

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELTON HOWARD,

Defendant-Appellant.

UNPUBLISHED

August 27, 1999

No. 211425

Recorder's Court

LC No. 97-008470

Before: Hoekstra, P.J., and O'Connell and Danhof*, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of burning real property, MCL 750.73; MSA 28.268. The trial court sentenced defendant to four- to ten-years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant first argues that the evidence at trial was insufficient to support his conviction. Defendant does not dispute that an arson of real property occurred; rather, he claims that the prosecution failed to prove that he was the person responsible for setting the fire. We disagree. Although plaintiff introduced no direct evidence that defendant participated in the arson, the evidence of defendant's troubled relationship with the victim and the defendant's statements to the victim after the fire provided sufficient circumstantial evidence when viewed in a light most favorable to plaintiff. *People v Wolfe*, 440 Mich 508, 513-518; 489 NW2d 748 (1992). Defendant complains that this testimony contradicted the victim's testimony and that the testimony relied upon by the court was subject to more than one interpretation. These questions, however, belong to the fact-finder to resolve and are not subject to de novo review. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

Defendant next argues that the trial court committed error requiring reversal when it admitted evidence that defendant mailed letters to the complainant's clients and that he came onto her business premises armed with a gun. Defendant argues that this was "other bad acts" evidence, and therefore it was inadmissible under MRE 404(b). In this regard, defendant maintains that it was inadmissible because the prosecution failed to provide pretrial notice, as required by MRE 404(b)(2), of its intention

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

to introduce such evidence, and because the evidence was inadmissible under *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

To preserve an evidentiary issue for appeal, the party opposing the admission of evidence must object at trial on the same ground that the party asserts on appeal. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; ___ NW2d ___ (1999); *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). Defendant objected to the admission of the evidence regarding the letters that he allegedly mailed to the complainant's clients; however, he objected only on hearsay and relevancy grounds. Because defendant did not object to this testimony as improper bad acts evidence, the issue is waived for appellate review. *Griffin, supra*; *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Defendant failed to object at all to Williams' testimony that he had brought a gun into her building; therefore, this issue is also waived for appellate review. *Id.* Accordingly, this Court will not review the issue unless failure to do so would result in manifest injustice. *Griffin, supra*; *Asevedo, supra*. Here, we find that our refusal to review the issue will not result in manifest injustice. The testimony regarding the letters is not bad acts testimony under MRE 404(b). See *VanderVliet, supra* at 64 and *People v Hall*, 433 Mich 573, 580, 583-584; 447 NW2d 580 (1989). Further, the evidence of defendant's possession of a gun came into evidence through a nonresponsive answer and was, therefore, inadvertent. Generally, a nonresponsive, volunteered answer is not reversible error. *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

Finally, defendant argues that the trial court abused its discretion when it imposed a sentence of four to ten years in prison, a sentence which exceeded the sentencing guidelines' recommended range of zero- to nine-months' imprisonment. A sentence constitutes an abuse of discretion if it violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). When imposing a sentence for an offense that is included in the sentencing guidelines, the court must use the applicable guidelines. MCR 6.425(D)(1).¹ However, if the sentencing court determines that a minimum sentence outside the recommended minimum range should be imposed, it may do so provided that the recommended range under the guidelines is "disproportionate . . . to the seriousness of the crime." *Milbourn, supra* at 657; see also MCR 6.425(D)(1). When imposing a minimum sentence outside the guidelines range, the court must articulate, both on the record and on the Sentencing Information Report (SIR), its reasons for doing so. MCR 6.425(D)(1); *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). "A court may justify an upward departure by reference to factors considered, but adjudged inadequately weighed, within the guidelines, as well as by introducing legitimate factors not considered by the guidelines." *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998).

Where there is a departure from the sentencing guidelines, an appellate court should first inquire whether the case involves circumstances that are not adequately embodied in the guidelines variables. *Milbourn, supra* at 659-660; *People v Hudson*, 187 Mich App 31, 34; 466 NW2d 313 (1991). Here, the trial court placed the following reasons for its departure on the record: (1) the total destruction of the complainant's business, resulting in her loss of livelihood; (2) the danger to people who might have been in the building at the time of the fire, and to firefighters; (3) the apparent "stalking"

behavior of defendant toward the complainant; and (4) defendant's behavior after the crime, in contacting the complainant and "brag[ging] about it and mak[ing] further threats." These reasons concern the severity of the crime; the relationship between defendant and the complainant; the effect of the crime on the complainant; and defendant's apparent lack of remorse after committing the crime. These circumstances were properly considered by the sentencing court. See *Milbourn, supra* at 660 (prior relationship between the victim and the offender); *Castillo, supra* at 448 (nature and severity of the crime); *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995) (lack of remorse); *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998) (effect of the crime on the victim).

This Court recently noted that "[t]he crucial test for proportionality is not whether the sentence departs from, or adheres to, the recommended range under the sentencing guidelines, but whether it reflects the seriousness of the matter." *Castillo, supra* at 447-448. We agree that the guidelines did not adequately address all of the circumstances surrounding this case and that the recommended range of zero to nine months was inadequate given the circumstances and the offender. Defendant's minimum sentence of four years' imprisonment, which is well under the statutory maximum of ten years, MCL 750.73; MSA 28.268, is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra* at 636.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell

/s/ Robert J. Danhof

¹ MCR 6.425(D)(1) was amended in 1998 (effective January 1, 1999) in response to the enactment of the sentencing guidelines developed by the Sentencing Commission pursuant to MCL 769.31 *et seq.*; MSA 228.1097(3.1) *et seq.*; MCL 769.34(1); MSA 28.1097(3.4)(1). See MCR 2.425(D)(1) and Staff Comment to September, 1998 Amendment. However, the Supreme Court's sentencing guidelines continue to apply to offenses committed before January 1, 1999. Administrative Order 1998-4. Therefore, all references in this opinion to MCR 2.425(D)(1) are to the former version of the rule.