# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 21, 2013 |
| v | No. 307962<br>Monroe Circuit Court |
| VINCENT E. MINICHIELLO,<br><br>Defendant-Appellant. | LC No. 11-038995-FC |

Before: SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right the sentence imposed for his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and resisting and obstructing a police officer, MCL 750.81d. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 15 to 40 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction,[1] (which represented an upward departure from the statutory sentencing guidelines range) and 46 months to 15 years' imprisonment for the resisting and obstructing a police officer conviction. We affirm.

On appeal, defendant argues that the trial court's upward departure from the statutory guidelines range for the assault conviction was an abuse of discretion, that the extent of the departure was not justified, and the factors cited by the court in favor of an upward departure were not objective and verifiable. We disagree.

Whether a particular factor for departure from the sentencing guidelines exists is a question of fact that is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). Whether a factor is "objective and verifiable" is reviewed de novo. *Id.* The determination that the factors constituted "substantial and compelling" reasons for departure from the guidelines and the extent of the departure are each reviewed for abuse of discretion. *Id.*

[1] Defendant was charged with assault with intent to commit murder, MCL 750.83, and was found guilty of the lesser included offense of assault with intent to do great bodily harm less than murder, MCL 750.84.

"A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

The sentencing court "must use the sentencing guidelines, as provided by law." MCR 6.425(D). "[O]nce the sentencing court calculates the defendant's guidelines range, it must, absent substantial and compelling reasons, impose a minimum sentence within that range." *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007); MCL 769.34(2). Offense variables and prior record variables are determined "by reference to the record, using the standard of preponderance of the evidence," *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), as well as reasonable inferences from the record, *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012). "[C]ircumstances inherently present in the crime must be discounted for purposes of scoring" an offense variable. *People v Glenn*, 295 Mich App 529, 535; 814 NW2d 686 (2012), lv gtd 491 Mich 934 (2012).

"A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). The reason or reasons given justifying a departure "must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases." *Smith*, 482 Mich at 299. "To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed." *People v Anderson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 301701, issued October 23, 2012), slip op at 3.

A departure "may not be based on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007); MCL 769.34(3)(b). "[B]efore a trial court can determine whether that characteristic was given inadequate or disproportionate weight, the trial court must determine how that characteristic affected the defendant's minimum sentence range." *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007). The ultimate sentence, after any departure, must be "proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record." *Smith*, 482 Mich at 305.

If this Court "finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand . . . for resentencing." MCL 769.34(11); *Babcock*, 469 Mich at 265. "[I]f the trial court articulates multiple reasons, and the Court of Appeals determines that some of these reasons are substantial and compelling and some are not, the panel . . . must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone." *Id.* at 260. If this Court is unable to determine the trial court's intentions in such a case, it must "remand the case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure." *Id.* Additionally, "[i]f the trial court would have

imposed the same sentence regardless of a misunderstanding of the law, this Court may affirm." *Anderson*, slip op at 6.

In this matter, defendant's minimum sentencing guidelines range for the assault conviction was 43 to 152 months in prison. The trial court, however, exceeded the guidelines, sentencing defendant to a minimum of 15 to 40 years' imprisonment. The trial court indicated several reasons for exceeding the guidelines. First, the trial court stated that defendant "maliciously and violently affected the victim's quality of life for the short period of time he survived the attack" and "did not possess one ounce of humanity to even think to place an anonymous call for someone or medical personnel to respond to the victim's home." "Whether defendant could have more done [sic] to assist the victim[] is not objective and verifiable," *Anderson*, slip op at 4, because that reason is not based on actions or occurrences external to the minds of those involved in the decision, and is not capable of being confirmed, *id.*, slip op at 3. Defendant's failure to assist the victim, Carl Cousino, is therefore not a substantial and compelling reason supporting the trial court's upward departure. However, the fact that the victim's quality of life was affected after the attack was objective and verifiable. Prior to the attack, Cousino was frail and elderly, but apparently lived on his own and there was no indication that he was unable to care for or feed himself. After the attack, Cousino was in a coma, was unable to breathe on his own, and was unable to feed himself.

The trial court also stated that the sentencing guidelines "fail to address the impact on [Cousino's] family as expressed on the record." Cousino's son, Jeff, spoke at defendant's hearing. He told the court that his father "was not able to attend his own mother's funeral," that he "had to put my father's dog . . . down . . . and I've lost my job after taking time off to handle my father's care and affairs[, and] I personally need therapy who [sic] can't afford therapy after losing my job." He said he "fought with every member of my family due to the affect [sic] that this crime has had on me and to . . . this day those relations are strained. I have battled severe depression, severe anger, thoughts of suicide and even thoughts of homicide." Finally, he said that his daughter "recently got engaged and my father won't be able to attend her wedding or will never meet her children." An offense's effect on the family of a victim can be a substantial and compelling reason justifying an upward departure. See *People v Armstrong*, 247 Mich App 423, 425-426; 636 NW2d 785 (2001).[2]

Some of these factors are objective and verifiable, such as the fact that Jeff's grandchildren will never meet their great-grandfather, that Jeff lost his job, and that Jeff was forced to euthanize his father's dog. Defendant argues that "there is no verification of those facts other than Mr. Cusino's [sic] assertion." The standard for a "substantial and compelling" reason, however, is objective and *verifiable*, not objective and *verified*. Because at least some of the effects on the victim's family are objective and verifiable, the trial court did not abuse its

[2] "[T]he guidelines . . . do not take into account the violation of the victim's parents' trust in defendant, the effect on the family occasioned by the victim's loss of trust in all men, including his own father, or the effect on the victim and his sister from having to learn about sexual matters at such a young age." *Armstrong*, 247 Mich App at 425-426.

discretion by concluding that the toll defendant's assault took on Cousino's family was a substantial and compelling reason justifying an upward departure from the guidelines.

Next, the trial court pointed to defendant's criminal record and concluded that "this unique case is a scenario not contemplated or fathomable by the sentencing guideline committee that one individual could amass such a prior record." Noting the 10-year gap rule of MCL 777.50, the trial court said that the rule "woefully fails to provide consideration of a criminal who committed one or more offenses in consecutive years, over more than two decades, with the exception of a year or two." "[A]lthough prior offenses that did not occur within five years of the sentencing offense cannot be considered under OV 13, that does not mean that they cannot give rise to a substantial and compelling reason to justify a departure from the guidelines range . . ." *People v Price*, 477 Mich 1, 5 n 3; 723 NW2d 201 (2006). Defendant's lengthy criminal history is objective, verifiable, and, to the extent his prior offenses were not used to calculate his guidelines range, was properly considered by the trial court. The trial court did not abuse its discretion when it found that defendant's criminal history was a substantial and compelling reason justifying an upward departure.

The trial court next indicated that while the parties stipulated to a score of 100 points on this factor, if this Court disagreed with the assessment of 100 points, the trial court would find that OV 3 "does not adequately address the severity of the offense against the victim," because it did not account for "how the victim died[, as] Mr. Cousino never regained consciousness." "[C]ircumstances inherently present in the crime must be discounted for purposes of scoring" an offense variable. *Glenn*, 295 Mich App at 535. However, in this case, although the crime of assault with intent to do great bodily harm less than murder, MCL 750.84, may account for a grotesque beating, it does not account for the death of a victim. OV 3 recognizes a victim's death in a crime other than homicide, but it does not contemplate that Cousino was beaten unconscious and remained in a vegetative state until he passed away over two months later. This fact is both objective and verifiable. Accordingly, were we to disagree with the scoring of 100 points for OV 3, the trial court would not have abused its discretion in concluding that the circumstances surrounding Cousino's death constituted a substantial and compelling reason in favor of departing upward from the guidelines range.

Next, the trial court said that defendant's score of zero on OV 7, concerning aggravated physical abuse, was inadequate "given the facts and circumstances of this case," because it involved a "series of assaults" amounting to "a bare-knuckled and extremely cruel beating of another human being." The cruel nature of Cousino's assault cannot be disputed given the nature and extent of the victim's injuries, and was not contemplated by the crime of assault with intent to do great bodily harm less than murder, MCL 750.84. This is necessarily so, as no actual physical injury is required for the elements of the crime of assault with intent to do great bodily harm less than murder to be established. See, e.g., *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). The trial court thus did not abuse its discretion when it concluded that the "cruel" nature of the crime was a substantial and compelling reason for an upward departure.

The trial court also found that defendant's score of zero on OV 8 was inadequate because "it is conceivable that the victim was either left inside the attachment to his garage, or dragged out into the cold, and at night, when it was unlikely he would have been discovered until at least daylight." Cousino was a 76-year-old frail man who apparently shuffled his feet when he walked and required a cane or a walker for stability. One witness testified to having seen him fall on more than one occasion. Using the preponderance of the evidence standard, *Osantowski*, 481 Mich at 111, it is more likely than not that a man of this constitution could not have moved himself from his breezeway after a serious assault, and that defendant dragged him from the breezeway to his back yard, where he was found by his neighbors, the police, and his son.

The probability that defendant moved Cousino outdoors, where he was exposed to the elements until he was discovered by Adkins and her husband, is a objective and verifiable factor that was not already considered in calculating defendant's guideline range, is "external to the minds of those involved in the decision, and [is] capable of being confirmed." *Anderson*, slip op at 3. The trial court did not abuse its discretion by concluding that the likelihood that defendant dragged, then left Cousino outside after assaulting him was a substantial and compelling reason supporting an upward departure from the guidelines.

Finally, the trial court found that defendant's score of 10 on OV 12, concerning contemporaneous felonious criminal acts, was inadequate because "[a]lthough the [p]rosecutor only charged one offense of resisting and [o]bstructing a [p]olice [o]fficer, it is clear from the trial testimony that it took three officers to subdue the Defendant and place him under arrest, and that the Defendant's threats were made to all three officers." A score of 10 on OV 12 is assigned when "[t]wo contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(1)(b). Contemporaneous felonies count toward a defendant's OV 12 score only if the act occurred within 24 hours of the sentencing offense, and the act has not and will not result in a separate conviction. MCL 777.42(2)(a)(i)-(ii). The Felony Information charged defendant with one count of resisting and obstructing a police officer for the act of resisting "Deputy Redmond, and/or Deputy Brodie, and/or Sgt. Kovenich."

The alternate "and/or" conjunctions in the charging document make it difficult to discern whether defendant was convicted of resisting and obstructing one, two, or three officers. If defendant was convicted of resisting and obstructing all three officers, none of those acts were eligible to have been scored on OV 12, because each act resulted in a conviction. See MCL 777.42(2)(ii); *Harper*, 479 Mich at 617 (holding that a departure "may not be based on an offense characteristic . . . already taken into account."). However, if he was convicted of resisting and obstructing only one or two of the officers, then defendant's actions toward the one or two officers with whom he was *not* charged with resisting and obstructing could have been considered by the trial court as a reason for departure. The question need not be resolved with certainty, because even if the trial court erroneously considered defendant's resistance of all three officers despite a conviction with respect to all three officers, its memorandum stated other valid reasons for departure.

In short, the trial court provided substantial and compelling reasons for its upward departure. And, the extent of the upward departure was not an abuse of discretion. As previously indicated, after looking at the trial courts articulated substantial and compelling reasons for departure, reviewing courts "engage in a proportionality review. Such a review

considers whether the sentence was proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record. Everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment." *Smith*, 482 Mich at 305. The departure from the guidelines recommendation "must contribute to a more proportionate criminal sentence than is available within the guidelines range." *Id.*

The trial court explicitly attempted to craft a sentence proportionate to defendant's criminal history. The guidelines instruct that the highest guidelines range corresponds with PRV and OV variables that each total 75 points or more. MCL 777.65. At the sentencing hearing, the court said that "in some of these [variables] because of the background of [defendant], he maxed out and . . . again the guidelines don't capture that and so the Court was attempting to fashion something and trying to extrapolate where these guidelines would've taken us if the sentencing guideline committee could have . . . fathom[ed] this type of an offense." For example, defendant's 45 prior misdemeanor convictions resulted in a score of 20 points for PRV 5, the maximum ever provided for under PRV 5. Twenty points is the same score for a defendant with seven prior misdemeanor convictions. MCL 777.55(1)(a). Defendant's record, 45, exceeds the number of misdemeanors, seven, to keep the same score of 20 points by over 642 percent; his sentence exceeded the upper end of the guideline range by about 18.4 percent.[3] This comparison oversimplifies the issue, because several factors were in play in the trial court's decision to depart upward from the guidelines, but still tends to show that defendant's sentence was not disproportionate (in the prosecution's favor, at least) to his criminal record.

If the trial court articulates multiple reasons supporting its decision to depart upward from the sentencing guidelines, and "some of these reasons are substantial and compelling and some are not, [this Court]. . . must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone." *Babcock*, 469 Mich at 260. "If the trial court would have imposed the same sentence regardless of a misunderstanding of the law, this Court may affirm." *Anderson*, slip op at 6. The trial court in *Anderson* "stated that it thought any one of the reasons it articulated justified an upward departure," and the panel found that "[g]iven the court's comments, we are satisfied that the court would have departed to the same degree on the basis of the valid reasons alone." *Id.*, slip op at 7.

Here, the trial court said that it is "persuaded that the Defendant should serve the sentences I have rendered and it is my intention that this sentence be sustained if an appellate court determines that any of my rationale for departure survives review." Discussing OV 12 at defendant's sentencing hearing, the court said that it would "overrule the defenses [sic] objection and in the alternative I would exceed the guidelines anyway." This is sufficient language for this Court to have confidence in the trial court's intention to have imposed the same sentence, even if one of the cited bases for departure fails.

[3] Defendant argues that "30 of the 45 misdemeanors could not even arguably be scored." Fifteen prior misdemeanors still more than doubles the highest number of prior misdemeanors contemplated by the legislature.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause