betrayal of the Lewis family trust and their charity." That is, defendant was trusted, shown kindness, and given a place to live but, in return, he killed their daughter which was "reprehensible."

After review of the record, it appears to me that the trial court adequately explained why substantial and compelling reasons justified the extent of departure imposed. I note, and infer from what the trial court articulated, *Smith*, 482 Mich at 318, that:

- the evidence supported a first-degree murder conviction which would have resulted in a mandatory sentence of life imprisonment;
- defendant's prior relationship with the victim and her family was an aggravating circumstance because he may have killed the victim in retaliation for being asked to move from the victim's mother's house where he had been living after being homeless;
- defendant's claim that his actions against the victim were in response to a "combative situation" was incredible in light of the relative size difference, his obvious animus toward the victim, and the numerous, bleeding stab wounds that the victim suffered;
- defendant took several conscious and concerted actions to conceal the murder, mislead police, and avoid detection, including: (1) stripping the victim naked and burning her clothes, (2) giving away her personal effects, (3) burying, then moving and reburying her body in a more discreet location, (4) sending the victim fake, but discoverable messages, (5) repeatedly denying any knowledge of the victim's whereabouts to her family and friends, as well as police, and (6) joining in the search for the victim with the expressed, yet false, hope of her return;
- defendant had a significant amount of time to assist the victim after he stabbed her numerous times, before she died from her wounds, but did nothing to help her;
- because of the nature of the victim's wounds, her struggle to breathe and her need for assistance would have been plainly obvious to defendant, but he ignored her and let her slowly die which illustrates significant depravity;
- even if defendant's claim that he strangled the victim to death was true, he would have had to strangle her for a significant period of time, even after she lost consciousness, for death to result which illustrates significant depravity; and
- the murder and defendant's actions after the murder were particularly heinous considering the fact that the victim's family had provided defendant a home when he was homeless.

In summary, I believe the trial court adequately justified its departure sentence. Mathematical specificity and precise words are not necessary to justify a particular departure. *Smith*, 482 Mich at 311; *Babcock*, 469 Mich at 260 n 14. In this case, it is clear from the record that the trial court, which presided over the trial in this matter, thoroughly understood and meticulously considered the nature of this crime and this criminal before sentencing this defendant. In my opinion, although the trial court did not employ "magic words" to justify its sentence, the connection between the reasons given for departure and the extent of the departure is clear. See *Smith*, 482 Mich at 313-314. And I agree with the trial court that the sentence it imposed was more proportionate to this offense and offender than one within the guidelines recommended range. See *Babcock*, 469 Mich at 264. Accordingly, I would affirm the departure sentence and conclude that remand is not necessary.

/s/ Mark J. Cavanagh